STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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STATE OF WISCONSIN,

Plaintiff-Respondent, Appeal No. 2015AP002256-CR

vs.

JEFF C. HILGERS,

Defendant-Appellant.

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APPEAL FROM A JUDGMENT BY
DANE COUNTY CIRCUIT COURT, BRANCH 1,
JUDGE JOHN W. MARKSON, PRESIDING

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# BRIEF OF DEFENDANT-APPELLANT JEFF C. HILGERS

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## STATEMENT OF ISSUES FOR REVIEW

Whether the trial court erroneously instructed the jury that "participation in a home detention program" constitutes "confinement in a correctional institution" under the sexual assault statute.

Decided by the trial court: No.

Whether evidence that Mr. Hilgers was a corrections officer who had a consensual sexual relationship with a person who was home pursuant to a home detention program was sufficient to support a conviction for second degree sexual assault.

Decided by the trial court: Yes.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. The briefs are expected to fully present and meet the issues on appeal and fully develop the theories and arguments and legal authorities on each side. Oral argument would be of marginal value.

Publication is recommended. This opinion will apply established rules of law to a factual situation significantly different from those in published decisions. The plain language of the statutes at issue is clear; however, interpretation of the statute has not been well-developed in the case law, and no decision directly addresses one of the issues here, which is whether "participation in a home detention program" constitutes "confinement in a correctional institution" for purposes of the sexual assault statute.

## STATEMENT OF THE CASE

A. The Nature of the Case.

This is an appeal of a criminal conviction. The state of Wisconsin charged Defendant-Appellant Jeff C. Hilgers ("Mr. Hilgers") with Second Degree Sexual Assault, contrary to Wis. Stat. § 940.225(2)(h), for being a corrections officer who had sex with an individual while she was allegedly "confined in a correctional institution." It is undisputed that no sexual activity occurred at an actual correctional institution. Rather, the sexual relationship was consensual and occurred at the alleged victim's home where she resided pursuant to a jail diversion program.

B. Procedural History.

On August 7, 2014, the state of Wisconsin filed a Complaint against Mr. Hilgers. (R.1.) The Complaint alleged AKC (known then as Angelia Culberson; as of July 2013, she married Jeff Hilgers and became Angelia Hilgers) was an adult confined in the Dane County jail between October, 2012, through December, 2012. (*Id.*) From 1998 through May 30, 2013, Mr. Hilgers was a member of the Dane County Jail correctional staff. (R. 65: 177). From December 10, 2012, through May 28, 2013, the Dane County Jail had released Mrs. Hilgers from the jail and placed her in a Dane County program called the "Pathfinders Diversion Program." (*Id.*, at 47.) After Mrs. Hilgers was released to her home through the jail diversion program, she and Mr. Hilgers had consensual

sex. (*Id*., at 186.) No sexual activity occurred at the jail. (*Id*., at 46, 179, 202.) These are the material factual allegations which were admitted throughout the proceedings.

Prior to the preliminary hearing, Mr. Hilgers filed a motion to dismiss. (R. 5.) The motion stated that § 940.225(2)(h) requires that there be sexual activity between a correctional staff member and a person confined in a correctional institution, and that a person confined in her home is not "confined in a correctional institution." (*Id*.) The motion alleged that this rendered the Complaint defective, as it failed to set forth a factual basis to support the elements of the charge, contrary to rights guaranteed by the 4th, 5th, and 14th Amendments to the United States Constitution; article I, sections 1, 8, and 11 of the Wisconsin Constitution; and §§ 968.01 and 968.02 of the Wisconsin Statutes. (*Id*.) The motion was denied prior to the preliminary hearing. (R. 9.) Defendant was bound over for trial, and the State filed an Information based on the same allegations set forth in the Complaint. (R. 12.) An arraignment was held, (R. 11,) not guilty pleas were entered, and the case was transferred to the trial court, with the Honorable John W. Markson presiding. (*See* R. 17.)

On December 4, 2014, Mr. Hilgers moved the court to review the decisions to not dismiss the case. (R. 15.) On January 26, 2015, the court denied the motion, (R. 24-25,) and concluded that the home, when used through a statutory Home Detention Program, is essentially an extension of the jail and could thus be

considered a "correctional facility" under § 940.225(2)(h).[1] (R. 63:11-17.) Mr. Hilgers then filed a petition for interlocutory appeal which was denied. (R. 26, 29.)

