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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Court of Appeals Case No. 2017AP000798-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNALEE A. KAWALEC,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

On Appeal from the Circuit Court for Walworth County, the Honorable John R. Race and Kristine E. Drettwan, Presiding

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I. The circuit court was correct when it held that Kawalec's trial counsel performed deficiently.

Kawalec's trial counsel admitted that he didn't present the bankers' testimony about H.K.'s intent because he wrongly believed the joint account was a complete defense as a matter of law and that this wasn't a matter for the jury to decide. Now the State constructs strategic justifications that counsel didn't provide. The Court should not construct a strategic defense that trial counsel did not offer. *State v. Jenkins*, 2014 WI 59, ¶ 36 n. 18, 355 Wis. 2d 180, 848 N.W.2d 786. *Contra State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719 (holding that a court may consider strategic reasons counsel overlooked or disavowed).

Regardless, even the State's hypothetical explanations aren't objectively reasonable justifications for counsel's failure to present the bankers' testimony. Nor do they justify counsel's decision to agree to the altered jury instructions. Therefore, the Court should hold that the circuit court was correct when it held that counsel's performance was deficient.

A. The circuit court correctly held that it was objectively unreasonable for counsel to believe that H.K.'s intent in establishing the joint account was irrelevant and that it wasn't an issue for the jury.

H.K.'s creation of a joint account with Kawalec after giving her power of attorney, and her later use of those funds for her own purposes, created conflicting presumptions that H.K. had donative intent and that Kawalec's use of the funds constituted fraud. *See Russ v. Russ,* 2007 WI 83, ¶ 36, 302 Wis. 2d 264, 734 N.W.2d 874. When those presumptions conflict, the factfinder

must determine the principal's intent. *Id.* Although the State acknowledges that "the banker's testimony would have been crucial for establishing H.K.'s intent, (State's Brief at 19), it claims that a reasonable attorney could believe that *Russ* only applies when the joint accounts predate the creation of a power of attorney. (State's Br. At 15.) However, regardless of the timing of the power of attorney and creation of joint accounts, no reasonable attorney could believe that H.K.'s intent was irrelevant or that it wasn't an issue for the jury.

Russ establishes that the depositor's intent is the key issue, regardless of whether the power of attorney came before or after the joint account. In *Russ*, our supreme court adopted the approach to this issue that was utilized in three cases decided by the Illinois court of appeals. *Russ*, 302 Wis. 2d 264, ¶ 36 ("We adopt the approach of the Illinois court of appeals in *Estate of Ryboldt*, *In re Estate of Harms*, and *In re Estate of Teall*.")[1]. Just like H.K., the principal in *Ryboldt* established joint accounts with the agent after granting the agent power of attorney. *Ryboldt*, 631 N.E.2d at 793-94. The Illinois court of appeals noted the conflicting presumptions and held that "where such conflicting presumptions exist they cancel each other out, leaving the trial court free to make a determination based upon facts and credibility of the witnesses." *Id.* In addition, the court found that a banker's testimony about the principal's intent in setting up a joint account – the same kind of testimony that the bankers could have provided in this case – was critical evidence. *Id.* at 796. Thus, it was objectively unreasonably for counsel to fail to introduce the bankers' critical testimony.

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[1] *In re Estate of Rybolt*, 258 Ill. App. 3d 886, 197 Ill. Dec. 570, 631 N.E.2d 792, (Ill. App. 1994), *In re Estate of Harms*, 236 Ill. App. 3d 630, 177 Ill. Dec. 256, 603 N.W.2d 37 (Ill. App. 1992), *In re Estate of Teall*, 329 Ill. App. 3d 83, 263 Ill. Dec. 364, 768 N.E.2d 124 (Ill. App. 2002).

The State also claims that because *Russ* was a civil case an attorney could reasonably believe it was inapplicable in a theft prosecution. (State's Brief at 21.) However, our supreme court would not have affirmed the circuit court's decision that allowed the agent in that case to keep funds he withdrew from the joint account while serving as power of attorney if that action constituted theft. No reasonable attorney would subscribe to such an absurdity, nor is there any rational reason to assume the rights of joint-account holders are determined differently in a civil case than they are in a criminal case.

Even without considering *Russ* and its adoption of *Ryboldt* , no attorney could reasonably believe that H.K.'s intent was unimportant in this case. The joint-account statute makes depositor intent an issue. Under Wis. Stat. § 705.03 the parties to a joint account may withdraw and use funds in the account without being required to account to any other party to the account "unless there is clear and convincing evidence of a different intent." Moreover, if H.K. intended to gift the money in the joint account to Kawalec, then she wasn't guilty of theft because lack of consent is an element of theft, Wis. Stat. § 943.20. Given all of this, H.K.'s intent was critical to this case. The State concedes that the bankers' testimony would have been crucial for establishing H.K.'s intent. (State's Brief at 19.) Therefore, the circuit court was correct to find that trial counsel's failure to present that testimony was deficient.

