RECEIVED
07-17-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

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.

SUPPLEMENTAL BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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

---

WALTER LAW OFFICES LLC
108 West Court Street
Elkhorn, WI 53121
Tel. (262) 743-1290

By: Andrew R. Walter
State Bar No. 1054162

I. The State can prosecute a joint-account owner for theft only in the rare case that the State can prove that the account creator did not intend to give the other parties the rights that Wis. Stat. § 705.03 provides to joint-account owners.

Section 705.03(1) provides that the owner of a joint account is not liable for withdrawals and it bars anyone, including another owner, from looking into or questioning a party's application of sums withdrawn from the account during the lifetime of the parties. *Matter of Estate of Frank*, 140 Wis. 2d 429, 431-432, 410 N.W.2d 621 (Ct. App. 1987) (holding that Section 705.03 bars an action by one joint-account owner against another owner for withdrawing all of the funds in the account.) Thus, while under other forms of co-ownership a party who liquidates assets might face prosecution for theft, § 705.03(1) provides joint-owners with rights that negate several elements of the crime of theft.

Section 705.03 provides each joint-account owner the authority to withdraw any sum from the account regardless of the interests or wishes of the other owners. *Frank*, 140 Wis. 2d at 431-32. In *Frank*, a sole account owner converted the account to a joint account with the Defendant. The Defendant withdrew the entire balance two days before the original owner's death. When the original owner's estate sued, the Court held that § 705.03(1) bars anyone, including another party, from "looking into or questioning" any withdrawal made during the lifetime of the owners. *Id.* at 431-433. One owner of a joint account cannot prevent another from withdrawing funds. *In re Guardianship of Emma W.*, 2003 WI App 132, ¶ 7, 265 Wis. 2d 681, 666 N.W.2d 84

(holding that the guardian of one joint owner could not prevent other owners from withdrawing funds). As those cases illustrate, § 705.03 provides joint owners with statutory authority to withdraw any amount without first seeking consent.

Given that authority, a joint-account owner's withdrawal cannot constitute theft under Section 943.20(1)(b). Such a prosecution would require proof that the withdrawal was made "contrary to his or her authority." Wis. Stat. § 943.20(1)(b). That cannot be true because § 705.03 provides that authority.

Several other elements cannot be met in prosecuting a joint-account owner. A joint-account owner is not a bailee because each joint owner has full ownership and can dispose of the entire account as they desire. Also, withdrawals from a joint-account do not constitute conversion because each owner already has the right to full use. Therefore, joint-account owners cannot commit embezzlement.

Although section 943.20 defines "property of another" to include co-owners, this does not subject joint-account owners to prosecution for embezzlement. That definition does not apply to prosecutions under § 943.20(1)(b) because the phrase "property of another" does not appear in that section. It appears only in subsections (1)(a) and (d). The legislature could have included money, negotiable security, instrument, paper, or other negotiable writing of another within that definition but it chose not to do so.

A joint owner could not be prosecuted for embezzlement even if that definition applies to prosecutions under § 943.20(1)(b). Section 705.03(1) authorizes joint-account owners to withdraw all funds, so that action is not contrary to the account-

owner's authority. That section also makes it clear that joint-account owners are not bailees and owe no fiduciary or other duty. Conversion is impossible because each owner has full use of all funds.

To the extent that the theft law could be interpreted to criminalize what § 705.03 authorizes, the authority granted by § 705.03 should govern. That statute specifically governs the authority and duties of joint-account owners. It governs the relationship and rights of each owner as to each other and to third parties. As the specific statute on joint-account ownership, it controls over any definition of "property of another" in § 943.20 because the theft statute only addresses the broad range of various forms of co-ownership. *See Gottsacker Real Estate Co. v. DOT*, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984) (holding that when two statutes relate to the same subject matter the specific statute controls over the general statute). To hold otherwise would criminalize actions that § 705.03(1) specifically authorizes.

