STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP381-CR
(Milwaukee County Case No. 2014CF3516)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORRY L. ARDELL,

Defendant-Appellant.

Appeal From The Judgment of Conviction and Final Order Entered In The Circuit Court For Milwaukee County, The Honorable Jeffrey A. Wagner Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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SUPPLEMENTAL STATEMENT OF THE CASE

The state attempts to backpedal from its effective concession below that N.T.'s own allegations were not credible (R95:57, 86), repeatedly claiming that the Court must view the evidence in a light most favorable to the verdict. *E.g.*, State's Brief at 2 n.1, 5. However, "[t]he fact section of a brief is no place for argument," ***Hoekstra v. Guardian Pipeline, LLC***, 2006 WI App 245, ¶6 n.7, 298Wis.2d 165, 726 N.W.2d 648, or one-sided spin while ignoring contrary evidence.

The state's assertion is wrong in any event. Because Ardell challenges not the technical sufficiency of the evidence but the impact of errors on the jury's ability to reach a fair and accurate verdict, the Court must view the evidence in the light most favorable to the defense. *E.g.*, ***Neder v. United States***, 527 U.S. 1, 19 (1999); ***State v. Jenkins***, 2014 WI 59, ¶¶50-65; 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. concurring); *compare* ***State v. LaCount***, 2008 WI 59, ¶25, 310Wis.2d 85, 750

N.W.2d 780.

ARGUMENT

I.

BECAUSE WIS. STAT. §940.32 DOES NOT SUPPORT THE STATE'S THEORY OF THE OFFENSE, THE ERRORS BASED UPON THAT INVALID THEORY MANDATE REVERSAL AND A NEW TRIAL.

A. Wis. Stat. §940.32 Requires that the Relevant "Course of Conduct" be "Directed at" the Alleged Victim, Not Merely Relate to Him or Her

The State's Brief at 16-23 effectively concedes the primary error identified in Ardell's motion and opening brief. As Ardell demonstrated there, Wis. Stat. §940.32 requires that the relevant "course of conduct" be "directed at" the alleged victim, not merely relate to him or her. Accordingly, as demonstrated by the common sense, plain meaning of the statutory language and the uniform consensus of the foreign courts interpreting the identical language, actions or communications merely intended to obtain information about the alleged victim from, or to relay such information to, third parties are not covered absent evidence and a jury finding that the defendant either intended such requests or information to be passed on to the alleged victim or intended the third party to harass the alleged victim based on the information. Ardell's Brief at 10-18.

Despite the pretense of disagreement, the state's brief does not really dispute this point. Instead, the state merely argues that the statute "includes not only direct acts and communication between the defendant and the victim, but also acts and communications *through* third parties." State's Brief at 16-19. The state repeatedly uses this "communications through third parties" or similar language to describe its position. *Id.* at 14, 16, 17, 18, 26; *see id.* at 23 ("Ardell involved third parties").

Of course, communicating "through" or "involv[ing]" third parties is exactly the limited type of third party communications that Ardell has shown the statutory language covers – communications with third parties that the defendant *intends* to be relayed on to the alleged victim. However, "communications *through* third parties" do not rationally include communications with third parties about the alleged victim absent the intent that they be relayed to the alleged victim.

The state's attempt to shoehorn the statutory language into a dictionary definition from an unrelated context does not help its case. State's Brief at 18. The statute applies to "conduct" directed at a specific person, not "attention, thoughts, emotions, etc." directed at that person. The statute addresses the impact of "conduct" on the alleged victim, while "attention, thoughts, emotions, etc." have no necessary impact on the alleged victim at all. Under the state's novel interpretation, conduct relating to or about the alleged victim that does not even involve third parties let alone the alleged victim – such as looking up newspaper articles or conducting legal research or a Google search – would subject people to felony convictions for "stalking." Statutes must be construed to avoid such absurd results. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271Wis.2d 633, 681 N.W.2d 110.

The state makes little effort to rebut the many foreign decisions reflecting the uniform consensus consistent with Ardell's plain meaning of the statute's "directed at" requirement. Instead it merely cites irrelevant factual distinctions having no relation to the statutory meaning. State's Brief at 20.

