STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2256-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFF C. HILGERS,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the parties' briefs will fully address the issues presented. The State agrees with Hilgers that publication is warranted because no decision of this court addresses whether a person in a home detention program under Wis. Stat. § 302.425 is

an "individual confined in a correctional institution" under Wis. Stat. § 940.225(2)(h).

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Relevant information will be included where appropriate in the State's argument.

ARGUMENT

Defendant-appellant Jeff C. Hilgers appeals a judgment convicting him of one count of second-degree sexual assault by a correctional institution staff member. (54.) *See* Wis. Stat. § 940.225(2)(h). A jury convicted Hilgers of this crime for having sexual intercourse with Jane[1] at her apartment while she was participating in Dane County's Pathfinders Jail Diversion Program. Hilgers was a Dane County Sheriff's Department Deputy, and had met Jane while she was confined at the Dane County Jail.

On appeal, Hilgers argues that he could not have been convicted of this crime because Jane was not confined in a correctional institution when they had sexual intercourse. (Hilgers's br. 10-16.) Instead, he argues, at best she was participating in a home detention program under Wis. Stat. § 302.425, which does not meet the statutory definition of a correctional institution. (Hilgers's br. 10-16.) Similarly, Hilgers contends that the jury instruction for the crime was erroneous and that the evidence was insufficient to allow the jury to find him guilty. (Hilgers's br. 10-20.) He also argues

[1] The State will identify the victim by a pseudonym in this brief. *See* Wis. Stat. § (Rule) 809.86(4).

that Pathfinders did not qualify as a home detention program. (Hilgers's br. 19-20.)

This Court should affirm. The relevant statutes establish that a home detention program is a correctional institution under Wis. Stat. § 940.225(2)(h). The circuit court thus properly instructed the jury and the evidence was sufficient to allow the jury to find that Jane was confined in a correctional institution. Further, because the State introduced sufficient evidence that allowed the jury to conclude that Pathfinders was a home detention program, there was sufficient evidence to convict Hilgers of sexual assault by a correctional staff member.

I. Under the plain language of the relevant statutes, a home detention program under Wis. Stat. § 302.425 is a correctional institution for the purposes of Wis. Stat. § 940.225(2)(h).

A. Law governing statutory construction and standard of review.

Hilgers challenges both the sufficiency of the evidence and the court's instruction to the jury that participation in a home detention program constitutes confinement in a correctional institution. (Hilgers's br. 10-16; 65:246.) As he recognizes, resolution of these claims is ultimately a matter of statutory construction, a question of law that this court reviews de novo. *State v. Hemp,* 2014 WI 129, 359 Wis. 2d 320, ¶ 12, 856 N.W.2d 811.

Statutory construction beings with the statute's language, and if the language is unambiguous, a court applies the plain language to the facts of the case. *See id.* ¶ 13. Statutory language is examined in the context it is used. *Id.* Language is given its common, ordinary, and accepted meaning, though technical or specifically defined

words are given their technical or defined meanings. *State v. Hanson*, 2012 WI 4, ¶ 16, 338 Wis. 2d 243, 808 N.W.2d 390.

Further, "'words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose.'" *Hemp*, 359 Wis. 2d 320, ¶ 13 (quoting *State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811). Courts favor an interpretation that fulfills the statute's purpose. *Hanson*, 338 Wis.2d 243, ¶ 17. Context and purpose are important in discerning the plain meaning of the statute. *Id*.

B. The applicable statutes unambiguously establish that a person participating in a home detention program is a person confined in a correctional institution.

This Court should conclude that the trial court correctly determined that a person placed in a home detention program under Wis. Stat. § 302.425 is an "individual who is confined in a correctional institution" within the meaning of Wis. Stat. § 940.225(2)(h).

1. Relevant statutes.

Several statutes are involved in resolving this matter. To begin, Wis. Stat. § 940.225(2)(h), which defines the crime the jury convicted Hilgers of, states:

> **940.225 Sexual assault.**
>
> . . . .
>
> **(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.

"Correctional institution" is defined in Wis. Stat. § 940.225(5)(acm) as "a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in 938.02(10r)."

Wis. Stat. § 961.01(12m) defines "jail or correctional facility." It states:

961.01 Definitions. As used in this chapter:

. . . .

(12m) "Jail or correctional facility" means any of the following:

(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.

Wisconsin Stat. § 302.30 defines jail:

302.30 Definition of jail. In ss. 302.30 to 302.43, "jail" includes municipal prisons and rehabilitation facilities established under s. 59.53 (8) by whatever name they are known. In s. 302.37 (1) (a) and (3) (a), "jail" does not include lockup facilities. "Lockup facilities" means those facilities of a temporary place of detention at a police station which are used exclusively to hold persons under arrest until they can be brought before a court, and are not used to hold persons pending trial who have appeared in

court or have been committed to imprisonment for nonpayment of fines or forfeitures. In s. 302.365, "jail" does not include rehabilitation facilities established under s. 59.53 (8).

