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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal Nos. 2016AP001956 CR
2016AP001957 CR
Circuit Case Nos. 2013CF000453
2013CF001256

v.

DARRIN K. TAYLOR,

Defendant-Appellant.

**APPELLANT'S BRIEF
AND APPENDIX**

Appeal from the Judgment of Conviction and Sentence entered in Kenosha
County Circuit Court
Honorable Mary Kay Wagner, presiding

SUBMITTED BY:

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COMPLIANCE CERTIFICATE

I hereby certify that this Appellant's Brief and Appendix conforms to the form and length requirements of Rule 809.19(8)(b) and (c) in that it is typewritten using a proportional font. The length of this Appellant's Brief is 4,892 words. I further certify in accordance with Rule 809.19(12)(f) that the text of the electronic copy of this Appellant's Brief and Appendix is identical to the text of the paper copy of this Appellant's Brief and Appendix.

Dated this _____ day of January 2017.

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STATEMENT OF THE ISSUES

1. Was the evidence presented at trial sufficient to support a jury verdict of guilty on the charge of causing mental harm to a child beyond a reasonable doubt?

Trial Court: Yes.

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Darrin Taylor believes that no case law directly addresses the issue presented in this case and therefore oral argument is necessary.

STATEMENT REGARDING PUBLICATION

This case involves the determination of the evidence required for the State to prove the offense of causing mental harm to a child beyond a reasonable doubt. Appellant, Darrin Taylor submits that the opinion would be instructive to all circuit courts and therefore has statewide implications and that publication is advisable.

STATEMENT OF THE CASE

A Criminal Complaint was filed on April 24, 2013 which alleged one count of First Degree Sexual assault of a Child under the age of 12, pursuant to Wisconsin Statutes § 948.02(1)(b); one count of First Degree Child Sexual Assault – Contact with a Child under age 13, pursuant to Wisconsin Statutes § 948.02(1)(e); and two counts of Felony Bail Jumping, pursuant to Wisconsin Statutes § 946.49(1)(b) against Darrin Taylor (“Taylor”). (R. 1; Case No. 2013CF000453).

An initial appearance was held on April 24, 2013. (R. 67). The court set cash bail at \$25,000.00. (*Id.* at 4). Taylor waived his right to have a preliminary hearing within 10 days. (*Id.* at 8).

On May 7, 2013 a preliminary hearing was held (R. 68). Taylor waived his right to a preliminary hearing. (*Id.* at 3-7). A Preliminary Hearing Waiver form was also filed with the court. (R. 10). The court ordered the case to be bound over for trial. (R. 68; p. 7). The State filed and Information. (R. 8). Taylor acknowledged receiving the Information and waived it reading. (R. 68; p. 7). Taylor also moved the court to modify his bail. (*Id.* at 8). The court denied the motion. (*Id.* at 12).

An Arraignment was held on May 24, 2013. (R. 69). Taylor entered a not guilty plea to all counts in the Information. (*Id.* at 3). The State

moved the court for a no contact order while Taylor remained in custody. (*Id.* at 4). The court granted the State's motion as to S. F. and L. B. and any child under the age of eighteen. (*Id.* at 10). Taylor also moved the court to modify his bond. (*Id.* at 3). The court denied the bond motion. (*Id.* at 12).

On July 2, 2013 the State and Taylor agreed to adjourn the pretrial hearing. (R. 70).

On August 12, 2013, the court set a date for a bond hearing. (R. 71).

The court heard Taylor's bond motion on August 16, 2013. (R. 72). The court denied the motion. (*Id.* at 12). The court also set a jury status date. (*Id.* at 4).

Taylor moved the court to allow visitation from his two biological children while he was in custody on September 23, 2013. (R. 73). The court declined to issue an order granting the motion and suggested that the trial court hear the issue. (*Id.* at 6). On September 24, 2013 the trial court heard the same motion and granted Taylor's request. (R. 74; p. 7).

On November 11, 2013 the State and Taylor agreed to adjourn the trial in light of potential new charges being filed. (R. 75).

On November 13, 2013 a Criminal Complaint was filed which alleged one count of Repeated Sexual Assault of a Child , pursuant to Wisconsin Statutes § 948.025(1)(d); one count of Mental Harm to a Child a

Party to a Crime, pursuant to Wisconsin Statutes § 948.04(1) and 939.05; seven counts of Felony Bail Jumping, pursuant to Wisconsin Statutes § 946.49(1)(b); one count of Intimidation of a Victim as Party to a Crime, pursuant to Wisconsin Statutes § 940.44(2) and 939.05; and five counts of Contempt of Court as Party to a Crime, against Darrin Taylor (“Taylor”). (R. 1; Case No. 2013CF001256).

