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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP1045-CR
Case No. 2016AP1046-CR
Case No. 2016AP1047-CR
Case No. 2016AP1048-CR
Case No. 2016AP1049-CR

TERRANCE L. EGERSON,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING, AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHELLE A. HAVAS, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE WHEN COUNSEL DID NOT MOVE TO DISMISS THE CHARGES THAT WERE NOT SUPPORTED BY FACT.

The State argues that the complaints pled sufficient facts to justify the domestic abuse repeater enhancers and that any motion by Egerson's counsel to dismiss the enhancers would have failed. (State's Br. at 21). However, Egerson did not physically abuse A.E with their phone conversations and the State has not shown that the complaints contained sufficient facts to support the domestic abuse enhancer.

The State asserts that Egerson had a long history of physically abusing A.E. (State's Br. at 1). This assertion distracts from the real issue - whether the criminal complaints contained sufficient facts to support the domestic abuse enhancer - because to determine whether probable cause existed one must look to the complaint itself. *State v. Williams*, 47 Wis. 2d 242, 253 177 N.W.2d 611 (1970). The State attempts to establish probable cause after the fact by citing to an exhibit attached to the State's Response to Defendant's Motion for Post-Conviction Relief. (State's brief at 3, 4, 20, 21).

Egerson denied the claim that he had a long history of physically abusing A.E. when given the opportunity, stating, "the only thing I wanted to do is challenge the mental image

that's been portrayed to me in that temporary restraining order." (48R33:33)[1]

The State asserts that Egerson does not deny that he has physically abused A.E. in the past. (State Br. at 19 (citing Egerson's Br. 13-16)). Again, this distracts from the real issue. Egerson's brief focused on the facts contained within the complaints. Egerson did not admit to abusing A.E. in the past; rather, Egerson argued that the complaints in case 13CF1401 and case 13CF1860 do not allege what if any prior physical abuse occurred between A.E. and Egerson. (Egerson's Br. At 16).

The State also misconstrues the facts actually alleged in the complaints. The State asserts, based on its remarks at sentencing, that in case 13CF1401 Egerson went to A.E.'s place of work. (State's Br. at 18). However, the complaint in case 13CF1401 does not contain this assertion.

In deed, Officer Graber's preliminary hearing testimony directly contradicts the State's assertion. Officer Graber testified, "Did they personally see him at the location? No." (45R40:6). In addition, A.E. complained that Egerson "was in violation of a valid domestic abuse injunction by calling her at work." (45R40:6). A.E. did not complain to Officer Graber that Egerson was physically present.

Most importantly and not mentioned in the State's brief, Officer Graber over heard the phone conversation between Egerson and A.E. and he testified that he did not

[1] Consistent with the first brief, this reply brief cites to the record contained in 2016AP1045 as "45_", in 2016AP1046 as "46_", in 2016AP1047 as "47_", in 2016AP1048 as "48_" and in 2016AP1049 as "49_". When citing to documents that are contained in all files, this brief will use "45_" as a reference

hear any statements that may have been threatening in any way. (45R40:18).

The State also argues that Officer' Graber's testimony shows that Egerson contacted A.E. at least twice on that date. (State's Br. at 26). However, Officer Graber testified that he heard one phone call between Egerson and A.E., not two. (45R40:6).

The State also asserts that in case 13CF3435 Egerson used his mother to make threatening calls to A.E. (State's Br. at 19). Yet, a common-sense evaluation of the complaint shows that Egerson's mother never threatened A.E. A.E. stated in the complaint that, "Bessie Egerson [Egerson's mother] has been contacting her [A.E.] two to four times a day telling her to be on the defendant's side and defend him and to speak on the defendant's behalf."(48R2:3). A.E.'s statement contains no threat by Egerson's mother.

Moving from the facts to the law, the State agrees that Wis. Stat. § 968.075(1)(a)4 applies to the facts of this case. (State's Br. at 17). Yet, the State interprets Wis. Stat. § 968.075(1)(a)4 in a manner not consistent with the statute's plain language. The State argues that a conversation between Egerson and A.E. is a physical act by Egerson against A.E. (State's Br. at 17-18).