Nor does ***State v. Sebba*** 2012 WL 209751 (Ariz. App. 2012) (unpublished), conflict with the uniform consensus interpreting the plain meaning of "conduct directed at" as that Court

previously did in ***LaFaro v. Cahill***, 56 P.3d 56 (Ariz. App. 2002), and Ardell does here. State's Brief at 20-22. Sebba sought instructions that conflicted with the statutory language and ***LaFaro*** by suggesting that communications to third parties could never be covered or that conviction required that the defendant expressly "directed" the third party to relay the communication to the victim. As Ardell has explained, however, communications to third parties that the defendant intends be relayed to the alleged victim (i.e., "communications *through* third parties" in the state's terminology) *are* covered, regardless of whether the defendant orders the third party to do so. Sebba's requested instructions thus were legally incorrect under the plain meaning of the statutory language. There was no need to distort that language as requested by the state here and the ***Sebba*** Court did not do so.

B. By Failing to Rebut Ardell's Arguments, the State Effectively Concedes that Construing §940.32(2) to Modify or Excise the "Directed At" Requirement as It Requests Would Violate Wis. Stat. §940.32(4) and Ardell's First Amendment and Due Process Rights.

Other than its misplaced "forfeiture" argument, *see* Section I,D, *infra*, the state makes no attempt to rebut Ardell's showing that distorting §940.32(2) to cover communications with third parties relating to but not directed at the alleged victim would conflict with both Wis. Stat. §940.32(4) and Ardell's First Amendment and Due Process rights. *See* Ardell's Brief at 16-20. It accordingly has conceded the point. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (that not disputed is deemed conceded).

C. The Circuit Court Erred by Admitting Evidence Concerning Ardell's Communications with Hagen

The state's "forfeiture" argument, State's Brief at 12-13, is both conclusory and factually inaccurate. Ardell *did* object to Michelle Hagen's testimony in an in limine motion and argument prior to trial; Hagen was neither N.T.'s employer, coworker nor friend, so his communications with her did not fall within Wis. Stat. §940.32(1)(a)7. (R118:¶11; R87:12-14; App. 11-13).

Other than the state's misplaced attempt to define the "directed at" requirement out of the stalking statute, it makes no effort to dispute Ardell's showing that admission of Hagen's testimony regarding the emails was error. *See* Ardell's Brief at 20-23. It therefore concedes this point as well. ***Charolais Breeding Ranches,*** *supra*.

D. The Failure of the Jury Instructions to Explain that Ardell's Communications with Third Parties Legally Cannot be Part of the Required "Course of Conduct Directed at" N.T. Absent Proof Beyond a Reasonable Doubt that He Intended Either that They be Relayed to Her or that They Be Used to Harass Her Denied Him the Right to a Jury Verdict Beyond a Reasonable Doubt of All Facts Necessary for Conviction

Other than its misplaced attempt to rewrite the statute, *see* Section I,A, *supra*, the state's only response to Ardell's challenge to the instructions' failure to properly define the limited circumstances in which communications with a third party may constitute "conduct directed at" N.T. is its undeveloped assertion that Ardell somehow forfeited his right to acquittal absent a jury verdict beyond a reasonable doubt of all facts necessary for conviction. State's Brief at 12-13. Oddly, that argument ignores controlling authority, identified in Ardell's Brief at 25,

27, that any waiver or forfeiture of that right must be made during the court's personal colloquy with the defendant demonstrating his knowledge of that right and that his actions would waive it. *E.g.*, ***State v. Smith***, 2012 WI 91, ¶¶52-57, 342 Wis.2d 710, 817 N.W.2d 410; ***State v. Hauk***, 2002 WI App 226; ¶34, 257 Wis.2d 579, 652 N.W.2d 393, citing ***State v. Livingston***, 159 Wis.2d 561, 569, 464 N.W.2d 839 (1991). As the state implicitly concedes by not addressing the point, ***Charolais Breeding Ranches,*** *supra*, the record reflects no such waiver or forfeiture here.

The state's ineffective assistance argument also necessarily undermines its forfeiture argument. The state there claims that the plain meaning of the statutory language relied upon by Ardell was so novel and unexpected that an attorney in trial counsel's position would not reasonably have known to object to the instructions that failed to require proof of all facts necessary for conviction. State's Brief at 14-16. As the Supreme Court has held, however, that very novelty means that the issue is not waived. ***State v. Howard***, 211 Wis.2d 269, ¶¶39-44, 564 N.W.2d 753 (1997) (because defendant and attorney could not have known how Supreme Court subsequently would interpret legal requirements for penalty enhancer, they did not waive issue by not objecting to instructions that failed to impose those requirements).[1]

[1] The Supreme Court overruled a different holding in ***Howard*** on different grounds in ***State v. Gordon***, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

II.