On November 13, 2013 an Initial Appearance was held. (R. 74; Case No. 2013CF001256). Taylor moved to dismiss Count Two, Mental Harm to a Child as Party to a Crime. (*Id.* at 3). The court took the motion under advisement. (*Id.*). The court set cash bail at \$25,000.00 and ordered no contact with L. B., S. F. and S. F.’s father. (*Id.* at 5-6).

A preliminary hearing on Case No. 2013CF001256 was held on November 21, 2013. (R. 75; Case No. 2013CF0012546). Taylor waived his right to a preliminary hearing. (*Id.* at 2-6). A Preliminary Hearing Waiver form was filed with the court. (R. 6; Case No. 2013CF001256).

On December 18, 2013, an arraignment was held. (R. 76; Case No. 2013CF001256). The State had filed an Information. (R. 8; 2013CF001256). Taylor waived the reading of the Information and entered a not guilty plea to the charges in the Information. (R. 76; pp. 3-4; Case No. 2013CF001256).

A status hearing was held on January 30, 2014. (R. 77; Case No. 2013CF001256).

On April 2, 2014 a status hearing was held to set dates. (R. 78; Case No. 2013CF001256).

A motion hearing was scheduled on July 16, 2014. (R. 79; Case No. 2013CF001256). Taylor's motion to allow contact with his two biological children was discussed and the court determined that contact was presently not prohibited resulting in Taylor withdrawing his motion. (*Id.* at 6-8).

On August 4, 2014 a hearing was held on the State's motion for joinder and other acts evidence. (R. 80; Case No. 2013CF001256). The State moved the court to join Cases 2011CF001166, 2013CF000453 and 2013CF001256. (*Id.* at 2). Taylor did not object to the joinder of Cases 2013CF000453 and 2013CF001256. (*Id.* at 13). The court ruled that Case 2011CF001166 should not be joined. (*Id.*). The court withheld a ruling on the other acts motion. (*Id.* at 21).

On September 11, 2014 a status/*Ludwig* hearing was held. (R. 81; Case No. 2014C001256). The court held a colloquy with Taylor in regards to the State's offer to resolve his cases. (*Id.* at 5-8). Taylor rejected the State's offer. (*Id.* at 8).

A jury selection hearing was scheduled for September 15, 2014. (R. 82; Case No. 2013CF001256). However, based on Taylor's motion for a third party defense, the hearing was adjourned. (*Id.* at 15).

On September 18, 2014 a motion hearing was held. (R. 83; Case No. 2013CF001256). At that hearing the court granted Taylor's motion for a third party defense. (*Id.* at 88).

On September 29, 2014 a jury was selected. (R. 84; pp. 9-90; Case No. 2013CF001256). In the afternoon of September 29, 2014 a hearing was held on the admission of confidential information from the DCFS. (R. 85; Case No 2013CF001256).

The jury trial commenced on September 30, 2014. (R. 86; Case No. 2013CF001256). The State filed Amended Informations in both cases. (R. 33; Case No. 2013CF000453 and R. 22; Case No. 2013CF001256). Taylor acknowledged receipt of the Amended Informations, waived their readings and entered not guilty pleas. (R. 86; pp. 4-5; Case No. 2013CF001256). The court instructed the jury and then the jurors heard opening arguments from the district attorney and defense attorney. (*Id.* at 20-106). The jury then heard testimony from the State's witness, L. B. (*Id.* at 114-187).

The jury trial continued on October 1, 2014. (R. 87; Case Mo. 2013CF001256). The jury heard testimony from the following State

witnesses, L. B., Julie McGuire, Dakota Bossingham, Rebecca Matoska-Mentink, Michael Held, S. F., Julie Ortiz, J. F. and Officer Gloria Gonzales. (*Id.* at 6-193).

On October 2, 2014 the jury trial continued. (R. 88; Case No. 2013CF001256). The State rested its case in chief. (*Id.* at 4). Taylor moved to dismiss. (*Id.* at 5). The court queried the State as to its proof on mental harm to a child. (*Id.*). The court held in abeyance a decision on the proof for mental harm to a child which would also affect one count of felony bail jumping. (*Id.* at 10). The court denied the motion to dismiss on the other counts. (*Id.* at 11). The court then held a colloquy with Taylor in regards to his right to remain silent. (*Id.* at 12-15). The jury then heard testimony from the defense witness, Audrey Henry and Taylor. (*Id.* at 18-122). Taylor stipulated to being charged with a felony in Case No. 2011Cf001166 and was out on bond at the time of the new allegations. (*Id.* at 125-26). The court then instructed the jury. (*Id.* at 130-209).

