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 REPLY BRIEF

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 Reply Brief 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 Reply Brief is 1,681 words. I further certify in accordance with Rule 809.19(12)(f) that the text of the electronic copy of this Reply Brief is identical to the text of

the paper copy of this Reply Brief.

Dated this _____ day of March 2017.

_____
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TABLE OF AUTHORITIES CITED

ARGUMENT

I. THE JURY VERDICT OF GUILTY ON THE CHARGE OF CAUSING MENTAL HARM TO A CHILD IN CASE NO. 2013CF001256 IS BASED ON SPECULATION AND THEREFORE MUST BE VACATED

The State's claim that the evidence at trial was sufficient to support the jury verdict must fail for several reasons. The State fails to show that the evidence at trial constituted a substantial harm to S.F.'s psychological or intellectual functioning; the State concedes that there was no evidence that S.F.'s behaviors were not within her normal range for her age and development; and the State fails to show a nexus between Taylor's conduct and S.F.'s behavior. (State's Brief at 5-6 and 8).

The State offers three pieces of evidence to support the jury verdict. One is that the investigator noted that S.F. appeared to feel very guilty about Taylor's incarceration; the second is that S.F.'s mother reported that after Taylor's incarceration, S.F. was upset and wanted to go live with her

father; and, her father reported that S.F. was scared at night and did not want to return to her mother's home.

Wis. Stat. § 948.01(2) required the State to show a substantial harm to S.F.'s psychological or intellectual functioning. The three pieces of evidence offered by the State fail to meet this requirement. There is nothing about the behaviors cited by the State that show S.F. was exhibiting any behaviors that were outside of the normal range for S.F.'s age and stage of development. Moreover, 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.*). In addition, S.F.'s father further testified that S.F. was attending school and doing okay in school. (*Id.* at 168). Clearly, the evidence offered by the State fails to satisfy Wis. Stat. § 948.01(2).

The State concedes that no evidence was presented which demonstrated a substantial and observable change in

S.F.'s behavior, emotional response or cognition that was not within the normal range for S.F.'s age and stage of development. The State argues that since the statute states "may" demonstrate, the State was not required to show this evidence. (State's Brief at 8). This is a specious argument by the State.

In *In the Matter of Klisurich,* 98 Wis.2d 274, 296 N.W.2d 742 (1980) the supreme court held that "The mere presence of the word 'may,' however, does not in all cases give rise to a discretionary power or duty. Schmidt v. Local Affairs & Development Dept., 39 Wis.2d 46, 53, 158 N.W.2d 306 (1968). In light of legislative intent, or due to the context within which the word is used, the term 'may' is properly construed as mandatory in some cases. *Id.* See also *Wauwatosa v. Milwaukee County*, 22 Wis.2d 184, 191, 125 N.W.2d 386 (1963)". *Klisurich,* 296 N.W.2d at 744.

In addition, statutes are interpreted to give meaning to each word and phrase in the statute. *Lang v. Lang,* 161 Wis.

2d 210, 467 N.W.2d 772, 776 (1991). The State's interpretation of the statute that the word "may" means that the State can disregard the phrase "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" in the statute. The State's interpretation renders that phase as surplusage. Rather the use of the word "may" does not limit the evidence required and allows for the exceptions for children that may not be able to function within a "normal range". There is nothing in the statute that relieves the State of its burden of proof.

In Taylor's Appellant's Brief, the case *In the Interest of H.Q. and P.Q.*, 152 Wis. 2d 701, 449 N.W.2d 75 (Ct. App. 1989) was cited as instructive authority. The State distinguishes this case from the present case. (State's Brief at 6-7). The State misses the point. It's the logic presented in *H.Q.* that is instructive in this case. The *H.Q.* court ruled

that an implied finding of emotional damage based solely on observations of a child being upset and concerned was insufficient. *Id.* at 78. In *H.Q.* the court required more, such as expert testimony. *Id.* Essentially the *H.Q.* court recognized the difficulty for an untrained person to discern when a child's behavior is within "normal range" and when the behavior is evidence of emotional damage. As such the *H.Q.* court reasoned that expert testimony was needed for the trier of fact to make the necessary distinction. *Id.* Following the same logic in this case, the jury was asked to discern that S.F. suffered mental harm based solely on observations of her being upset and concerned. The jury was provided no evidence that S.F.'s behavior was not within her normal range. As in *H.Q*, the trier of fact needed more, such as expert testimony. As a result, the evidence presented at trial was insufficient to support a verdict finding Taylor guilty of mental harm to a child. While the statute does not require the State to present expert testimony, the State was not precluded

from presenting expert testimony or some equivalent to provide the jury with means to make the necessary distinction. Finally, the State argues that communications from Taylor to S.F. after he was incarcerated constituted conduct that was a substantial factor in causing mental harm to S.F. (State's Brief at 9). Not only, as shown above and in Appellant's Brief, was there no evidence of mental harm, the State fails to show the nexus between Taylor's conduct and any mental harm. As shown in Appellant's Brief, a jury verdict can be overturned when "there is such a complete failure of proof that the verdict must be based on speculation." *Coryell v. Conn*, 88 Wis.2d 310, 315, 276 N.W.2d 723 (1979).

The jury verdict in this case is based on speculation and, like the jury verdict; the State's argument is also based on speculation. As such, Taylor respectfully requests that this court vacate his judgment of conviction on the charge of mental harm to a child.

A. THE FELONY BAIL JUMPING IN COUNT 3 OF CASE NO. 2013CF001256 SHOULD ALSO BE DISMISSED.

In Appellant's Brief, Taylor noted that the trial court held that 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).

The State apparently does not disagree. (State's Brief at 12). As such, upon this court finding that the evidence to support the jury verdict of mental harm to a child to be insufficient, Taylor requests this court to also vacate the jury verdict finding him guilty of felony bail jumping in Count Three.

CONCLUSION

For all of the reasons stated above and in Appellant's Brief, Taylor requests this court to vacate the judgment of conviction for mental harm to a child and the bail jumping charge based on that conviction.

Respectfully submitted,

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