THE SUBSTANTIVE INSTRUCTIONS FAILED TO REQUIRE A JURY FINDING BEYOND A REASONABLE DOUBT THAT ARDELL HAD THE SUBJECTIVE INTENT AND KNOWLEDGE NECESSARY FOR CONVICTION

The state's forfeiture argument also presumes to cover Ardell's showing that the instructions failed to require a jury finding beyond a reasonable doubt of all facts necessary for conviction because they failed to require such proof that Ardell had (1) the subjective intent or purpose that his actions would cause a reasonable person to fear bodily injury or (2) knowledge that his actions would place N.T. in reasonable fear of bodily injury. State's Brief at 12-13. For the same reasons already stated, there was no forfeiture. Section I,D, *supra*; *see* ***Smith***, *supra*; ***Howard***, *supra*.

The state's assertions on the merits fare no better. State's Brief at 15. Sidestepping the statute's actual language, the state ignores the fact that §940.32(2) imposes separate *mens rea* requirements in subparagraphs (a) ("intentionally engages in a course of conduct . . . that would cause a reasonable person under the same circumstances to suffer serious emotional distress [etc.]") and (b) ("knows or should know that at least one of the acts that constitute the course of conduce will cause the specific person to suffer serious emotional distress [etc.]"). The two are not interchangeable.

By its terms, subparagraph (a) requires that the defendant act "intentionally," i.e., with the purpose to cause the result or with awareness the result is "practically certain," Wis. Stat. §939.23(3), and with the result being the impact on *a reasonable person* under the same circumstances. The instructions failed to require a finding beyond a reasonable doubt of this fact necessary for conviction.

Subparagraph (b), on the other hand, requires that the defendant "know or should know" that the conduct "will cause" a particular harm to *the alleged victim*. The instructions made reference to this requirement, but required only a possibility ("could cause") rather than the required "will cause." The state does not even properly identify these errors, let alone rebut them, and thus concedes the point. ***Charolais Breeding Ranches***, *supra*.

¶	**Mens rea**	**Result**	**Instruction given**
(a)	"intentionally," i.e., purpose or practical certainty	"would cause" specified impact on "reasonable person"	Nothing re requirement. (R95:43-46)
(b)	"knows or should know"	"will cause" specified impact on alleged victim	Substitutes "could cause" for "will cause." (R95:45)

III.

ARDELL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

The state's primary response to Ardell's ineffectiveness claim is that the decisions such as ***Wiggins v. Smith***, 539 U.S. 510 (2003), are wrong, that unreasonable errors due to oversight are not sufficient to establish deficient performance, and that attorneys are not reasonably expected to determine the common sense plain meaning of statutory language on their own. State's Brief at 13-16. Of course, the state's argument undermines its position since, if the law is so novel that an attorney cannot be expected to determine what it is, then there is no forfeiture requiring an ineffectiveness claim to overcome. ***Howard***, *supra*. On the other hand, if the law is so accessible that an attorney's failure to preserve an objection results in forfeiture, then it

cannot be so novel as to overcome a finding of deficient performance. Whichever applies here – novelty and no forfeiture or lack of novelty and deficient performance – the case still boils down to meaning of the statute and resulting prejudice rather than some technicality on deficient performance.

Regarding Hagen's testimony and the emails, trial counsel objected their admission and had no strategic or tactical reason for failing to adequately object.

Regarding the statute, there is nothing novel about requiring trial counsel to read and understand the statute, especially when, as here, its plain meaning is apparent from its face: the conduct must be "directed at" the alleged victim, not just some third party. True, there may be certain common sense exceptions to that plain language reflected in the foreign cases interpreting that language – i.e., where the defendant intended the communications with third parties to be relayed to or cause others to harass the alleged victim (i.e., communicating "through" third parties) – but those are exceptions, not the core rule that any reasonable attorney would be expected to see from the plain language.

The same applies to Ardell's remaining claims. Section 940.32(4) is clear on its face, and the authority on which Ardell's First Amendment and due process claims are based long precede the charges here. If an unrepresented defendant is expected to recognize and apply established law to the facts, *see* ***State v. Allen***, 2010 WI 89, ¶¶43-53, 328 Wis.2d 1, 786 N.W.2d 124, an experienced attorney is as well.