Courts in other jurisdictions have split regarding whether a joint-account owner's withdrawals can constitute theft. For example, the Montana supreme court holds that a joint-account owner cannot commit theft from the account because joint owners are authorized to withdraw the funds and any withdrawal does not infringe upon an interest to which they are not entitled. *State v. Kane*, 992 P.2d 1283, 1285-86 (Mont. 1999). A number of other states have reached similar conclusions. *See, e.g., Hinkle v. State*, 355 So.2d 465, 467 (Fla. Dist. Ct. App. 1978) ("a co-owner of a joint bank account cannot be guilty of larceny of funds held in the joint account"); *Gainer v. State*, 553 So.2d 673, 681 (Ala. Crim. App. 1989) (affirming a theft conviction only because the

defendant wrongfully obtained her status as a joint account owner).

Other courts have reached the opposite conclusion. The Nevada supreme court upheld a theft conviction when an agent created joint accounts without the principal's consent and subsequently withdrew funds for her own benefit. *Walch v. State*, 112 Nev. 25, 909 P.2d 1184, 1187-89 (Nev. 1996). However, the fact that the agent is the one who created the account clearly distinguishes that case. The Maryland court of appeals upheld an embezzlement conviction against a joint account owner, but in that case the evidence showed that the creator of the account intended only to let the defendant make withdrawals for the creator's benefit and that the defendant knew that. *Wagner v. State*, 445 Md. 404, 128 A.3d 1, 11-12 (Md. Ct. Spec. App. 2015). Further, Maryland law provides for convenience accounts that do not convey ownership, and this was such an account. *Id.*, 128 A.3d at 12.

In all fairness, these other cases provide little guidance. The cases holding that a joint account holder cannot be prosecuted occurred in states where the joint ownership and theft laws are different than Wisconsin's. The cases upholding prosecutions have significant factual distinctions and different statutes.

In the end, Wis. Stat. § 705.03 sets the standard. It is possible to prosecute a joint owner for theft because of the language "unless there is clear and convincing evidence of a different intent. However, these prosecutions will be exceedingly difficult because in a criminal prosecution the State will have to prove that different intent beyond a reasonable doubt.

II. To prosecute a joint owner of a bank account for theft, the State must prove beyond a reasonable doubt that the creator had "a different intent" because under Wis. Stat. § 705.03 joint ownership negates elements of the offense.

Section 705.03 provides ownership and virtually unrestricted withdrawal rights. Evidence sufficient to support a reasonable hypothesis that the defendant is a joint owner negates several elements of embezzlement. The State can overcome this by proving that the person who created the account did not intend to provide those rights. Section 705.03 sets the challenger's burden of proof with the clear and convincing evidence standard. However, in a criminal prosecution joint ownership negates elements of the crime, and the State must disprove negative defenses beyond a reasonable doubt. Furthermore, lowering the State's burden would be inconsistent with clear purpose of the statute, which is to apply a heavy burden on anyone who challenges a joint owner's transactions.

The State must disprove negative defenses beyond a reasonable doubt. *State v. Schulz*, 102 Wis. 2d 423, 427-28, 307 N.W.2d 151 (1981). A negative defense is a defense that negates an element of the crime. *State v. Austin*, 2013 WI App 96, ¶ 13, 349 Wis. 2d 744, 836 N.W.2d 833 (explaining the difference between negative and affirmative defenses). The United States and Wisconsin Constitutions require the State to prove all elements of a crime beyond a reasonable doubt. *Schulz*, 102 Wis. 2d at 427. Because a negative defense attacks an element of the crime, no law can reduce that burden to rebut a negative defense. *Id.* at 427-28 (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

In an embezzlement prosecution, evidence that the funds came from a joint account raises a negative defense. Section

705.03(1) provides each joint owner with ownership of and right to use all funds without consulting the other parties. *Frank*, 140 Wis. 2d at 431-32. This authority negates the element requiring that the use be "contrary to his or her authority." It negates the element of bailment. It negates the intent to convert element because each party already has ownership and full use of the funds. It negates lack of consent because of the presumption that anyone depositing funds to a joint account did so with donative intent. *See Russ v. Russ*, 2007 WI 83, ¶ 31, 302 Wis. 2d 264, 734 N.W.2d 874 (recognizing rule that donative intent is presumed when funds are deposited to a joint account). Therefore, the State must counter the negative defense with proof beyond a reasonable doubt that the creator had a different intent.

