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OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CASE NO.; 2018 AP 000208-CR

STATE OF WISCONSIN,
Plaintiff-Appellee

vs.

KENNETH BURKS,
Defendant-Appellant

ON NOTICE OF APPEAL TO REVIEW THE JUDGMENT OF
CONVICTION ON MARCH 15, 2017 BY MILWAUKEE COUNTY
JUDGE JEFFREY COINEN AND THE DECISION OF JUDGE CONEN
DENYING DEFENDANT'S POSTCONVICTION MOTION ON JANUARY 25, 2018.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. TRIAL COUNSEL ERRED BY FAILING TO OBJECT TO THE IMPERMISSIBLE
VOUCHING BY DETECTIVE KURTZ OF THE TRUTHFULNESS OF THE STATE’S STAR
WITNESS..

Under Wisconsin law a witness may not testify that another physically or mentally competent witness is telling the truth. State vs. Jensen, 147 Wis. 2d. 249, 432 NW2d 913(1988). In State vs. Romero, 147 Wis. Wd 264, 432 NW2d 899(1988) the Supreme Court held that a witness could not testify that the complainant “was being totally truthful with us.” State vs. Romero, 147 Wis. 2d 899 at 904-905.

In the present facts , Milwaukee Police Department Detective Kurtz testified under oath in front of the jury that the State's key witness was "very believable". Trial defense counsel did nothing to object to the admission of this highly improper vouching of the truthfulness of the testimony of E.G..

Respondent argues that this statement was simply trying to somehow explain the investigatory process and not to tell the jury that the witness was being truthful. Their Response cites three cases in support of their argument. None of these cases are relevant to the facts of this case. In State vs. Smith, 170 Wis. 2d 701, 490 N.W.2d 40, the Detective told the jury about the course of events during the interrogation of defendant which led to a confession.. His testimony simply explained the interrogation process and how he had arrived at what he believed to be a truthful confession. Similarly, in State vs. Miller 341 Wis. 2d 737, 343 NW2d 741(Ct.App. 2012), the court held that the testifying Detective was simply explaining the circumstances of the witness's interrogation and the reasons for it. In State vs. Snider, 266 Wis. 2d 830, 668 NW2d 784 (Ct.App. 2003), trial defense counsel made a strategic choice to elicit the detective's vouching testimony on cross examination in order to explain the interrogation course of events and to attempt to impeach the credibility of the Detective.

None of these cases have any relevance to the facts of this case. In these facts there is no lengthy interrogation of the witness in which the Detective is trying to get the witness to finally tell the truth. Unlike the above cited cases, Detective Kurtz's impermissible vouching was not an attempt to simply explain the course of events during the interrogation. It was a clear and unequivocal statement that E.G. was truthful in her version of the events. This blatant declaration

to the jury that E.G.'s testimony was believable invaded the principle that the jury is the sole determiner of credibility.

The defective performance of trial defense counsel in not objecting to the improper vouching of E.G.'s testimony by Detective Kurtz has caused substantial prejudice to defendant's case at trial. The key citizen witness for the State was E.G. There was no confession by Mr. Burks. Noone was presented at trial to explain the text messages in the context of a drug deal(s) other than E.G. Her "very believable" story tied in all the strands of the other evidence and the text messages for the State. Without her testimony the State's case would be based on the speculation about what the messages meant and how the drugs were delivered. The credibility of E.G.'s testimony was already impeached by the fact that she was an admitted drug addict and was in fact using on the date of the offense. Despite her admitted liability for First Degree Reckless Homicide by directly and knowingly delivering the drugs to the victim, the State charged her with no crimes.. It is reasonable to infer that the jury would assume that she was not charged in return for her testimony against Defendant Burks. This would undermine the credibility of E.G.'s testimony in the eyes of the jury even further. In other words, without the impermissible vouching by Detective Kurtz of the "very believable" story she told there is a reasonable probability that the jury would not have believed E.G. and the outcome of the trial would have been different. As a consequence of these facts, the judgment of conviction should be vacated and the matter remanded to the trial court for a new trial without any improper vouching by any witness.