IV.

THE IDENTIFIED ERRORS PREJUDICED ARDELL'S DEFENSE AND WERE NOT HARMLESS

The prosecutor who viewed first hand the testimony of the

complainant and the independent witnesses rebutting her claims chose to disregard her testimony and to focus on the undisputed evidence of Ardell's emails to Hagen (R95:57, 86). The jury thus easily could have done so as well. *Cf.* ***Kyles v. Whitley***, 514 U.S. 419, 448 (1995) ("If a police officer thought so, a juror would have, too" (footnote omitted)).

The state neither acknowledges nor attempts to satisfy its burden of proving that the identified errors were harmless beyond a reasonable doubt. *See, e.g.*, ***State v. Carnemolla***, 229 Wis.2d 648, 653, 600 N.W.2d 236 (Ct. App. 1999). It does not even attempt to show that there would not exist a reasonable probability of a different result but for trial counsel's supposed failure to preserve objection to the issues raised.

Rather, the state just argues that the evidence viewed most favorably to the state was sufficient for conviction. State's Brief at 2 n.1, 5, 18-19, 22-23. However, sufficiency was not in issue and Wisconsin has long since rejected distortion of harmless error analysis to allow a conviction to stand so long as the evidence remained sufficient for conviction. ***State v. Dyess***, 124 Wis.2d 525, 540-45 & n.9, 370 N.W.2d 222 (1985), rejecting, for instance, ***State v. Wold***, 57 Wis.2d 344, 356-57, 204 N.W.2d 482 (1973) (nonconstitutional error harmless if untainted evidence sufficient for conviction).

Whether addressing harmless error or resulting prejudice, the evidence must be viewed most favorably to the defense. *E.g.*, ***Neder***, 527 U.S. at 19. By failing to even acknowledge the applicable standard, let alone apply it to dispute Ardell's showing of resulting harm, *see* Ardell's Brief at 29-32, the state concedes that the errors were not harmless. ***Charolais Breeding Ranches***, *supra*.

V.

A NEW TRIAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Ardell's interests of justice claim is based on the well-established principle that this Court has the authority to reverse in the interests of justice where a crucial issue was clouded by improperly admitted evidence (here, admission of Hagen's testimony regarding the emails) or the instructions failed to require proof beyond a reasonable doubt of all facts necessary for conviction, such that the real controversy was not fully tried (here, the errors identified in Sections I & II of Ardell's Brief). Ardell's Brief at 32-34; *see, e.g.*, ***In Interest of C.E.W.***, 124Wis.2d 47, 57, 368 N.W.2d 47 (1985) ("If the instructions in this case are erroneous, the key issue, that is, whether the County proved facts upon which the jury could conclude that a ground for termination of parental rights exists, would not have been fully or properly tried").

The state does not dispute either that basic principle or the conclusion that, if Ardell's plain meaning interpretation of the statutory language is correct, the real controversy was not fully tried. Instead, it argues that the circuit court committed no error and that Wis. Stat. §752.35 contains an implicit exception for cases where the issue could also be challenged on ineffectiveness grounds. State's Brief at 24-26. The first assertion conflicts with the statutory language while the second conflicts with decades of settled authority reflecting that this Court's "discretionary reversal power, although to be invoked in exceptional circumstances, is plenary and not necessarily restrained by any other possible means of relief." ***State v. Armstrong***, 2005 WI 119, ¶114, n.26, 283 Wis.2d 639, 700 N.W.2d 98; *see, e.g.*, ***State v. Maloney***, 2006 WI 15, ¶¶1, 14, 288Wis.2d 551, 709 N.W.2d 436 (although it rejected ineffectiveness claim, Court retains authority to reverse

in interests of justice); ***State v. Cuyler***, 110 Wis.2d 133, 327 N.W.2d 662 (1983) (reversing in interests of justice despite counsel's failure to object).

CONCLUSION

For these reasons, Korry Ardell respectfully asks that this Court vacate his judgment of conviction and remand the matter to the circuit court for a new trial or, if that is not granted, for an evidentiary hearing on his ineffectiveness claim. The state does not dispute that the enhancers must be stricken. State's Brief at 26-27.

Dated at Milwaukee, Wisconsin, September 25, 2017.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,987 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 25th day of September, 2017, I caused 10 copies of the Reply Brief of Defendant-Appellant Korry L. Ardell to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Robert R. Henak

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