On June 15, 2015, the court held a hearing regarding the jury instructions. (R. 40,63.) The defense requested that the jury be instructed as set forth in the model jury instructions. (R. 40.) Specifically, the defense requested that the jury be instructed that the state must prove beyond a reasonable doubt that Angelia Hilgers was confined in a correctional institution; while instructing that the Dane County Jail is a correctional institution. (*Id*.)

Over the objection of the defendant, the court decided to instruct the jury that the state must prove that a person *participating in a home detention program* is confined in a correctional institution." (R. 44.)

On June 22-23, 2015, a jury trial was held. (R. 64-65.) The same material allegations set forth above were attested to. (*Id*., at 65.) Mr. Hilgers was convicted. (*Id.*) On October 29, 2015, Mr. Hilgers filed a notice of appeal. (R. 59.) In this appeal, Mr. Hilgers argues that the jury was improperly instructed, and if it had been properly instructed, there would have been insufficient evidence to convict.

[1] For reasons unrelated to this appeal, the court dismissed Counts II-VIII of the Information which alleged Possession of Child Pornography. Those allegations are unrelated to the facts or issues in this appeal.

C. Statement of Facts.

Ms. Anglia Culberson (now known as Mrs. Hilgers, and referred to herein as Mrs. Hilgers) was convicted of Operating while Impaired, and was sentenced to the Dane County jail. (R. 65: 46.) In the Fall of 2012, she began her jail term at the Ferris Center. (*Id*., 46.) The Ferris Center is one of three Dane County Jail locations and is a work release ("Huber") facility. (*Id*., at 178.) This is where Mrs. Hilgers first encountered Mr. Hilgers. (*Id*.)

Mr. Hilgers worked for the Dane County Sheriff's Department at the jail as a corrections officer. (*Id*., at 177.) He started working there in 1998. (*Id*., at 176.) His responsibility was to supervise inmates. (*Id*., at 177.) His job required him to rotate around the three Dane County jail locations. (*Id*., at 178.)

From the time Mrs. Hilgers first encountered Mr. Hilgers at the Ferris Center in November 2012, (*id*., at 178,) through her last day there, Mr. and Mrs. Hilgers had a purely professional relationship only. (*Id*., at 46, 179, 202.) On the day Mr. Hilgers was required to rotate to another location, Mrs. Hilgers quietly left Mr. Hilgers her e-mail address. (*Id*., at 180.) She did not see Mr. Hilgers at the jail after that. (*Id*., at 180-81.) Mrs. Hilgers was released from the Ferris Center in December 2012. (*Id*., at 202.) From there, she was transferred to the Pathfinders Jail Diversion Program. (*Id*., at 47.) Through this jail diversion program, Mrs. Hilgers was placed in a halfway house. (*Id*., at 47, 202.)

At the halfway house, Mrs. Hilgers signed two contracts with the jail diversion program. (*Id*., at 48-49.) These contracts set forth the rules which established where Mrs. Hilgers was allowed to go. (*Id*., at 48-53.) It is undisputed that the written rules did not expressly restrict Mrs. Hilgers to confinement in her home. (*Id*., Exhs. 2-3.) In fact, home confinement was not even mentioned. (*Id*.) Mrs. Hilgers' range of travel was monitored by a GPS system referred to as the "ankle bracelet." The ankle bracelet would vibrate and sound an alarm if she were to travel outside area. (*Id*., at 133.)

The jail diversion program eventually authorized Mrs. Hilgers to get her own apartment, (R. 54, 203.) At that point, Mrs. Hilgers and Mr. Hilgers had still only communicated via e-mail, as they continued to await the date that Mrs. Hilgers was supposed to have her ankle bracelet removed, which had been scheduled for April 18, 2013. (*Id*., at 183.) That was when the two were hoping to go out together on a first date. (*Id*.) It turned out to be a miscalculation. (*Id*., at 184.) Devastated, Mrs. Hilgers discussed this with Mr. Hilgers. (*Id*., at 59,184.) The two decided to proceed with their date anyway and met for coffee. (*Id*.) Within weeks, the sexual relationship began. (*Id*., at 185-86.) Mr. Hilgers and Mrs. Hilgers had numerous consensual sexual encounters, all at Mrs. Hilgers' home while she was on the bracelet. (*Id*., at 186.)