And finally, Wis. Stat. § 302.425, which governs home detention programs, states in relevant part:

302.425 Home detention programs.

. . . .

(2) SHERIFF'S OR SUPERINTENDENT'S GENERAL AUTHORITY. Subject to the limitations under sub. (3), a county sheriff or a superintendent of a house of correction may place in the home detention program any person confined in jail. The sheriff or superintendent may transfer any prisoner in the home detention program to the jail.

. . . .

(3) PLACEMENT OF A PRISONER IN THE PROGRAM. The sheriff or superintendent may, if he or she determines that the home detention program is appropriate for a prisoner, place the prisoner in the home detention program and provide that the prisoner be detained at the prisoner's place of residence or other place designated by the sheriff or superintendent and be monitored by an active electronic monitoring system. The sheriff or superintendent shall establish reasonable terms of detention and ensure that the prisoner is provided a written statement of those terms, including a description of the detention monitoring procedures and requirements and of any applicable liability issues. The terms may include a requirement that the prisoner pay the county a daily fee to cover the county costs associated with monitoring him or her. The county may obtain payment under this subsection or s. 302.372, but may not collect for the same expenses twice.

. . . .

(5) STATUS.

(a) Except as provided in par. (b), a prisoner in the home detention program is considered to be a jail prisoner but the

> place of detention is not subject to requirements for jails under this chapter.
>
> (b) Sections 302.36, 302.37 and 302.375 do not apply to prisoners in the home detention program.
>
> **(6)** ESCAPE. Any intentional failure of a prisoner to remain within the limits of his or her detention or to return to his or her place of detention, as specified in the terms of detention under sub. (3), is considered an escape under s. 946.42 (3) (a).

2. A person participating in a home detention program is effectively confined in the jail, and thus, in a correctional institution.

The plain meaning of these statutes shows that a person participating in a home detention program is confined in a correctional institution for the purposes of Wis. Stat. § 940.225(2)(h). As applied to Jane, she was confined in the Dane County Jail, which is unquestionably a correctional institution, when she was participating in the Pathfinders program.

Initially, Jane was "confined" at her apartment within the meaning of Wis. Stat. § 940.225(2)(h). The circuit court ordered Jane to serve a jail term as a condition of her probation after her conviction on an operating while intoxicated charge. (46:Ex. 9; 65:45-46.) The Dane County Sheriff placed Jane on home detention, letting her serve her jail term at her apartment rather than in the jail. Under Wis. Stat. § 302.425(3), Jane was "detained at [her] place of residence." The meaning of "detained" for the purposes of § 302.425 appears to be largely synonymous with the meaning of "confined" under Wis. Stat. § 940.225(2)(h). Both words describe persons whose freedom of movement is restricted as a result of their involvement in the criminal justice system. And the dictionary definitions of the words are very similar. One definition of "confine" is "imprison." A

definition of detain is "to hold or keep in or as if in custody." *See* Merriam Webster's Collegiate Dictionary, 261, 340 (11th ed. 2012). Jane's detention at her apartment was thus also confinement there.

Further, Jane's apartment was a "correctional institution" under Wis. Stat. § 940.225(2)(h). While on home detention, she was considered a jail prisoner. Wis. Stat. § 302.425(5)(a). Thus, at least constructively, Jane remained in jail while she participated in the program. Jane also remained in the sheriff's custody while on home detention. The sheriff has a statutory duty to take charge and custody of the county jail and the persons in it, and to "keep the persons in the jail personally or by a deputy or jailer." Wis. Stat. § 59.27(1). The Legislature has also given the sheriff the ability to place people in the jail on home detention under § 302.425. Jane's placement in the program was at the sheriff's discretion upon the sheriff's determination that the program was appropriate for her. *See* Wis. Stat. § 302.425(3). This authority is part of the sheriff's exclusive responsibility to run the jail, and is something a circuit court cannot interfere with. *See State v. Schell*, 2003 WI App 78, ¶¶ 14-19, 261 Wis. 2d 841, 661 N.W.2d 503. Because persons on home detention are jail prisoners and are placed in the program pursuant to the sheriff's authority to run the jail, the person's place of detention while in the program should be considered the county jail. A jail is a correctional institution for the purposes of Wis. Stat. § 940.225(2)(h). *See* Wis. Stat. §§ 940.225(5)(acm), 961.01(12m)(b).