The reasonable doubt standard is most compatible with § 705.03 in a criminal context. Nothing in the statute indicates that it lowers the burden of proof in a criminal case. Rather, the legislature's choice of the clear and convincing standard instead of the usual preponderance of the evidence standard shows that the purpose is to raise the burden on anyone challenging a joint owner's withdrawals or ownership. To interpret it as lessening the State's burden when the State challenges a joint owner's transactions would ignore the purpose of the statute. When an element depends on the determination of property ownership or rights, the existence of a lower burden of proof under civil law does not change the State's burden to prove each element beyond a reasonable doubt.

In sum, the reasonable doubt standard is constitutionally required and consistent with § 705.03. Therefore, to prosecute a joint owner for embezzlement from a joint bank account, the State must prove beyond a reasonable doubt that the creator of

the account did not intend to give the defendant the rights provided by § 705.03(1).

III. Whether the power of attorney applied to the joint account, the documentary basis for any restrictions on Kawalec's use of the joint account, and whether *Russ* applies to a joint account established after the POA.

The Court has asked what documents in the record, if any, serve as the basis for any restrictions on Kawalec's use of the funds in the joint account. The only document Kawalec is aware of that would qualify is the power of attorney that was executed in 2005.

A. The power of attorney no longer applied to the funds in the account once H.K. chose to remove the designation "as POA" from Kawalec's name and add her as a joint owner.

Chapter 705 provided H.K. with several options for titling the account and defining H.K. and Kawalec's respective interests. H.K. first utilized Wis. Stat. § 705.05, which allows an account owner to designate an agent. Three years later H.K. changed it to a joint account under § 705.03(1) by removing the designation "as POA" from Kawalec's name and making her a joint owner. Under § 705.03, this terminated any agency relationship regarding this account, because the statute provides ownership rights that are clearly inconsistent with an agency relationship.

Chapter 705 provides options for an account creator to define the ownership rights of parties to an account and to resolve any disputes regarding what rights each account

provides. One option is true joint ownership without agency. Wis. Stat. § 705.03(1). Section 705.05 allows an agency option, wherein a single owner or a party to a joint account can designate an agent either as power of attorney or under another form of agency. It provides:

> (1) A party to an account, notwithstanding such party's minority, or if the account has multiple parties, all of them acting in concert, may appoint one or more agents for purposes of making withdrawals from the account. The authority of an agent to make withdrawals from an account may be terminated by any party to the account upon written notice to the financial institution, and this shall not preclude a party's liability for wrongful termination of such agency.
> (2) The uses and purposes for which withdrawals may be made by an agent to an account shall be governed by agency principles of general application…

Wis. Stat. § 705.05.

H.K.'s decision to retitle his account to remove the agency designation and make Kawalec joint owner severed the agency relationship with regard to this account for several reasons. First, H.K. chose joint ownership, and § 705.03 is clearly inconsistent with an agency relationship because it provides ownership and unlimited use without any accounting or right of another owner to question withdrawals. Second, H.K. agreed that this account would be bound by those terms when he signed the joint account signature card which stated "[a]ll transactions shall be governed by applicable laws and the bank's terms (copy acknowledged as received herewith) that pertain to this type of account." (51:4.) It was a joint ownership account, and the applicable law is § 705.03.