The jury trial continued on October 3, 2014. (R. 89; Case No. 2013CF001256). The jury heard closing arguments from the district attorney and Taylor's attorney. (*Id.* at 16-87). The court then gave the jury its final instructions and swore in the bailiffs. (*Id.* at 87-102). The jury returned its verdict finding Taylor guilty on one count of first degree sexual

assault of a child under the age of twelve; and guilty on one count of felony bail jumping in Case No. 2013CF000453. (*Id.* at 105-106). The jury found Taylor not guilty of first degree sexual assault contact with a child under the age of thirteen and not guilty of one count of felony bail jumping in Case No. 2013CF000453. (*Id.* at 106). In Case No. 2013CF001256 the jury found Taylor guilty on the following: one count of repeated sexual assault of a child; one count of mental harm to a child as party to a crime; seven counts of felony bail jumping; one count of intimidation of a victim; and, five counts of contempt of court. (*Id.* at 106-111). The court polled the jury. (*Id.* at 111-139). The State moved for judgment on the verdicts. (*Id.* at 140). Taylor moved for dismissal of counts two and four in Case No. 2013CF000453. (*Id.*). The court granted Taylor's motion. (*Id.*).

On December 8, 2014 the sentencing hearing was adjourned. (R. 90; Case No. 2013CF001256).

Taylor was sentenced on December 17, 2014. (R. 91; Case No. 2013CF001256). At sentencing, the State agreed to have Case No. 2011CF001166 dismissed and read-in. (*Id.* at 3). The court made a finding that there was substantial evidence indicating mental harm to a child based on the testimony. (*Id.* at 9). The court reviewed the PSI. (*Id.* at 4-7). The court then listened to arguments from the district attorney and defense

counsel, and heard a statement from Taylor. (*Id.* at 9-42). The court then sentenced Taylor to 25 years initial confinement and 6 years 4 months of extended supervision on Count One in Case No. 2013CF000453; and one year initial confinement and one year extended supervision on Count Three concurrent to Count One in the same case. (*Id.* at 43-44). The court then sentenced Taylor 9 years of initial confinement and 4 years of extended supervision on Count One in Case No. 2013CF001256 to run concurrent to Counts One and Three in Case No. 2013CF000453, (*Id.* at 51); on Count Two in Case No. 2013CF000453, the court sentence Taylor to 2 years of initial confinement and two years of extended supervision consecutive to Counts One and Three in Case No. 2013CF000453. On the seven counts of felony bail jumping in Case No. 2013CF001256, the court sentenced Taylor to one year initial confinement and one year of extended supervision on each count concurrent to Count Two in Case No. 2013CF001256). (*Id.* at 53). On Count Four in Case No. 2013CF001256 the court sentenced Taylor to 9 months concurrent with Counts One and Three of Case No. 2013CF000453 and Count One of Case No. 2013CF001256. (*Id.*). On the five counts of party to a crime of contempt of court the court sentenced Taylor to six months consecutive on each count and concurrent with Count Two of Case No. 2013CF001256. (*Id.*).

On September 6, 2016, Taylor filed a post-conviction motion to vacate all but two of the DNA surcharges imposed in Case Nos. 2013CF000453 and 2013CF001256. (R. 66; Case No. 2013CF001256). A hearing on the motion was held on September 28, 2016 where the court granted the motion. (R. 67; Case No. 2013CF001256).

STATEMENT OF THE FACTS

On April 14, 2013, S.F. reported to her mother that about three to four weeks earlier Taylor had touched her vagina with his tongue. (R. 1; Criminal Complaint; Case No. 2013CF000453). During a forensic interview with Julie McGuire, S.F. also disclosed that Taylor had squeezed her butt. (*Id.*). At the time of these alleged offenses, Taylor had been released on bond in Case No. 2011CF001166. (*Id.*).

In November, 2013, S.F.'s father told the police that S.F. reported to him that Taylor had inappropriately touched her on various times prior to the incident reported on April 14, 2013. (R. 2; Criminal Complaint; Case No. 2013CF001256). A second forensic interview was conducted by Julie McGuire in which S.F. further disclosed additional instances where Taylor inappropriately touched her. (*Id.*). Records from the Kenosha County Detention Center revealed that Taylor was visited by S.F. and her mother on May 14, 21 and 28, 2013, and on June 4, 2013. (*Id.*). At the time of the visits, Taylor was released on bond in Case No. 2011CF001166 and also subject to contempt of court in Case No. 2013CF001256. (*Id.*).