At one point, Mrs. Hilgers decided to move in with Mr. Hilgers. (*Id*., at 187-88.) To do so, she needed to transfer her "alcohol sobrietor" to Mr. Hilgers'

house.[2] (*Id*., at 210-11.) That required her to notify the Wisconsin Department of Corrections of her new residence, any other residents, and their occupations. (*Id*., at 188.) In doing so, she revealed that she would be living with Mr. Hilgers, a correctional officer. (*Id.*) This triggered an investigation. (*Id.*)

When investigated, Mrs. Hilgers acknowledged having a consensual sexual relationship with Mr. Hilgers at her house while on the bracelet. (*Id*., at 213.) Mrs. Hilgers was immediately removed from the Pathfinders jail diversion program and returned to the jail to serve the remainder of her sentence. (*Id*., at 66, 213-14.) Mr. Hilgers was suspended from employment. (*Id*., at 188.) On June 29, 2013, Mr. Hilgers and Mrs. Hilgers married. (*Id*., at 214.) The following year, the present case was brought against Mr. Hilgers, accusing him of sexually assaulting Mrs. Hilgers, contrary to Wis. Stat. § 940.225(2)(h). (R. 1.)

## ARGUMENT

The evidence was undisputed that Mr. Hilgers only had sex with Mrs. Hilgers at her house while she was home on a jail diversion program. A person at home on a jail diversion program has the unique status of being a jail prisoner who is <u>not</u> confined in a correctional institution. This is a circumstance which the plain language of the sexual assault statute simply does not cover. The trial court, however, instructed the jury that "confinement in a correctional institution" could be established by "participation in a home detention program"

[2] This is a device that measures breath alcohol level which Mrs. Hilgers was required to blow into regularly as a condition of her release from jail.

without any evidence that Mrs. Hilgers was in an actual jail or correctional facility at the time. For the reasons which follow, based on the plain language of the applicable statutes, the Court of Appeals should find that the court's instructions to the jury were erroneous. And, applying the correct legal standard, the evidence was insufficient to support a conviction because Mr. and Mrs. Hilgers never engaged in any sexual activity in a correctional institution. Based on the erroneous instruction and the insufficient evidence, the conviction must be vacated.

## I. Under the plain language of the sexual assault statute, the jury instructions were erroneous.

The trial court erroneously instructed the jury that "participation in a home detention program constitutes confinement in a correctional institution," because under the plain language of the statute, proof that a correctional officer had sex with an individual actually confined in a correctional institution was required, and Mrs. Hilgers was not confined in a correctional institution when she and Mr. Hilgers had sex at her home.

### A. Standard of Review.

A sufficiency of the evidence review in this case requires a threshold determination of whether the jury instructions correctly stated the statutory requirements for conviction of the crime. *See State v. Beamon*, 2013 WI 47, ¶ 18, 347 Wis. 2d 559, 570-71. Jury instructions that do not accurately state the statutory requirements for the crime charged constitute erroneous statements of

law. *State v. Ferguson*, 2009 WI 50, ¶ 44, 317 Wis. 2d 586, 767 N.W.2d 187. Erroneous statements of law are reviewed independently of the circuit court, benefiting from its analysis. *See State v. Fonte*, 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594. If the Court of Appeals determines that a jury instruction erroneously stated the applicable statute, it must then determine whether, under the totality of the circumstances, the erroneous instruction constituted harmless error. *See State v. Harvey*, 2002 WI 93, ¶¶ 46-47, 254 Wis. 2d 442, 647 N.W.2d 189.

### B. The Court must interpret the sexual assault statute based on its plain language and the language of related statutes.

The instruction that "participation in a home detention program constitutes confinement in a correctional institution" is inconsistent with the plain language of the statute and the pattern jury instructions. To analyze the instructions, the Court must interpret the applicable statute. Statutory interpretation begins with the statutory language. If the meaning of the statute is plain, the inquiry ordinarily stops. *State ex rel. Kalal v. Circuit Court for Dane Cty. (In re Criminal Complaint)*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663-64 (citations omitted). Statutory language must be given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id.* (citations omitted.) "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage… In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.* (citations omitted.)

Statutes are interpreted to fulfill the objectives of the statute, and to avoid absurd results. *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 621.