The evidence indicates that this is what H.K. intended. Kawalec was already on the account as an agent, yet H.K. chose to remove that designation. It was H.K. who asked to change the account, and he asked for a joint account. (156:7.) At the postconviction hearing, H.K.'s personal banker testified that he told H.K that joint ownership would make the money Kawalec's, that it was like giving her a gift. (156:9.) Having heard the effect this change would have, H.K. went through with it.

For these reasons, H.K.'s choice to remove the agency designation and name Kawalec a joint owner severed the agency relationship regarding this account.

B. The holding of *Russ* and Wis. Stat. § 705.03 both require that courts determine the rights and duties of joint bank account holders by determining the intent of the person who created the account.

The *Russ* holding applies when there is a conflict between ownership rights under Wis. Stat. § 705.03 and an agent's fiduciary duties. Even if the *Russ* holding did not apply, Wis. Stat. § 705.03 would still control. As in *Russ*, under § 705.03 the creator's intent is the key issue.

In *Russ*, the court recognized that § 705.03 authorizes joint-account owners to use funds in the joint account without accounting to any other party, unless there is clear and convincing evidence of a different intent. *Russ*, 302 Wis. 2d 264, ¶ 29. That case involved a POA executed after the creation of the account. The court held that by itself the existence of the POA did not meet that clear and convincing evidence standard. *Id.*, ¶ 31. Court's presume donative intent when a person deposits funds into a joint bank account. *Id.* (citing *Derr v. Derr*, 2005 WI App

63, ¶ 36, 280 Wis. 2d 681, 696 N.W.2d 170. However, when an agent transfers funds deposited by the principal, a presumption of fraud is created. *Id.*, ¶ 32. When there is a conflict between those two presumptions the court must determine the intent of the person who founded the account. *Id.* ¶ 40.

Russ extends to any conflict between Wis. Stat. § 705.03 and the fiduciary duties imposed by a POA as long as the principal created the joint account voluntarily and while still competent. *Russ* adopted the approach taken by the Illinois court of appeals in three cases. *Id.*, ¶ 34. In one of those cases cited as an example by our supreme court, the Illinois court of appeals looked to the founder's intent to determine an agent's right to funds in joint accounts created both before and after the POA. *Estate of Ryboldt*, 258 Ill. App. 3d 886, 197 Ill. Dec. 570, 631 N.E.2d 792 (1994). In addition, *Russ* did not limit its holding to cases involving a POA created after a joint account. *See Russ*, 302 Wis. 2d 264, ¶ 40. (providing that circuit courts "should decide conflicts between Wis. Stat. § 705.03 and the fiduciary duties imposed by a POA" in the manner utilized in that case).

In sum, *Russ* applies whenever there is a conflict between Wis. Stat. § 705.03 and an agent's fiduciary duty pursuant to a POA, at least when the principal created the joint account voluntarily and while still competent. It would not apply when an agent actively uses the position to create a joint account, either by personally opening the account or by exerting improper influence on the principal. *See id.*, ¶ 35 (adopting the approach taken in *In re Estate of Teall*, 329 Ill. App. 3d 83, 263 Ill.Dec. 364, 768 N.E.2d 124 (Ill. Ct. App. 2002) (holding that agent's use of position to create joint account creates presumption of fraud)).

Regardless of *Russ*, Wis. Stat. § 705.03 provides that intent is the key issue. *Russ* recognized that the ultimate question was whether the evidence met the standard of "clear and convincing evidence of a different intent" provided in Wis. Stat. § 705.03. *Russ*, 302 Wis. 2d 264, ¶ 31. Moreover, courts have consistently looked to intent to determine ownership rights in bank accounts. *See, e.g., In re Kemmerer's Estate*, 16 Wis. 2d 480, 487-88, 114 N.W.2d 803 (1962) (holding that ownership rights are determined by looking to what the account creator intended). In sum, regardless of what evidence there might be to prove or disprove another intent pursuant to § 705.03, it is ultimately up to the jury to decide whether there is sufficient evidence that H.K. had a different intent, i.e. a non-donative intent, when he made Kawalec a joint owner.