Jane's participation in the program also amounts to confinement in a correctional institution because she was subject to an escape charge under Wis. Stat. § 946.42 if she failed to remain within the physical limits of her detention or to return to her place of detention as required by the program's rules. *See* Wis. Stat. § 302.425(6). Had Jane been

placed in the program before her conviction, she would have been entitled to sentence credit for her time spent in the program. *See State v. Magnuson*, 2000 WI 19, ¶ 25, 233 Wis. 2d 40, 606 N.W.2d 536 (a person is in custody under sentence credit statute if she is subject to an escape charge for leaving her status).[2] Sentence credit is given to persons who have "spent time in custody" in connection with the course of conduct they are sentenced for. Wis. Stat. § 973.155(1)(a). Custody includes, without limitation, "*confinement* related to an offense for which the offender is ultimately sentenced." *Id.* (emphasis added). Jane was confined while she was participating in the home detention program.

Finally, a reading of "confined in a correctional institution" to include a person participating in the home detention program is consistent with the Legislature's purpose in enacting Wis. Stat. § 940.225(2)(h). Correctional institution staff members have a tremendous amount of power over the persons they supervise. Section 940.225(2)(h) seeks to prevent abuses of that power by making any sexual contact or intercourse between the staff and inmates a serious crime. *See* Wis. Stat. § 940.225(2).

Similarly, intimate relationships between staff and those confined could result in unfair preferential treatment being given to prisoners by institution employees. Such activity could also create security threats, with employees being enticed to bring contraband to their charges or look the other way when they engage in misconduct, either out of affection

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[2] *Magnuson* overruled *State v. Swadley*, 190 Wis. 2d 139, 526 N.W.2d 778 (Ct. App. 1994), which had held that sentence credit was not available for time spent in the home detention program. *Magnuson*, 233 Wis. 2d 40, ¶ 31 n.7.

or because of a threat by the inmate to expose the relationship.

And these concerns were present here even though Hilgers was not directly supervising Jane while she was on home detention. Home detention participants still interact with jail employees, particularly the ones who are responsible for ensuring compliance with the program's rules. For example, Jane had to agree to allow any person from the sheriff's department into her residence. (46:Exs. 2, 3.) Further, because the sheriff has unlimited discretion to return persons to the jail from the home detention program, it is always possible that an institution employee who had sex with someone in the program will end up supervising the person later on. Wis. Stat. § 302.425(2). Construing the statute to prohibit sexual relationships between correctional institution staff and those on home detention is consistent with the Legislature's purpose in creating Wis. Stat. § 940.225(2)(h).

3. Hilgers has not demonstrated that Jane was not confined in a correctional institution.

Hilgers makes several arguments why Jane was not confined in a correctional institution and Wis. Stat. § 940.225(2)(h) thus does not apply to him, but none are persuasive.

Hilgers points to Wis. Stat. § 302.425(5)(a)'s language that the place of home detention is not subject to Chapter 302's requirements for jails. (Hilgers's br. 11.) This does not mean that Jane was not confined in a correctional institution. Rather, the language is necessary to make the home detention program possible. People on home detention are considered jail prisoners, but if the places they were confined had to meet all the requirements of jails, the

program could not work. No private residence would comply with Chapter 302.

In fact, this language, along with that of Wis. Stat. § 302.425(5)(b), demonstrates that the Legislature intended that residences be considered jails for the purposes of the home detention program. Section 302.425(5)(b) provides that statutes governing prisoner classification systems, health and safety standards for jails, and conduct in jails do not apply to prisoners on home detention. That the Legislature found it necessary to exempt the home detention program from some statutory requirements for jails shows that it otherwise thought that the places of detention for persons in the program were jails. If there were no question that these places were not jails, there would be no reason to exempt them.

Next, Hilgers argues that Wis. Stat. § 302.425(1)(b) does not include a home or a home detention program in its definition of jail. (Hilgers's br. 11.) Instead, he notes, the definition is limited to a house of correction, a work camp, or a Huber facility. (*Id.*) Hilgers ignores that these three examples are preceded by "includes," and the definition, which does not even include a traditional county jail, is meant to expand the types of custody from which the sheriff can release a person to home detention. This statute does not prove that Jane was not confined in a correctional institution for the purposes of Wis. Stat. § 940.225(2)(h).

Hilgers also maintains that participation in the home detention program is not even confinement in a place at all. As an example, he contends that the Legislature did not intend for Wis. Stat. § 940.225(2)(h) to apply to Huber program participants when they are away from the Huber facility. (Hilgers's br. 12-13.) These arguments are wrong for the reasons the State has already provided. Jane was

detained at her apartment as a jail prisoner, and thus confined in a correctional institution. And the reasons to prevent jail employees from having sexual contact with prisoners while they are on Huber release are as compelling, if not more so, than those preventing such contact between employees and persons on home detention.