**1. Nothing within the plain language of the statutes which define correctional institutions, jails, or correctional facilities defines homes or home detention programs as correctional institutions.**

Homes and home detention programs are not correctional institutions. It is only a second degree sexual assault if a corrections officer has sexual contact or intercourse with an individual who is "confined in a correctional institution."[3] The statute defines "correctional institution" in unambiguous terms: A jail or correctional facility, a juvenile correctional facility, or a juvenile detention facility. § 940.225(5)(acm). A "jail or correctional facility" is defined to mean:

(a) A Type 1 prison, as defined in s. 301.01 (5).
(b) A jail, as defined in s. 302.30.
(c) A house of correction.
(d) A Huber facility under s. 303.09.
(e) A lockup facility, as defined in s. 302.30.
(f) A work camp under s. 303.10.

§ 961.01(12m).

Jails are further defined further by § 302.30 to include "municipal prisons" and "rehabilitation facilities." § 302.30. None of the statutory definitions of

[3] (2) SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:

(h) Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

Wis. Stats. § 940.225(2)(h).

correctional institutions, jails, or correctional facilities, or other referenced facilities, make any reference to homes or home detention programs. They are not correctional institutions.

**2. A person on a home detention program is a jail prisoner who is not confined in a jail; she is confined to her home.**

As set forth in § 302.425, people in statutory home detention programs have the legal status of jail prisoners, but their "place of detention [the home] is not subject to requirements for jails." § 302.425(5)(a). Furthermore, just like the other jail and correctional facility statutes, the home detention program statute's definition of "jail" does not include the home or a home detention program. § 302.425. Instead, it defines jail as a house of correction, a work camp under § 303.10 and a Huber facility under § 303.09. § 302.425(1)(b).

With there being a statute defining home detention program which states that the place of home detention is "not subject to the requirements for jails," and with there being nothing in the plain language of any statute which provides that a home or home detention program is a statutory "correctional institution," the state crafted a proposed instruction that completely removed the person's place of confinement from the analysis.

The state persuaded the trial court to allow the jury to convict based on the person's status as opposed to the person's place of confinement. This is why the

jury instruction was worded oddly: "Participation in a home detention program constitutes confinement in a correctional institution."

This was erroneous. Participation in a program is not confinement in a place. This is linguistic wrangling to make a square peg fit in a round hole. The plain language of the statute governs, and it requires that the person actually be confined in a correctional institution. The "confined in" language is mandatory, and cannot be replaced with different language which shifts the focus from confinement place to confinement status.

Under the plain, common understanding of sex "with a person confined in a correctional institution," the sex must occur while the person is confined *in* the institution. The court cannot remove the word "in," with its emphasis on place, to make the facts fit the crime. Merriam-Webster Dictionary defines "in" as a "word to indicate inclusion, location, or position within limits "in the lake," "wounded in the leg," "in the summer." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 18 Jan. 2016. <http://www.merriam-webster.com/dictionary/in>.

Jail prisoners are often "in" places that are not correctional institutions. The fact that a person has the status of jail prisoner is insufficient to demonstrate that the person is presently confined in a correctional institution. For example, a person may be confined in a Huber facility, but from there, he could be released for work. When released to work, he cannot logically be considered "confined in" the Huber facility, because he has left that facility. The person would remain a jail

prisoner, in the custody of the jail, and would perhaps be "confined *by*" the jail, but while at work, he cannot be considered "confined *in*" the Huber facility. That would be absurd.[4]

If the legislature wanted the sexual assault statute to cover sex between a correctional officer and any jail prisoner regardless of the prisoner's location, it could have very easily said so. It didn't. It said the opposite: The statute proscribes sex between a correctional officer and an individual "confined in a correctional institution." § 940.225(2)(h). A person in the home detention program is considered "detained at [her] place of residence." § 302.425(3)." Confinement in a residence and confinement in a correctional institution are two different types of confinement.

The court's construction of the statute rendered the phrase "confined in" superfluous, and in essence replaced it with "in the custody of." This was error. Courts must construe statutes according to their plain meaning in a manner that avoids rendering any of the statutory language superfluous. *Robin K. v. Lamanda M.*, 2006 WI 68, ¶ 16, 291 Wis. 2d 333, 718 N.W.2d 38.

The plain language of the statute is clear. The Court should not look any further than its plain words. Mrs. Hilgers was not confined in a correctional institution. She was confined in her home. A home is not a correctional

[4] With proper arrangements, a Huber inmate could be anywhere: in the classroom of a school or university, at any place of business, working on the farm, riding in someone's car or in some form of public transportation, shopping at the grocery store, at church, visiting a health care professional, in a courthouse, or *en route* to any combination of these places. But being somewhere other than the facility means that the person is not confined in the facility at that time.

institution. The home detention program is not a correctional institution. The plain words of the statute simply do not fit the facts. The statute cannot be reconfigured through creative jury instructions to make it fit.