B. Even though the funds in the joint account were "property of another" as that term is defined in the theft statute, whether there was a bailment and whether Kawalec had consent to use those funds depended on H.K.'s intent in creating the joint account.

The State argues that because the theft statute provides that "property of another includes property to which the actor is a co-owner," trial counsel could have reasonably believed that H.K.'s donative intent was irrelevant. (State's Brief at 16-20.) However, whether the property is "property of another" is not the only element of theft. If H.K. intended the joint account as a gift, then Kawalek wasn't a bailee. If H.K. intended to gift the funds in the joint account, then Kawalek's use of those funds wasn't without consent.

In addition to proving that the funds were "property of another," the State had to prove that Kawalec held the funds as a bailee. Wis. Stat. § 943.20(1)(b); (146:85) (instructing the jury as to the elements of embezzlement by bailee). A bailment is defined as:

> A delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carryout such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

Black's Law Dictionary (6th ed. 1990).

If H.K. had donative intent, then H.K. intended the funds in the account as a gift, they were not held in trust, they were not held for the specific purpose of carrying out the power of attorney, and there was no requirement that Kawalec return the funds or

any restriction on how she could dispose of them. In that circumstance, the funds could still be called "property of another" because H.K. was a joint owner, but there was no bailment.

Similarly, H.K.'s intent was crucial to the element of consent. Lack of consent is an element of theft. *Id.* If H.K. intended the joint account as a donation to Kawalek, her use of the funds for her own purposes wasn't without consent.

Contrary to the State's claim, there is no conflict between Wis. Stat. § 705.03 and the definition of "property of another" in § 943.20. Money in a joint account is property of another, given that there are multiple owners. But just because it is property of another doesn't mean it is theft for one owner to take it. "*Unless there is clear and convincing evidence of a different intent*," funds in a joint account don't constitute a bailment or trust because by law each joint owner can use the funds without restriction. *See* Wis. Stat. § 705.03. A joint account holder can be guilty of theft if there is evidence of a different intent. In this case, the prosecution introduced evidence of other intent – the power of attorney. Trial counsel's failure to rebut that evidence with the bankers' crucial testimony was unreasonable.

When a person is simultaneously a joint-account holder and power of attorney for another party to the joint account, the rights in that account, whether it is a bailment, and whether the parties have consented to unrestricted use of the funds depends on the intent of the person who established and funded the joint account. Thus, the State is correct that co-ownership, even in the form of a joint account, is not a complete and irrebuttable defense to a theft charge. In such a case, the key issue is the depositor's intent.

Therefore, H.K.'s intent was key to the elements of bailment and consent. The State admits the bankers' testimony would have been crucial for establishing H.K.'s intent. Thus, the

trial court was correct to find that counsel's failure to present that testimony constituted deficient performance.

C. Counsel's decision to agree to a definition of bailee that said "a person who acts as a power of attorney is a bailee" was objectively unreasonable.

The harm caused by counsel's failure to present the bankers' testimony was aggravated by his inexplicable choice to agree when the State proposed to alter the jury instructions to tell the jury that "a person who acts as a power of attorney is a bailee." There was ample evidence that Kawalec was a power of attorney, so this language essentially decided the bailment issue. Nevertheless, the State argues that a reasonable attorney could have thought Kawalec was a bailee because she was H.K.'s power of attorney.

It would be unreasonable and frankly absurd for a defense attorney to essentially concede an element because of the attorney's belief that it might be true. The State's logic would also support an attorney not presenting any defense when an attorney could reasonably believe that the defendant is guilty. The argument fails because an attorney is supposed to make strategic choices for the client's benefit. In other words, the fact that the attorney might lose an argument is no reason not to engage in it, particularly when there is no risk to the client and great harm comes from avoiding the argument.

There was no strategic reason to agree to this alteration. The alteration was harmful because it was one sided. While a person who acts as a power of attorney is normally a bailee, a joint account holder isn't a bailee unless there is evidence of a different intent. Thus, a fair instruction would tell the jury both of those things, and instruct the jury that it should determine the

issues by considering H.K.'s intent in establishing the account. Using a dictionary definition of bailment also would have been proper. Even leaving the instructions unaltered without either explanation would have been much less harmful to Kawalec's defense. In addition, there was no reason to agree to the State's proposal given that there was no risk in disagreeing or providing another proposal. The trial court actually asked for counsel's input, and the discussion was out of the presence of the jury.