S.F.'s father testified at trial that he observed that when S.F. was at his house for visitation that she did not want to return to her mother's house; that at times he would find S.F. crying; and that S.F. was scared at

night and did not want to sleep alone. (R. 87; pp. 160-61; Case No. 2013CF001256).

ARGUMENT

I. THE FACTS PRESENTED AT TRIAL FAILED TO SUPPORT THE JURY VERDICT OF GUILTY ON THE CHARGE OF CAUSING MENTAL HARM TO A CHILD IN CASE NO. 2013CF001256

The standard of review for sufficiency of the evidence to support a jury verdict is narrow: "Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." *Morden v. Continental AG*, 2000 WI 51, ¶ 38, 235 Wis.2d 325, 611 N.W.2d 659. Thus, "if the evidence gives rise to more than one reasonable inference, [the court must] accept the particular inference reached by the jury." *Id.* at ¶ 39. Similarly, the court must accept the jury's inference even if stronger and more convincing evidence supports a contradictory inference. *Id.* In such cases, this court will not overturn the jury's verdict unless "there is such a complete failure of proof that the verdict must be based on speculation." *Id.* (quoting *Coryell v. Conn*, 88 Wis.2d 310, 315, 276 N.W.2d 723 (1979)).

To prove mental harm to a child, the State is required to show that:

- (1) Taylor exercised permanent or temporary control of S.F.; (2) S.F. suffered mental harm; (3) Taylor cause mental harm to S.F. which requires that Taylor's conduct was a substantial factor in producing the mental

harm; (4) Taylor caused mental harm by conduct which demonstrated substantial disregard for the mental well-being of S.F.; and (5) S.F. had not attained the age of 18 years at the time the alleged harm was caused. *See* Wis. Stat. § 948.04 and WIS JI—CRIMINAL 2116.

Wis. Stat. § 948.01(2) defines mental harm as “Mental harm” means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. “Mental harm” may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Taylor contends that the evidence adduced at trial failed to satisfy all of the elements of the offense of mental harm to a child. Specifically, that the State failed to show that any observable changes in S.F.’s behavior was not within the normal range for S.F.’s age and stage of development. In addition, the State failed to show that Taylor’s conduct and/or conduct that he aided and abetted, constituted a substantial factor causing any observable changes in S.F.’s behavior.

When the State rested its case in chief, Taylor moved to dismiss. (R. 88; pp. 5-10; Case No. 2013CF001256). The court held as follows:

And the court is going to hold in abeyance decision regarding adequate proof of count two mental harm to a child, and that would also include count three. If we can't prove count two, can't prove count three. So I'll hold that in abeyance perhaps for motions after verdict if we get to that. But I do think there are some issues concerning how do you prove mental harm to a child.

We all have our opinions of what hurts kids. Some people think it's television. Some people think its rock and roll. And some people think it's, you know, other things. So it's just, I think there is – there can be an issue there, but we'll see.

(*Id.* at 10).

At sentencing, the court revisited the issue and stated, “The court does believe that there was accurate – substantial evidence indicating the mental harm to a child based on the repeated sexual assaults and the intimidation, which I think all caused mental harm based on the testimony.

So I am done ruling on that issue.” (R. 91; pp. 8-9; Case No.

2014CF001256).

The jury heard testimony from S.F.'s mother that S.F. had been living a family unit with Taylor and her mother for about 4 to 5 years. (R. 86; p. 117; Case No. 2013CF001256). S.F.'s mother told the jury that in the summer of 2013, after Taylor was incarcerated and no longer in the family home that S.F. no longer wanted to live with her mother and wanted

to go live with her father. (*Id.* at 160.). S.F.'s mother further testified that S.F. would wake up in the middle of the night very upset; that S.F. used to cry a lot; and, that S.F. wanted to go live with her father. (*Id.* at 161-62).

S.F.'s mother also testified that she took S.F. to a doctor for the bad dreams that S.F. was having. (*Id.* at 171.). S.F.'s mother told the jury that the doctor told her that "sometimes that happens when you are twelve or thirteen years old." (*Id.*).

S.F.'s father testified at trial that he observed that when S.F. was at his house for visitation that she did not want to return to her mother's house; that at times he would find S.F. crying; and that S.F. was scared at night and did not want to sleep alone. (R. 87; pp. 160-61; Case No. 2013CF001256). S.F.'s father further testified that S.F. was attending school and doing okay in school. (*Id.* at 168).

The State argued that expert testimony was not required to prove the elements of mental harm to a child. (R. 91; pp. 7-8; Case No. 2013CF001256). Taylor does not dispute this argument; however the State is not relieved from its burden of proof beyond a reasonable doubt.