II. TRIAL COUNSEL ERRED TO THE SUBSTANTIAL DETRIMENT OF DEFENDANT BY FAILING TO OBJECT TO THE COURT'S RELIANCE ON AN IMPERMISSIBLE SENTENCING FACTOR.

A sentencing court erroneously exercises its discretion when its sentencing decision is not based on the facts on the record or it misapplies the applicable law. State vs. Travis 2013 WI. 38, 347 Wis 2d 142, 832 NW2d 491. It misapplies the law when it relies upon clearly irrelevant or improper factors. McCleary vs. State 49 Wis 2d 263, 278, 182 NW 2d 512(1971). An erroneous exercise of discretion occurs when the court imposes a sentence without the underpinnings of a explained judicial reasoning process. McCleary vs. State 490 Wis. 2d 263, 278, 182 NW 2d 512(1971)

When the Appeals Court reviews the transcript of the March 13, 2017 sentencing hearing, it is clear that the trial court engaged in an admittedly significant rant and expressed its frustration over the substantial failures of the medical system and its facilitation of opioid abuse and even death. In its lengthy diatribe the court cast blame on the AMA, the pharmaceutical industry, the big time dealers, and the flawed governmental legal regulatory system. None of this has anything to do with the facts of Mr. Burk's case. The court seems to acknowledge this, yet still sentences defendant to a lengthy prison sentence. The court is rightfully frustrated, but its frustration should not cause Mr. Burks to be sent to prison for 15 years because he is the only one available for the court to punish for these systemic failures. To be sure, the court did briefly address other sentencing factors which were relevant to the facts of Mr. Burk's case. As to his character, the court acknowledged that Defendant had a minor criminal record. He also did not accept responsibility for the offense and went to trial.

This is a serious offense which demands significant punishment. Although the trial court did in fact take into account several relevant sentencing factors, the

degree of punishment was clearly increased because defendant became the scapegoat for the entire system of opioid over prescription. The transcript of the March 13, 2017 sentencing hearing demonstrates that the trial judge piled on the years of prison due in part to his frustration with the entire medical system. The Defendant was the only person before him to punish.

Trial counsel performed deficiently by not objecting to the trial court's reliance on this irrelevant sentencing factor in sentencing defendant to a lengthy prison term.

As a consequence, the Judgment of Conviction should be vacated and the matter be remanded for a new sentencing hearing based upon proper sentencing factors.

CONCLUSION

For the aforementioned reasons, this court should vacate the Judgment of Conviction and remand this matter for a new trial in which the court is required to exclude any improper vouching testimony. In the alternative, this court should reverse the judgment of conviction and remand the matter for a new sentencing hearing in which improper sentencing factors, such as systemic failures in the drug prescription industry, are not relied upon by the trial court.

Dated this 12th Day of June 2018 In Waukesha, Wisconsin.

Respectfully Submitted,

SS//Michael S. Holzman

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CERTIFICATION

I HEREBY CERTIFY that the Reply Brief of the Appellant-Defendant Kenneth Burks in the matter of State vs. Kenneth Burks 2018 AP 000208-CR conforms to the rules contained in Wis. Stats. Sec. 809.19(b)© for an Appellant's Reply Brief produced with a proportional font and the length of the Reply Brief is 5 Pages. The brief contains 1675 Words.

Dated this 12th Day of June, 2018 in Waukesha, Wisconsin.

SS//Michael S. Holzman
Attorney for Defendant-Appellant

CERTIFICATION

I HEREBY CERTIFY that the e brief of the Defendant-Appellant in the matter State vs. Kenneth Burks, case No. 2018 AP 000208-CR is identical to the text of the paper brief in the same case.

Dated this 12th Day of June, 2018 in Waukesha, Wisconsin.

SS/ Michael S. Holzman
Attorney for Defendant-Appellant