STATE OF WISCONSIN
IN THE COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP845-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

MEDFORD B. MATTHEWS, III,
Defendant-Respondent.

ON APPEAL FROM KENOSHA COUNTY CIRCUIT COURT,
BRANCH 3, HONORABLE BRUCE E. SCHROEDER PRESIDING,
TRIAL COURT FILE 17-CF-1257

DEFENDANT-RESPONDENT'S BRIEF

Submitted By:

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

On January 10, 2018, the Kenosha County District Attorney's Office filed an Amended Criminal Complaint against the Defendant-Respondent, Medford B. Matthews III. In the Amended Complaint, the Defendant-Respondent was charged with seven (7) separate counts, including six (6) felony counts and one (1) misdemeanor count. The Defendant-Respondent was charged with four (4) counts of Exposing Intimate Parts, a Class I Felony, two (2) counts of Child Enticement, a Class D Felony, and one (1) count of Sexual Intercourse with a Child, a Class A Misdemeanor.

On December 11, 2017, the Attorney for the Defendant-Respondent, Attorney Renée E. Mura, filed a Motion to Dismiss Counts One (1) through Six (6) of the Complaint. This Motion asserted numerous grounds upon which the Defendant-Respondent requested dismissal of counts against him, including that the manner in which the Defendant-Respondent was charged was contrary to constitutional guarantees against double jeopardy, that there are insufficient allegations to support certain counts, and that the felonies as charged create an absurd and unreasonable result, contrary to law.

On February 21, 2018, the Honorable Circuit Court Judge Bruce E. Schroeder heard oral argument by the Kenosha County District Attorney's Office and Attorney Renée Mura on the Defendant-Respondent's Motion to Dismiss. By written order, Judge Schroeder held that the felony charges in this case were absurd, and dismissed the six (6) felony charges.

The issue for this Court is whether the Circuit Court erred in dismissing the six (6) felony charges.

The Circuit Court answers "no."

This Court should answer "no."

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Upon the opinion of the Defendant-Respondent, oral argument is not necessary. However, the Defendant-Respondent concurs with the State in that publication may aid in clarifying legislative intent, statutory construction, and the application of the absurdity doctrine, therefore meeting the criteria for publication pursuant to Wisconsin Statute Section 809.23(1)(a).

STATEMENT OF THE CASE

The Amended Criminal Complaint (hereinafter "Complaint") alleges that in July 2017, MJH, who was seventeen and one-half years old, began a friendship with

the Defendant-Respondent, Medford Matthews III, with whom she worked. (R. 16:2-3.)

According to the Amended Complaint, on September 3, 2017, The Defendant-Respondent stated that MJH came over to his house. The Defendant-Respondent asked her what exactly "are we or what do you want to be." MJH told him that she wanted to be his girlfriend. This is when they decided to be in a boyfriend and girlfriend relationship. (R. 16:5.)

Later that month, their relationship progressed to touching of a sexual nature. (R. 16:5.) The most serious touching alleged is that the Defendant-Respondent put "his finger inside of her vagina." (R. 16:6.)

The Complaint concludes, accurately, that "the defendant states that nothing that occurred with MJH was forced or against her will. *MJH concurs that the defendant never forced her*." (R. 16:6.) Upon MJH's mother learning of the relationship, MJH's mother then summoned the police to file criminal charges against her daughter's wishes. (R. 16:6.)

Based on his relationship with MJH and the contacts alleged in the Complaint, the State has charged the Defendant-Respondent with misdemeanor "sexual intercourse"

for touching the vaginal area. (R. 16:1-2.) The State has also charged him with *six* (6) felonies. (R. 16:1-2.)