In *In the Interest of H.Q. and P.Q.*, 152 Wis. 2d 701, 449 N.W.2d 75 (Ct. App. 1989), the court held that the evidence was not sufficient to prove emotional damage in the absence of expert testimony. *Id.* at 78. In that

case, the court was interpreting emotional damage to children within the context of the injunction statute Wis. Stat. § 813.122. *In the Interest of H.Q. and P.Q.* involves a different statute than mental harm to a child; however, Taylor submits that the case is instructive.

In *In the Interest of H.Q. and P.Q.* the evidence of the children's behavior was by testimony of the children's mother and an aunt; in this case, evidence of S.F.'s behavior is by testimony of S.F.'s mother and father. The court in *In the Interest of H.Q. and P.Q.* found that the testimony failed to prove emotional harm in the absence of expert testimony. *In the Interest of H.Q. and P.Q.* at 78. Similarly, the testimony of S.F.'s parents fails to prove mental harm without expert testimony.

In *In the Interest of H.Q. and P.Q.* 'Emotional damage means harm exhibited by "severe anxiety, depression, withdrawal or outward aggressive behavior" or a combination of them. Sec. 813.122(1)(e), Stats.'; in this case, mental harm is evidenced by anxiety, depression, withdrawal or outward aggressive behavior. The court in *In the Interest of H.Q. and P.Q.* found that the trial court "implicitly found that emotional damage had occurred" and that that finding was clearly erroneous. *Id.* Similarly, in this case the jury could only make an implied finding that mental harm occurred and therefore must also be found insufficient.

Finally, *In the Interest of H.Q. and P.Q.* was a civil case requiring a much lower burden of proof than the State's burden of proof in the present case.

To establish mental harm, the State is required to prove that the observable change in behavior is not within the normal range for the child's age and stage of development. Wis. Stat. § 948.01(2). The record is void of any evidence that S.F.'s behavior was outside of her age and stage of development. The only evidence the jury heard in this regard was that S.F.'s dreams were determined by a doctor to be something "that happens when you are twelve or thirteen years old." (*Id.*). Clearly, S.F.'s dreams were *within* her normal range. As such, the evidence failed to prove beyond a reasonable doubt that S.F. suffered mental harm.

Finally, the State is required to prove beyond a reasonable doubt that Taylor's conduct and/or conduct he aided and abetted constituted a substantial factor in causing mental harm to S.F. Wis. Stat. § 948.04. The jury heard many factors that may have contributed to S.F.'s behaviors: the disruption of her family unit, (R. 86; p. 117; Case No. 2013CF001256); having to live with her mother, (*Id.* at 160); her desire to live with her father, (*Id.* at 161-162); in addition to any of Taylor's conduct. Again, without the context of any expert testimony, the jury had no basis upon

which to determine what, if any, factors may have been a substantial factor causing S.F.'s behaviors.

Taylor contends that the evidence of mental harm to a child was so insufficient that the jury verdict could only be based on implicit findings and speculation and therefore, Taylor respectfully requests that this court vacate his judgment of conviction on the charge of mental harm to a child.

A. THE EVIDENCE IS ALSO INSUFFICIENT TO SUPPORT THE JURY VERDICT OF FELONY BAIL JUMPING IN COUNT 3 OF CASE NO. 2013CF001256.

As noted by the trial court, if mental harm to a child in Count Two cannot be proven then felony bail jumping in Count Three also cannot be proven. (R. 88; p.10; Case No. 2013CF001256).

Taylor allegedly committed the offense of mental harm to a child between the dates of April 4, 2013 and November 1, 2013. (R. 1; Case No. 2013CF001256). At that time, Taylor was out of custody on bail in Case No. 2011CF001166. A condition of bail was to commit no new law violations. The basis of the felony bail jumping charge was that Taylor committed the offense of mental harm to a child. As shown above, the evidence was insufficient to prove the offense of mental harm to a child.

As a result there is no factual basis to support the jury verdict of felony bail jumping.

As such, Taylor requests this court to also vacate the jury verdict finding him guilty of felony bail jumping in Count Three.

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CONCLUSION

For all of the reasons stated above, Darrin Taylor requests this court to find that the evidence fails to support the charge of Mental Harm to a Child and also one count of Felony Bail Jumping and to vacate jury verdict on this charges.

Respectfully submitted,

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2016AP001957

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2013CF001256

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DARRIN K. TAYLOR,

Defendant-Appellant.

APPENDIX CERTIFICATE

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 _____ day of January 2017.

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APPELLANT'S APPENDIX

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