IV. It was a misstatement of law to inform the jury that, as the holder of a power of attorney, Kawalec was necessarily a bailee because she "act[ed] as power of attorney"

The trial court was earnestly trying to clarify a complicated and novel issue for the jury, but the inserted language misstates the law for two reasons. First, it presumes that a joint account owner, whom the creator named as an individual rather than as an agent, "acts as a power of attorney." In contrast, § 705.03 gives each joint owner rights that are incompatible with an agency relationship. In other words, the statute creates a rebuttable presumption that each owner owes no duty to the others. Second, the instruction overlooks that an agent can accept a competent principal's voluntary transfer of money or other property, which terminates the agency relationship with regard to that property.

Agency and bailment are two different types of relationships with different elements. Joint ownership under § 705.03 is inconsistent with both of those relationships. An agent under a POA is a person granted authority to act for a principal under a power of attorney. Wis. Stat. § 244.02. A bailee is a person who takes possession of personal property from another to be held temporarily for the benefit of the bailee, the bailor, or both, under an express or implied contract. *Manor Enterprises, Inc. v. Vivid, Inc.,* 228 Wis. 2d 382, 398, 596 N.W.2d 828 (Ct. App. 1999). In a bailment, the title to the property does not pass to the bailee but remains with the bailor. *Id.*

In contrast to both of these types of relationships, Wis. Stat. § 705.03 creates a presumption that each party to a joint bank account has ownership of all funds and owes no duty to the other owners. Unlike agency, under § 705.03 a joint owner has no duty to account to the other parties. *Russ*, 302 Wis. 2d. 264, ¶ 29. Unlike agency, a joint owner is not subject to inquiry by other owners. *Frank*, 140 Wis. 2d at 433. Unlike both agency and bailment, Wis. Stat. § 705.03 provides that each party to a joint account owns the funds regardless of their contribution.

Under § 705.03, a joint owner does not act as a power of attorney just because that joint owner also serves as an agent under another owner's power of attorney. Under § 705.03, each owner is free to act in their own interest. That, and the immunity from inquiry by other owners is inconsistent with a presumption that a joint owner acts as a power of attorney.

Thus, it was incorrect to tell the jury that Kawalec "act[ed] as a power of attorney." If H.K. wanted Kawalec to act as an agent then H.K. could have left her designation as his agent pursuant to § 705.05. With regard to the account, he removed the

agency relationship when he removed the agency designation and made Kawalec a joint owner. Regardless, this was an issue for the jury to decide, but the instruction presumed she was acting as H.K.'s agent rather than as a joint owner.

In addition, an agent is not necessarily a bailee for all property received from the principal. One example particularly relevant to this case is when an agent accepts a gift from the principal. Nothing prevents an agent from accepting a gift that the principal gives intelligently and voluntarily. Nothing in H.K.'s POA prevented Kawalec from accepting a gift from H.K. (34). Similarly, H.K. described paying Kawalec $2,500 to $3,200 per month as compensation or reimbursement, (140:60, 65), which would not be held as part of a bailment despite the fact that it began as H.K.'s property and Kawalec held power of attorney. In sum, not all funds retained or accepted by the agent are held in bailment.

Another relevant example of that is when the principal gives the agent title to property, as H.K. did by creating a joint account with Kawalec. Unlike joint ownership, in a bailment the property title remains in the hands of the original owner. *Manor Enterprises, Inc. v. Vivid, Inc.,* 228 Wis. 2d 382, 398, 596 N.W.2d 828 (Ct. App. 1999). Regardless of whether the property remains subject to the power of attorney, with transfer of ownership it is not a bailment.