Specifically, because MJH and the Defendant-Respondent allegedly conducted their voluntary relationship inside of a residence rather than outside in plain view, the Complaint charged the Defendant-Respondent with *two* (2) counts of child enticement for allegedly "caus[ing] MJH to go into a building, to wit: [a] residence." (R. 16:1-2.) Nothing in the complaint indicates how the Defendant-Respondent, rather than MJH, caused MJH to go into a building. (R. 16:1-7.) The defense moved to dismiss these counts on several grounds including constitutional grounds; the Trial Court dismissed them pursuant to the doctrine of absurdity. (R. 12:1-6, R. 21:1-4.)

Because MJH and the Defendant-Respondent allegedly removed some items of clothing en route to their eventual, voluntary sexual intercourse—thus rendering body parts to be exhibited to the parties' view—the Complaint charged the Defendant-Respondent with *four* (4) counts of "exposing intimate parts." The defense moved to dismiss these counts on several grounds including constitutional grounds; the

Trial Court dismissed them pursuant to the doctrine of absurdity.

Specifically, the Trial Judge found that it would be absurd to permit the state to prosecute the Defendant-Respondent for entering a residence with his girlfriend and then removing clothing, both felonies, with the intent and for the purpose of having "sexual intercourse," which is a misdemeanor.

STANDARD OF REVIEW

The Defendant-Respondent concurs with the State that the proper application of the absurdity doctrine and the interpretation of certain Wisconsin criminal statutes are questions of law presented to this Court for de novo review. *See State v. Wittrock*, 119 Wis. 2d 664, 669, 350 N.W.2d 647, 650 (1984).

ARGUMENT

The Circuit Court did not err in dismissing the six (6) felony charges against the defendant.

A. The applicable law on the absurdity doctrine.

Along with the Federal Courts and the U.S. Supreme Court, "the highest courts in all 50 states and the District of Columbia have endorsed [the] principle" known as the "absurdity doctrine" or the "absurd result

principle." *See* Veronica M. Dougherty, *Absurdity and the Limits of Literalism*, 44 AM. U. L. REV. 127, 129 n. 9 (1994).

In Wisconsin, the doctrine requires that "statutory language is interpreted in the context of... closely related statutes... to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court*, 271 Wis.2d 633, 663, 681 N.W.2d 110, 124 (2004). Further, contrary to the State's argument, the doctrine does much more than protect defendants from "monstrous" outcomes in cases where the prosecutor takes advantage of "technical" or "linguistic" defects in the statute. Rather, "A court may construe a statute whose meaning is clear if a literal application would lead to an absurd or unreasonable result." *Coca-Cola Bottling Co. v. La Follette*, 106 Wis. 2d 162 (Ct. App. 1982).

Put more bluntly, "the absurd result principle may be no more than an acknowledgement that the legal community does not deal in nonsense." Dougherty, *Absurdity*, 44 AM. U. L. REV. at 131, n. 17 (citing *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989)). That is exactly what we have here. However, the State's brief has muddied

the waters and introduced several red-herring arguments. These must be addressed before proceeding to the heart of the matter.

It is important to note that a statute that produces an absurd result rises to the level of a constitutional violation of Due Process and Equal Protection under the law. In certain instances, the resulting absurdity of the application of a particular statute inherently refers to its unequal application. Statutory law that is unequally applied is a clear violation of Due Process and Equal Protection.

B. The State improperly mischaracterizes and limits both the absurdity doctrine and the role of the Circuit Court.

First, and most significantly, throughout its brief the State repeatedly pits the absurdity doctrine against the legislature. More specifically, through repetition and string-cites, the State portrays the Trial Judge's application of the doctrine as undermining the legislative function. In so doing, the State mischaracterizes the doctrine of absurdity and the Trial Court's role.

To begin, "legislatures draft generally applicable statutes that tend to be over- or underinclusive." Linda D.

Jellum, *But That is Absurd!*, 76 BROOK. L. REV. 917, 922 (2011). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *U.S. v. Kirby*, 74 U.S. [7 Wall.] 486 (1868). "To construe statutes so as to avoid absurd or glaringly unjust results, is ... a traditional and appropriate function of the courts." *Sorrells v. U.S.*, 287 U.S. 435, 450 (1932).