Contrary to the State's position, the legislative history of Wis. Stat. § 968.075(1)(a) shows that domestic abuse means a physical act rather than a verbal act. 1987 Wis. Act 346 Sec. 3 (published May 2, 1988) created Wis. Stat. § 968.075. The original statute defined "domestic abuse" just the same as it exists today, with one key difference: the

original version of Wis. Stat. § 968.075(1)(a)4. read, "A physical act, *or a threat in conjunction with a physical act*, which that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2 or 3" (emphasis added). Thus, the legislature defined a "physical act" as distinct from a "threat". "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110.

Almost two years after creating Wis. Stat. § 968.075(1)(a)4, the Wisconsin Legislature amended the law. 1989 Wis. Act 293 Sec. 1 (published May 7, 1990). The legislature excised any reference to "threat": "~~A physical act, or a threat in conjunction with a physical act, which~~ <u>that</u> may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2 or 3." 1989 Wis. Act 293 Sec. 1.

Therefore, even if Egerson's phone conversations with A.E. were threatening, which they were not, the phone conversations would not be "domestic abuse" as defined by Wis. Stat. § 968.075(1)(a) because the statute requires a physical act.

The State argues that Egerson performed a "physical act" because he used his body when he called A.E. (State's Br. At 18). By the State's interpretation, Egerson performed a physical act when he spoke with A.E. by moving his mouth. Yet, the above analysis of the statute shows that the legislature drew a distinction between a "physical act" and a "threat".

The State's interpretation provides absurd or unreasonable results where by verbal acts are physical acts. "Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 46.

The legislature in Wis. Stat. § 968.075(1)(a)4 modified the word "act" with the word "physical." If a "physical act" can encompass all acts such as verbal acts, then the modifier "physical" becomes surplusage to the noun, "act". To avoid this surplusage, "domestic abuse" cannot be all acts, such as a verbal act; but rather, "domestic abuse" can only be physical acts. Yet, State's interpretation obviates the word "physical" and makes every "act" a "physical act".

Applying the plain language of Wis. Stat. § 968.075(1)(a) to the facts alleged in the complaints brings into focus the unreasonable result of the State's interpretation. "Domestic abuse means any of the following [i.e., a "physical act"] engaged in by an adult person *against* his or her spouse or former spouse..." (emphasis added) Wis. Stat. § 968.075(1)(a). Contrary to the State's assertion, the statute contains the word "against." (State's Br. At 18). The State's position that Egerson engaged in a physical act against A.E. during their phone conversations is nonsensical.

The State relies on *State v. Bandy*, 204 WI App 120, 358 Wis. 2d 712, 856 N.W. 2d 347 (unpublished) (R. App. 101-05) to support its argument that phone calls can constitute domestic abuse. (States' Br. at 18). In Bandy the defendant was guilty of two counts of violating a temporary

restraining order (TRO). *Bandy*, 204 WI App 120. First, the defendant was physically present in violation of the TRO. *Id*. ¶16-28. Second, the defendant sent a series of text messages in violation of the TRO. *Id*. ¶29-30.

The State's brief points out that the Court in *Bandy* assumed that sending text messages constituted an act of domestic abuse. (State's Br. at 18). The Court understood that "the statute requires a physical act." *Id*. ¶19. The Court did not provide any analysis of whether the text messages were physical acts. *Id*. ¶29-31. However, the verbal phone conversations between Egerson and A.E. are not akin to the defendant in *Bandy* physically writing text messages or similarly writing letters to the petitioner. As shown by the prior analysis, Egerson's phone conversations with A.E. were not physical acts against A.E.

Next, the State argues that the phone conversations may have caused A.E. to reasonably fear imminent conduct described Wis. Stat. § 968.075(1)(a)1-3. The State acknowledges that Egerson was in jail when he made most of these calls. (State's Br. At 19).

To support the assertion that A.E. could have reasonably feared Egerson's imminent engagement in proscribed conduct, the State cites a precedent of Egerson having his mother threaten A.E. (State's brief at 19-20). However, as shown above, Egerson's mother never threatened A.E. The State argues that because of this *precedent* A.E. could have reasonably feared that Egerson might take the next step and ask someone on the outside to harm her physically. (State's Br. at 19-20).

The State's argument is mistaken for two reasons. First, Egerson's mother never threatened A.E.; therefore, A.E.'s supposed fear did not exist. Second, even if A.E.'s conversations with Egerson's mother caused fear, case 13CF3435 did not come about until July 2013. Therefore, prior to July 2013 A.E.'s supposed fear of Egerson would not have existed in cases 13CF1401, 13CF1860 and 13CF3152.