This Court should also reject Hilgers's reliance on *State v. Terrell*, 2006 WI App 166, 295 Wis. 2d 619, 721 N.W.2d 527. (Hilgers's br. 14-15.) In *Terrell*, this Court concluded that a bailiff was not a "correctional staff member" under Wis. Stat. § 940.225(2)(h) because he worked at the courthouse, not in a correctional institution. *Terrell*, 295 Wis. 2d 619, ¶¶ 10-11. *Terrell* does not apply here. There is no dispute that Hilgers was a "correctional staff member," as defined in Wis. Stat. § 940.225(5)(ad). And this Court's determination in *Terrell* that the courthouse was not a correctional institution does not appear to be relevant to resolving whether a person's place of confinement on home detention qualifies as one, despite Hilgers's conclusory argument that "[l]ike a courthouse, a home is not a correctional institution." (Hilgers's br. 15.) *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court does not address undeveloped arguments).

Hilgers next argues that there are policy reasons to draw distinctions between persons placed on home detention and those confined in the actual jail or a prison. (Hilgers's br. 16.) Specifically, he contends that a person in her home has more power and control when threatened, and can arm herself, reject visitors, call for assistance, or leave. (Hilgers's br. 16.) But people on home detention are not free to do these things. The program rules prohibited Jane from having a firearm at her residence. (46:Exs. 2, 3). While Jane was allowed to leave her apartment for work and appointments, she had to obtain advance permission for any changes to her

schedule. (46:Exs. 2, 3.) Jane also had to let anyone from the sheriff's department into her residence to determine if she was complying with the program's rules. (46:Exs. 2, 3.) The potential for sexual exploitation by a jail employee still exists when a person is on home detention.

Finally, Hilgers argues that the rule of lenity should lead this Court to adopt his interpretation of Wis. Stat. § 940.225(2)(h). (Hilgers's br. 17-18.) The statute is not ambiguous, so the rule does not apply. *See State v. Kittilstad*, 231 Wis. 2d 245, 266-67, 603 N.W.2d 732 (1999). Instead, the rule applies "when a court is unable to clarify the intent of the legislature." *State v. Freer*, 2010 WI App 9, ¶ 26, 323 Wis. 2d 29, 779 N.W.2d 12. "The rule is not violated by taking the commonsense view of the statute as a whole and giving effect to the object of the legislature, if a reasonable construction of the words permits it." *Kittilstad*, 231 Wis. 2d at 267 (citations and internal quotation marks omitted). As argued, the Legislature's intent in passing § 940.225(2)(h) is plain. There is no reason to apply the rule of lenity.

II. There is no requirement in Wis. Stat. § 302.425 that the terms of a home detention program confine the person to her home.

Hilgers argues that the evidence was insufficient to convict him and that the circuit court erroneously instructed the jury. (Hilgers's br. 18-20.) These arguments depend on Hilgers's incorrect argument that Jane was not confined in a correctional institution and they should fail.

In addition, Hilgers maintains that the evidence was insufficient to show that Jane was participating in a home detention program because there was no evidence introduced to show that the Pathfinders program's rules "expressly confine[d] her to her home." (Hilgers's br. 20.) This Court should reject this argument. There is no requirement in Wis.

Stat. § 302.425 that the program's rules specifically detain or confine the person solely to their residence.

Hilgers also notes that Jane testified that she was able to travel outside of her apartment without consequence, proving that she was not detained at her residence. (Hilgers's br. 20.) Even assuming that the State was obliged to show some specific level of restraint to show that Pathfinders was a home detention program, it did so here. The State introduced evidence that participants in Pathfinders had to get authorization from the program administrators to leave their residences, and had to establish a schedule if they wanted to leave for work, school, or treatment. (65:108.) The State also demonstrated that participants in the program had to wear a GPS ankle bracelet that tracked their movement and would send an alert whenever the person went beyond the boundaries established in the rules. (65:109-10.) People who lived in an apartment building were usually required to stay within a block radius of the building, though every person's range was different. (65:109.) Jane testified that the program administrators extended her range so she could go on walks, explaining why she was able to leave her building without her bracelet sending an alert. (65:221-22.) But according to Jane's testimony and a map she drew, she was not even permitted to walk around the full block that her building was located on. (46:Ex. 10; 65:215.) The evidence demonstrated that Jane's movement was greatly circumscribed by the rules of her release to the Pathfinders program. The jury could reasonably conclude she was on a home detention program.

CONCLUSION

The State respectfully requests that this court affirm the circuit court's judgment of conviction.

Dated April 15, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3,654 words.

Dated this 15th day of April, 2016.

_____
AARON R. O'NEIL
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 April, 2016.

_____
AARON R. O'NEIL
Assistant Attorney General