As explained by the United States Supreme Court, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); *see also Hartford Underwriters Ins. v. Union Planters Bank*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000). Therefore, reaching beyond the plain words of the law is not proper.

In *Terrell*, the trial court tried to broaden the language of the sexual assault statute to make it fit a sexual attack by a sheriff deputy on an inmate brought to a courtroom cell. The Court of Appeals applied the plain language of the sexual assault statute, § 940.225(2)(h), and held that under the undisputed facts, the statute did not apply. *State v. Terrell*, 2006 WI App 166, ¶¶ 3-4, 10, 295 Wis. 2d 619, 721 N.W.2d 527. The Court of Appeals explained that, under "the plain language of the statute," the sheriff deputy was not a correctional staff member, because he primarily worked in the courthouse, and "the courthouse is not a 'correctional institution.'" *Id.* at ¶¶ 8-11. Thus, the Court of Appeals held that, "based on the plain language of this statute, Terrell is not a 'correctional staff member.'" *Id.* at ¶¶ 8, 10. The distinction, based on the plain meaning of the

statute, focused on the fact that the deputy's workplace was at the courthouse and not "within the walls of the correctional institution." *Id.* at ¶ 10. The Court of Appeals concluded that "to interpret the plain language otherwise would result in absurd conclusions." *Id.*

*Terrell* applies here. Like a courthouse, a home is not a correctional institution. Just like the *Terrell* court could not broaden the definition of correctional staff to make it fit, the trial court here could not broaden the definition of "confined in a correctional institution" to make it fit. The jury instructions in this case broadened the statute beyond its plain language in a manner that would convert a home into a correctional institution, or "participation in a program" into confinement in a correctional institution, both of which would be absurd.

The instruction essentially amended the statute just for this case. Under this "amendment," any jail prisoner, regardless of where she may actually be, is confined in a correctional institution. That fiction is not very different than saying any sheriff deputy, regardless of where he may work, is a correctional staff member. The Court in *Terrell* determined that such logic would lead to absurd results.

Changing the statute is something only the legislature can do. To the extent the legislature may have silently intended for homes and home detention programs to constitute correctional institutions under the sexual assault statute, the judgment of conviction still must be vacated:

> Ours is "a government of laws not men," and "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." Antonin Scalia, A Matter of Interpretation, at 17 (Princeton UniversityPress, 1997). "It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us." Id.

*Kalal*, 2004 WI 58, at ¶ 52.

In this case, by changing the scope of the statute, the court was impermissibly legislating. "When reviewing the sufficiency of the evidence, the Court of Appeals cannot rely on an erroneous statement of the statute in the jury instructions as the standard, because doing so would, in effect, allow the parties and the circuit court in that case to define an ad hoc, common law crime." *Cf. State v. Baldwin*, 101 Wis. 2d 441, 446-47, 304 N.W.2d 742 (1981) (holding that conviction required proof beyond a reasonable doubt of statutory requirements of a criminal offense, rather than requirements as set forth in the complaint and information).

Additionally, there are policy reasons for the legislature to draw a distinction between the comforts of home and one's vulnerability in a prison cell. A person detained in her home has vastly more power and control. If a person feels threatened at home, the person can arm herself, reject visitors, call for help, hire security, have friends or family over, or leave. If a person in a prison cell is threatened, she is relatively helpless.

### 3. Under the rule of lenity, any ambiguity should be resolved in favor of Mr. Hilgers.

To the extent that there is ambiguity as to the meaning of the sexual assault statute, the rule of lenity applies, and the statute should be interpreted in favor of the accused. *See State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700 (citing *State v. Morris*, 108 Wis. 2d 282, 289, 322 N.W.2d 264 (1982); *State v. Wilson*, 77 Wis. 2d 15, 28, 252 N.W.2d 64 (1977)). The rule of lenity is a canon of strict construction, ensuring fair warning by applying criminal statutes to "conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997); *see also United States v. Castleman*, 134 S. Ct. 1405, 1416, 188 L. Ed. 2d 426 (2014) (addressing the need for fair warning implicit in the rule of lenity). The rule of lenity applies if a "grievous ambiguity" remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must "simply guess" at the meaning of the statute. *State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 872-73 (citations omitted).

