STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

CONNIE MAE APFEL,

Defendant-Appellant

On appeal from the Circuit Court for St. Croix County,

The Honorable Edward F. Vlack, presiding

REPLY BRIEF OF THE DEFENDANT-APPELLANT

CONNIE MAE APFEL

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I. Argument.

A. Failure to recall making a statement to the police does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made to the police contemporaneously.

The State asserts that "Ms. Apfel fails to provide authority which sets forth a standard for the exact questions which must be asked of a witness before a trial court may declare a witness's failure to recall inconsistent and then allow introduction of prior statements." State's Brief, p. 6. To this assertion Ms. Apfel would respond that she has provided the authority. The authority are the rules of evidence, which have already been identified in the parties' briefs. It is axiomatic that the proper questions to be asked before prior inconsistent statements may be admitted, are questions that elicit inconsistent statements. That did not occur in this case.

The circuit court and the State maintain that a response of "I do no recall" to the question "do you recall making a statement to the police?" renders all statements that may have been made to the police admissible as prior inconsistent statements. This sort of expansive interpretation was rejected in ***Wikrent v. Toys R. Us, Inc.***, and should be rejected here as well. ***Wikrent v. Toys R Us, Inc.***, 179 Wis.2d 297, 309-10, 507 N.W.2d 130 (1993). ("Unless required by the doctrine of

completeness[1], an out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously"), overruled on other grounds in ***Steinberg v. Jensen***, 194 Wis.2d 439, 534 N.W.2d 361 (1995). The response "I do no recall" to the question "do you recall making a statement to the police?" is only material to the question of whether a statement was actually made to the police, not to each and every statement which may be embedded within that statement.

In this case the State wanted to present testimony of the police officers to the effect that the victim C.A. had made prior statements to the police officers that Ms. Apfel had struck him, that he did not consent to being struck, and that he had felt pain when struck. The State argued that these statements were "prior inconsistent statements" with C.A.'s testimony at trial. However, at trial C.A. never testified with regard to whether Ms. Apfel had struck him, nor with regard to whether he consented to being struck, or whether he felt pain. He did not testify to these fact issues, because he was never asked about these fact issues.

Ms. Apfel's position is simple, before testimony may be admitted as evidence of a prior inconsistent statement, there must be a statement of the witness at trial for that prior statement to be inconsistent with. There is nothing

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[1] The reference to the doctrine of completeness is to Section 901.07, Wis. Stats., Remainder of or related writings or recorded statements. ***Wikrent***, 179 Wis.2d at 309-10. That statute is not at issue in this case.

remarkable about this position, it is nothing but an application of logic to the rules of evidence. What is remarkable is the State's position that testimony of prior statements of a witness may be introduced as "prior inconsistent statements," on issues to which the witness was never questioned and to which the witness never testified. To Ms. Apfel this seems to defy logic. A prior statement cannot be inconsistent to a statement that was never made at trial.

Before any question of whether evidence may be presented at trial concerning certain prior statements of that witness, the witness needs to testify at trial. Statements at trial must be elicited from that witness. If those statements at trial are inconsistent with other prior statements of the witness, then consideration may be given presenting evidence of those prior inconsistent statements. But there must be some statement at trial for those prior statements to be inconsistent with.

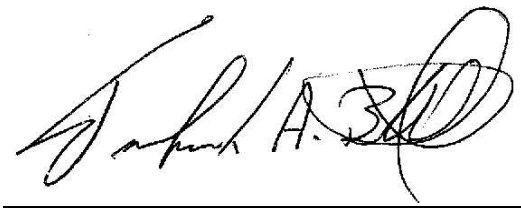
Typically, those inconsistent statements at trial will be elicited by asking questions of the witness. The State now wonders "what might those proper questions be?" Ms. Apfel would suggest that if the State wishes to submit testimony to the effect that the witness had previously told the officers that the defendant had struck him, and wishes to do so as a prior statement of the witness inconsistent with the witness' trial testimony, then at a minimum the witness should be asked at trial "did the defendant hit you?" Likewise, at minimum, it seems in a battery case the witness should at least be asked "did you consent to being hit?" and "did you feel pain?," before the State proceeds with presenting

testimony of the witness' prior statements concerning consent and bodily injury. No doubt more could be asked, but this would seem the bare minimum. Now, if the witness testifies "I do not recall," and "the trial judge has reason to doubt the good faith of such denial, [certainly] he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." ***State v. Lenarchick***, 74 Wis.2d 425, 436, 247 N.W.2d 80, 87 (1976). The point is, some questions on the material facts at issue at trial need to be asked of the witness before the admission of testimony of prior statements of the witness may even be considered. Those questions must elicit statements of the witness at trial which are inconsistent with other prior statement of the witness. If those questions are never asked, and the witness never offers an inconsistent statement at trial on their own initiative, then those prior statement will remain be inadmissible hearsay. And that is exactly what happened in this case.

II. Conclusion.

Wherefore, the defendant would request that this Court vacate the defendant's Judgment of Conviction on the charges of battery and disorderly conduct and order a new trial, and order resentencing on the charge of possession of paraphernalia.

Respectfully submitted May 31, 2016.



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III. Certifications.

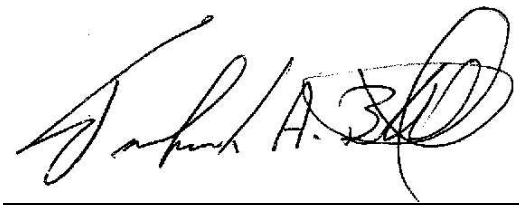
I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 997 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the

paper copy of the brief. 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 May 31, 2016.



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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by express mail on May 31 2016. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: May 31, 2016

Signature: _____