Thus, it was objectively unreasonable for counsel to agree to this alteration. It essentially decided the element of bailment, and there was no risk in disagreeing with the alteration or proposing an alternative. In sum, there is no strategic justification for essentially conceding the element, thus counsel's action was objectively unreasonable.

II. Counsel's failure to present evidence of H.K.'s intent, combined with his decision to agree to altered and improper jury instructions prejudiced Kawalec's defense on the elements of bailment and consent.

The State argues that there was no prejudice because one of the bankers testified that there was joint ownership and that joint ownership means that both Kawalec and H.K. were entitled to everything in the account. (State's Brief at 23-24.) However, the State's argument ignores that the banker who testified wasn't the one who set up the joint account, wasn't asked about H.K.'s statements, and didn't really add anything regarding H.K.'s intent. If the jury had the opportunity to hear the bankers' testimony about H.K.'s intent, and was also properly instructed, there is a reasonable probability the jury would at least have had reasonable doubts and come to a different result.

The banker that testified at the trial wasn't the banker who set up the account and counsel elicited never asked about H.K.'s intent. Marlo Carpio said there was a joint account but said he didn't set it up. (144:58.) Counsel never asked if he spoke to H.K. about what joint ownership meant. *Id.* Counsel didn't ask Carpio why the bank designated Kawalec as joint owner or whether Kawalec influenced that process. *Id.* Counsel didn't ask whether H.K. said anything that indicated H.K. intended to give a gift or consented to Kawalec using the money for her own purposes. *Id.* In sum, Counsel failed to elicit testimony that indicated that H.K. had donative intent.

The jury would've heard that crucial evidence if Counsel had called the banker who established the account. Anthony Moorefield would have told the jury that H.K. came to him and asked to establish a joint account. (156:8-9.) Moorefield would have testified that he met with H.K., made sure that H.K. understood that making Kawalec a joint owner would make the funds hers as much as H.K.'s, and told H.K. that creating the joint account was like giving her the money. *Id.* at 8-9. The jury would've heard that H.K. was fine with this, that H.K. always wanted the money to go to Kawalec anyway, and that H.K. told Moorefield to proceed even after hearing that this action would be like giving her the money. (156:8-9.)

The jury also would've heard that this wasn't just a convenience account, adding Kawalec as joint owner gave her no additional authority from the bank's perspective, it only changed her legal right to the funds in relation to H.K. (156:11-12.) In other words, there was no reason to create the joint account except to give her a gift.

In addition, Carpio could have told the jury critical information about H.K.'s intent, but Counsel didn't elicit the testimony. Carpio could have told the jury that he spoke to H.K.

about the joint account shortly after Moorefield, he told H.K. that making Kawalec joint owner was like giving her the money, and H.K. said "what's the difference, she's going to get – she was going to get the money anyway." (156:33.)

The State's claim that this would have been no help to Kawalec's defense is untenable. The State admits that the bankers' testimony "would have been crucial for establishing H.K.'s intent." (State's Brief at 19.) That admission is understandable; the bankers could have told the jury about H.K.'s own statements and reactions to being informed that making Kawalec a joint-account holder would be like giving her a gift, that it would allow her to do whatever she wanted with the money.

The potential impact on the jury of this crucial testimony must be combined with how the jury would've been influenced by proper jury instructions. But for counsel's error, the jury would not have been given the one-sided definition of bailment. Instead, it would have been given a dictionary definition or no definition. The jury would have been instructed to determine the parties' authority to use the funds in the joint account by determining H.K.'s intent.

Because of counsel's errors, we're now left to speculate on how the jury would have decided the question it was never asked – whether H.K. had donative intent when H.K. established the joint account. If the jury had the opportunity to hear the bankers' testimony about H.K.'s intent, particularly that he said "she was going to get the money anyway," and decided to make her an owner of the joint account even after the bankers told him that she would have full ownership and rights to the funds in that account, there is a reasonable probability that the jury would have found that the joint account was not a bailment, or would

have found that Kawalec had consent. Thus, there is a reasonable probability of a different result but for counsel's errors.

CONCLUSION

For these reasons, as well as those previously stated, Kawalec respectfully requests that the Court reverse the judgment of conviction and order denying her motion for a new trial.

Dated this 12th day of November, 2017.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and 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 a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,781 words.

Dated this 12th day of November, 2017.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Rule 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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 this 12th day of November, 2017.

_____

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