This misstatement lessened the State's burden to prove beyond a reasonable doubt that Kawalec held the joint-account funds as a bailee. It incorrectly told the jury that she was a bailee because she held H.K.'s power of attorney. That a jury hearing that instruction would take it as an instruction to at least presume that Kawalec was a bailee is reasonably likely. An

instruction that lightens the State's burden to prove an element beyond a reasonable doubt violates the defendant's right to due process. *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979) (overruled on other grounds by *Boyde v. California*, 494 U.S. 370, 380 (1990)). In sum, the language was a misstatement of the law that impermissibly lightened the State's burden.

Finally, it was at least misleading to inform the jury that H.K. testified that the funds in the U.S. Bank account were the property of H.K. It was misleading because it ignored that H.K. was unclear on this topic. H.K. made several statements that some or all of the money in the account belonged to Kawalec. (138:72, 80; 140:60, 65.) This made it easier for the state to meet its burden of proving that Kawalec was a bailee and that the joint account belonged to another person. Whether the money in the account belonged to H.K. alone or with J.K. was important to the bailment element because a bailment does not include transfer of title. *See Manor Enterprises, Inc.,* 228 Wis. 2d at 398.

In isolation it is correct to say the funds belonged to H.K., but under § 705.03 they also belonged to Kawalec. The jury was never instructed to consider the rights § 705.03 gives to joint owners. It was only instructed to consider "what effect, if any, the bank's designation of the defendant as a [joint owner other] has on this case…" The bank's designation is not particularly important, especially without the context of why the bank designated her as joint owner. What is important is that § 705.03 provides that as a joint owner, Kawalec had just as much ownership and right to withdraw as H.K., unless there was evidence of a different intent. Without that context, saying that the funds belonged to H.K. at least implied that Kawalec had no more rights to the funds than she would to his wallet. However, a joint bank account is more like a shared wallet. *Estates of*

Biesbier, 47 Wis. 2d 409, 418, 177 N.W.2d 919 (1970). The instruction misled the jury by failing to provide the proper context, that § 705.03 gave Kawalec ownership and free use of that shared wallet.

V. The court should grant a new trial in the interests of justice because the real issue of H.K.'s intent was not fully tried.

The question at the core of this case is why H.K. changed the bank account to remove the "POA" designation from Kawalec's name and create a joint account with her. If H.K. intended it as a gift, to give her the authority that Wis. Stat. § 705.03 provides to joint owners, then she should not have been convicted because she was not a bailee, had authority, and could not intend to convert what the statute says she owned. If H.K. had some other intent, such as to make it more convenient for her to act as POA, then she could be convicted.

H.K.'s intent was not fully tried. The jury was never told that was a relevant issue. The jury didn't hear the banker's crucial testimony about H.K.'s intent. The instructions essentially eliminated the State's burden to prove a bailment. These factors, and the fact that defense counsel didn't know the controlling law demonstrate that the real issue was not fully tried.

This Court has discretion to grant a new trial when the real issue has not been fully tried. Wis. Stat. § 752.35. Among the situations in which it can be said that the real issue has not been tried are when a jury was precluded from hearing evidence bearing on an important issue and when the jury was instructed incorrectly. The party seeking a new trial need not show a probable likelihood of a different result at a new trial. However,

the discretionary power of reversal should be exercised only in exceptional cases. This is one of those exceptional cases.

Trial counsel didn't know the law, so the jury was precluded from hearing the banker's crucial testimony about H.K.'s intent at the time he created the joint account. In *Rybolt*, the Illinois court of appeals said that testimony by a banker created a joint account and explained the ownership rights to its founder is crucial in the intent determination. 631 N.E.2d at 796.

Anthony Moorefield, H.K.'s personal banker, could have provided that crucial testimony. The jury didn't hear that H.K. asked Moorefield to change the account from individual with a POA to a joint account, that H.K. "always wanted the money to go to [Kawalec]," that Moorefield explained to H.K. that in a joint account all funds would be Kawalec's, that he told H.K. that creating the joint account had the same effect as giving Kawalec the funds. (156:7-9.) The jury did not get to hear Moorefield say that H.K. understood that he was giving Kawalec full ownership of the funds. (156:9.) The jury did not get to hear Moorefield's testimony explaining that there wasn't any reason to do this if H.K. only intended Kawalec to act as POA. (156:11-12.)