The State also cites *Bandy* to argue that A.E. could reasonably fear imminent physical harm from her phone conversations with Egerson. (State's Br. at 20). The State's reliance on *Bandy* is flawed for two reasons.

First, the facts of *Bandy* are different from the facts here. In *Bandy* the defendant violated the TRO a day after being served with it by being physically present. *Bandy*, 204 WI App 120, ¶4-5. The Court also noted the defendant's immediate past acts of domestic violence against the petitioner and his extensive criminal history. *Id*. at ¶20, 23. Additionally, the defendant was not in custody when he wrote the text messages. *Id*. at ¶22. And, the defendant did not challenge the facts. *Id*. at ¶14. Based on these facts present in *Bandy*, the petitioner's fear of more violence from the defendant was reasonable. *Id*. at ¶31.

However, these facts are not present in this case. Egerson was never physically present with A.E. Egerson was in jail, which A.E. knew, when he made most of the calls. Also, the complaints do not outline any immediate past acts of domestic violence by Egerson against A.E. or a criminal history of Egerson, which leads to the second reason the State's reliance on *Bandy* is flawed.

In *Bandy* the issue of "domestic abuse" was a sentencing issue and not a charging issue because the State did not charge him as a domestic abuse repeater, but sought to increase the defendant's probation term. *Id*. at ¶14.

Therefore, in *Bandy* the State made its record at sentencing. At sentencing the State provided the court the facts relevant to determine whether Wis. Stat. § 968.075(1)(a) applied to the defendant's crimes. Based on the State's presentation, which the defendant did not challenge, the court found that the defendant's crimes were acts of domestic abuse. *Bandy*, 204 WI App 120, ¶31.

Bandy is different than Egerson's case because in Egerson's case the complaint must contain the essential facts constituting the offense of domestic abuse repeater. *State v. Williams*, 47 Wis. 2d 242, 253 177 N.W.2d 611 (1970). The State argues that the alleged history of physical abuse between Egerson and A.E. is essential to understanding why A.E. would be fearful. (State's Br. at 19-201). These essential facts must be contained in the complaints. However, the complaints do not contain these essential facts; rather, the alleged facts are found attached to the State's Response to Defendant's Motion for Post-Conviction Relief.

Unlike *Bandy*, here the State did not provide sufficient facts in the complaints to show the court that the crimes were acts of domestic abuse.

Egerson's case is more similar to *O'Boyle*[2] than *Bandy*. In *O'Boyle*, the victim told O'Boyle to leave; yet, O'Boyle returned that night intoxicated knocking on the second floor window. The victim was so fearful that she called 911. O'Boyle was physically present breaking the law. However, it would not have been reasonable for the victim to fear imminent engagement in any of the proscribed conduct. O'Boyle 13-AP-1004, ¶22.

Egerson's counsel should have moved to dismiss the unsupported charges and counsel was ineffective when he did not move to dismiss the enhancers.

II. TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED EGERSON BECAUSE EGERSON WAS ERRONEOUSLY SUBJECTED TO INCREASED PENALTIES AND TO FELONY BAIL JUMPING CHARGES.

The State argues that Egerson's prejudice argument fails because he does not claim he would have gone to trial but for trial counsel's ineffectiveness. (State's Br. at 23). However, Egerson does not have to show that he would have gone to trial but for counsel's errors. Rather, Egerson must show that because of counsel's errors there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

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[2] State v. O'Boyle, No. 2013AP1004, unpublished slip op., (Feb. 4, 2014). (Unpublished but as a single-judge opinion citable as persuasive per Wis. Stat. § 809.23(3)(b)) (A. App. 119-30),

The State's brief states, "If there had been a different assortment of charges to chose from, the parties would have reached a different agreement." (State's Br. at 23). This is exactly Egerson's argument. Egerson agrees with the State that the result of the proceeding would be different had Egerson's counsel not been ineffective. It is this difference, as stated by the State, which creates the reasonable probability that the result of the proceeding would have been different.

Egerson does not offer speculation to satisfy the prejudice prong. Instead, Egerson shows that as a result of Egerson's counsel's errors, Egerson unnecessarily plead guilty to and was sentenced on two-felony bail jumping charges, and trial counsel's errors resulted in Egerson being unnecessarily exposed to fifty-five years and six months of imprisonment. (Egerson Br. at 20). It is as if Egerson's counsel wanted to negotiate with the State with both hands tied behind his back.