The sexual assault statute in this case cannot be construed against the accused because it imposes what amounts to strict liability, since there is no consent defense available, and the statute provides no notice. A jailer digging through the various definitional statutes could not be expected to understand that a home is a correctional institution, or that a home detention program is a correctional institution, because that is contrary to the common meaning of the

terms and the statutes do not say that. They say virtually the opposite. The home detention statute states that the person is "detained" at her "residence"; and, that the requirements for jails do not apply to the place of detention, whereas the sexual assault statute requires that the place of detention be a jail.

To the extent that there is any reason to believe that a residence could be a jail, the rule of lenity governs, because it would require sheer guesswork to draw that conclusion. The law enumerates many places of confinement that constitute correctional institutions. A home is not one of them. Under the rule of lenity, the statute should be interpreted in favor of Mr. Hilgers' innocence. His conviction must be vacated.

## II. Under the plain language of the statute, the evidence was insufficient, and the error was not harmless.

Because there was no evidence of sexual activity with an individual confined in a correctional institution, the evidence was insufficient, and the erroneous jury instruction was not harmless. Mr. Hilgers should have been acquitted.

### A. Standard of Review.

When the defendant challenges the sufficiency of the evidence, the standard of review is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. *State v. Hirsch*, 2002 WI App, 249 Wis. 2d 757, 761, 640 N.W.2d 140, citing *State*

*v. Johnson*, 135 Wis. 2d 453, 456, 400 N.W.2d 502 (Ct. App. 1986). The court need only be satisfied that the jury, acting reasonably, could be so convinced. *Id*.

### B. Because there was no evidence that Mr. Hilgers had sex with an individual confined in a correctional institution, there was insufficient evidence to support a conviction.

Viewing the evidence in the light most favorable to the jury's verdict, *Morden v. Continental AG*, 2000 WI 51, ¶ 39, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted), and applying the correct legal standard, no reasonable jury could find beyond a reasonable doubt that Mr. and Mrs. Hilgers had sex at the Dane County Jail, and thus the instructional error was not harmless. There is nothing in the record which supports the conclusion that Mrs. Hilgers was "confined in" a jail, a Huber facility, a work release facility, a prison, a juvenile detention center… at the time of the sexual relationship. Having sex in one's home is not having sex in a correctional institution.

Furthermore, the court did not define "home detention program" in the instruction. The parties were free to argue, and the jury was free to decide, what such a program was. This non-pattern instruction, which was based on an undefined statutory provision, was not a harmless error because it required the jury to speculate. Juror speculation is not harmless. A jury cannot base its findings on speculation. *Herbst v. Wuennenberg*, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978).

Moreover, although the jury did not know this, the home detention program statute specifically requires jails to set forth reasonable, written terms of detention. § 302.425(3). The Dane County Jail had written rules, but not one of them detained Mrs. Hilgers at her home. (R. 65: 107-08; 122-23.) And at trial, Mrs. Hilgers drew on a diagram just how far outside of her house she was able to travel. (*Id*., at 215-223; Exhs. 10-11.) Thus, while the evidence was clear that Mrs. Hilgers was involved in a jail diversion program, there was no evidence that the diversion program Mrs. Hilgers was in constituted a statutory home detention program, since it was undisputed that the written rules did not expressly confine her to her home.

Unfortunately, the plain language of the statute was not followed. And, the jury was free to ascribe its own meaning to "home detention program." The jury instruction errors, beyond a doubt, affected the outcome and were not harmless. The charges were unsupported by sufficient evidence. The judgment of conviction must be vacated.

## CONCLUSION

The Court of Appeals should vacate the judgment of the trial court based on erroneous jury instructions and insufficient evidence, and award Mr. Hilgers the costs of this appeal.

Dated: January 19, 2016.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,056 words.

Dated this 19th day of January, 2016.

AXLEY BRYNELSON, LLP

s/ Brian C. Hough
Brian C. Hough (State Bar No. 1025056)
Attorneys for Defendant-Appellant

## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of January, 2016.

AXLEY BRYNELSON, LLP

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## CERTIFICATE OF SERVICE

Defendant-Appellant, Jeff C. Hilgers, by his Attorneys, Axley Brynelson, LLP, by Attorney Brian C. Hough, hereby certifies that the Brief of Defendant-Appellant, Jeff C. Hilgers, was served electronically on the Court and the Plaintiff-Respondent State of Wisconsin by ECF on January 19, 2016.

AXLEY, BRYNELSON, LLP

s/ Brian C. Hough

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