Similarly, the jury did not get to hear the crucial testimony about H.K.'s intent from H.K.'s investment advisor Marlo Carpio. The jury did not get to hear that Carpio also explained the impact of a joint account to H.K., and that H.K.'s response was "she was going to get the money anyway." (156:32-33.) The jury did not get to hear that at or near the time H.K. changed the account to make Kawalec a joint owner he told Carpio that he wanted to help Kawalec financially. (156:27-28.) The jury did not get to hear that on the same day H.K. created the joint account he gave Kawalec a $100,000 gift. (156:28-29.)

The jury also didn't get to hear Moorefield explain why a power of attorney signature card was stapled to the signature

card for the joint account. H.K. signed the power of attorney signature card in 2007, three years before opening the joint account. (51:5.) Moorefield explained that he stapled the power of attorney card to the signature card for the joint account just to keep a record of the prior status of the account. (156:12-13.) It was not at H.K.'s request; Moorefield just didn't know what else to do with it. (156:13.)

This is critical because the State's closing argument included that the stapled POA proved that Kawalec was only on the account as power of attorney. (146:33-34.) Moorefield's testimony would have refuted this. Unfortunately, the jury did not get to hear Moorefield's explanation.

In addition, the jury instructions obscured the real issue and even shifted the burden of proof. The instructions did not inform the jury that H.K.'s intent in creating the joint account was an issue. (146:82-99.) The instructions did not inform the jury that Wis. Stat. § 705.03 gives the parties to a joint account ownership of all funds and the authority to withdraw all of the funds, unless there is evidence of a different intent. (146:82-99.) As a result, the issue of whether H.K. intended to give a gift of joint ownership, with all of the rights provided by Wis. Stat. § 705.03(1), was not put to the jury.

Further, it was a misstatement of the law to instruct the jury that Kawalec was necessarily a bailee because she "act[ed] as a power of attorney[1]." This essentially eliminated the State's burden to prove bailment. It was wrong because Kawalec was a bailee of those funds only if H.K. didn't intend to give her joint-ownership rights. Because of the misstatement of law, that issue was not fully tried.

[1] *Supra* Section IV.

This is the kind of exceptional case where it can be said that the issue was not fully tried. It is exceptional in that it is a case in which defense counsel admittedly did not know the law. It is exceptional because the jury was never told that a key issue, what H.K. intended when he created the joint account, was even relevant, that it was something they should consider. It is exceptional because of the novelty of prosecuting a joint account owner for theft of funds in the account. It is exceptional because no one asked H.K. why he removed the POA designation and made Kawalec a joint owner even though Kawalec's guilt or innocence hinged on his intent.

The Court should find that the real issue has not been fully tried and grant a new trial. The jury was not given any instruction or reason to consider a determinative issue. The jury was precluded from hearing evidence about H.K.'s intent at the time he created the joint account, the very type of evidence that the Illinois court of appeals described as crucial. *Rybolt*, 631 N.E.2d at 796; *see also Russ*, 302 Wis. 2d 264, ¶ 36 (adopting the approach utilized by the Illinois court of appeals in *Rybolt* and two other cases). And the jury instructions misstated the law in a way that essentially eliminated the State's burden of proving the bailment element. Therefore, the Court should grant a new trial so that this issue can be fully tried.

CONCLUSION

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

Dated this 27th day of June, 2018.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162

AMENDED CERTIFICATION AS TO FORM AND LENGTH

I certify that the Defendant-Appellant's Supplemental 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 5,303 words and 19 pages.

Dated this 16th day of July, 2018.

_____

Attorney Andrew R. Walter
Attorney for Defendant-Appellant
State Bar No. 1054162

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 27th day of June, 2018.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162