Additionally, Egerson's position would have been improved had Egerson's counsel moved to dismiss the felony bail jumping charge in case 13CF1860, which had no factual basis. The State agrees that the felony bail jumping charge in case 13CF1860 had no factual basis. (State's Br. at 25).

Only an oversight on counsel's part explains why there was no motion prior to the trial date to dismiss the felony bail jumping charge and why the charge was resolved with a dismissal and read-in and not an outright dismissal because at sentencing a court is allowed to rely on read-in charges. See *Embry v. State*, 46 Wis. 2d 151, 158, 174 N.W.2d 521 (1970).

The State asserts that the mischarged felony bail jumping in case 13CF1860 did not prejudice Egerson. (State's Br. at 25). Contrary to the State's assertion, Egerson would have been in a more favorable position had trial counsel been effective.

"The fundamental purpose of the Sixth Amendment's guarantee of effective assistance of counsel is not to assess the overall performance of counsel but to ensure that the adversarial process functions fairly and reliably." *State v. Thiel*, 2003 WI 111, ¶62, 264 Wis. 2d 571, 665 N.W.2d 305.

Here, the adversarial process did not function. There was no strategic advantage in not moving to dismiss the unsupported charges. And counsel's failure to act disadvantaged Egerson to being unnecessarily exposed to 55 ½ years of imprisonment. (Egerson's Br. at 20).

Of course Egerson's position would have improved had the unsupported charges been dismissed. In an attempt to restore confidence in the outcome - absent Egerson's counsel's errors - the State argues that "the State would have likely" or "the State could have" (State's Br. at 23). Thus, it is the State that offers speculation by arguing that it "would have likely" or "could have" in response to Egerson's counsel performing effectively.

Egerson does not have to show that had his counsel been effective he would have been sentenced to so many years less than his actual sentence. Egerson must show there is a reasonable probability that the result of the proceeding would have been different.

It is with this difference in outcome that Egerson meets the second prong of his ineffective of assistance claim. Therefore, Egerson has demonstrated a manifest injustice and should be allowed to withdraw his plea. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

III. THE COURT SHOULD ORDER A NEW TRIAL IN THESE CASES IN THE INTEREST OF JUSTICE BECAUSE THE INAPPROPRIATE DOMESTIC ABUSE REPEATERS VIOLATED EGERSON'S FUNDAMENTAL RIGHT TO DUE PROCESS.

The State agrees that the State charged Egerson with crime that that had no factual basis (State's Br. at 25). And, for the reasons explained above, the domestic abuse enhancers in this case were not supported by probable cause.

Yet, Egerson's counsel did nothing with the false charge or the domestic abuse enhancers.

This is an extraordinary case because review of the record shows the sentencing court and the State at sentencing agree with Egerson's claim that his actions were not physical abuse.

The court stated, "Now, I agree and everyone does agree that these are not offense of physical violence." (48R33:42-43).

The State concurred, "This type of abuse can be just as destructive as physical abuse." (48R33:22).

Even Officer Graber acknowledged that there was nothing threatening with Egerson's conversation with A.E. (45R40:18).

Yet, Egerson's case was dealt with as a "domestic abuse" case from the beginning to the end. The sentencing court ordered the domestic abuse assessment on each of the convictions. (48R33:47-50).

Justice has been miscarried in this case because the errors of Egerson's case, as argued above and which were never corrected, left the proceedings fundamentally unfair.

Therefore, this Court should vacate the judgments of conviction and order a new trial to cure the constitutional errors.

CONCLUSION

Based on the reasons stated herein, Mr. Egerson respectfully requests the Court to order the judgment of convictions reversed or in the alternate order a *Machner* hearing.

Dated this 27th day of March 2017.

Respectfully submitted,

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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 2999 words.

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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.

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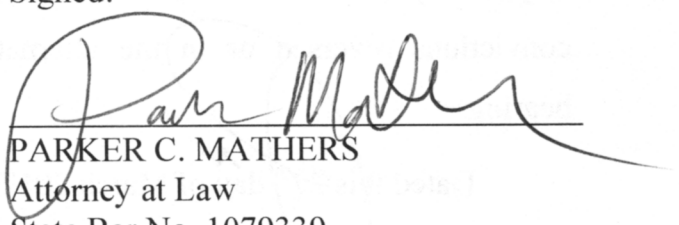

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