"As such, the absurd result principle is not subservient to the principle of legislative supremacy, but actually legitimizes the legislative role. The perceived tension between the two principles is not something that requires resolution or elimination." Dougherty, *Absurdity*, 44 AM. U. L. REV. at 134. Rather, "legislative supremacy represent[s] democratic ideals, and the absurd result principle represent[s] rule of law values… each essential to the legal system." *Id.* at 165.

Second, the State urges this Court to restrict the scope of the absurdity doctrine to cases where the statute in question suffers from "linguistic garble" and can be

fixed by "changing or supplying a particular word" to correct the legislature's "technical or ministerial error." An example of this type of problem is found in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), where the Court was forced to read "defendant" as "criminal defendant," otherwise the statute would have produced the "odd" result of affording different treatment of civil plaintiffs and defendants under the rules of evidence. *Id.* at 511-24.

The problem, however, is that in making its argument to restrict the application of the absurdity doctrine to such cases, the State is confusing two different concepts: *general* absurdity and *specific* absurdity. *See* Jellum, *But That is Absurd!*, 76 BROOK L. REV. at 918. The case discussed above is an example of general absurdity: a literal reading of the unambiguous statute would produce an absurd result generally, i.e., disparate treatment of every plaintiff and every defendant in every civil case that will ever be litigated.

In our case, the Trial Judge did not find that the felony statutes with which the Defendant-Respondent was charged are generally absurd and should be corrected by

"supplying a particular word" to correct a "technical or ministerial error." Rather, the problem in our case is that of specific absurdity. "Statutes that are specifically absurd are those statutes that are absurd as applied to the facts of a particular case." *Id.* at 918. Therefore, the issue is the absurdity of the statute as it is applied in our specific case. This is discussed in section C below; however, there are still three (3) more red-herring arguments to address.

Third, the State uses many paragraphs and several more citations to establish that a prosecutor has the power to charge a defendant with the crimes of his or her choosing. The State also "reiterate[s]" this in several parts of its brief. However, this basic starting point is not in dispute. Rather, the question is whether, under our facts, the prosecutor's charging decision would lead to an "absurd," "unjust," "nonsensical," "unreasonable," or even "odd" result if the defendant was convicted.

Fourth, the State further clouds the issue by arguing that a Court cannot dismiss charges with prejudice unless there is a constitutional speedy trial violation. This is not true. By way of example only, sec. 805.03, Wis.

Stats., authorizes a trial court to dismiss a case for failure to prosecute, and such dismissal "operates as an adjudication on the merits…" *Id.* at 918. It is well established that this section and its sanctions apply to criminal cases. *See, e.g., State v. Heyer*, 174 Wis. 2d 164, 496 N.W.2d 779 (Ct. App. 1993) (sanctioning defense counsel); *State v. Prieto*, 366 Wis. 2d 794, 876 N.W.2d 154 (Ct. App. 2015) (sanctioning the prosecutor).

Because a dismissal for the failure to prosecute *legitimate* charges would be a dismissal "on the merits," it would be nonsensical to permit the State to re-file charges that have no merit to begin with. Additionally, because the State has chosen to appeal rather than attempt to re-file the charges in the hope of obtaining a different Trial Court Judge, this issue is moot and should not detract from the real issue in this case.

Fifth and finally, the State criticizes the Trial Judge for not providing a citation for the obvious, i.e., that by creating sec. 948.09, Wis. Stats., the legislature intended "a completed act of non-marital sexual intercourse between an adult defendant and a child age 16 or older

should result in only a misdemeanor conviction for the adult."

The State's hyper-technical criticism of the Trial Judge fails. By way of analogy, the legislature enacted sec. 970.038, Wis. Stats., permitting hearsay at preliminary hearings. On what legal authority can we conclude that the legislature no longer intended that the prosecutor also satisfy the additional requirements of sec. 970.03(14)(b) with regard to hearsay uttered by a child? No such authority is needed; obviousness needs no citation. Similarly, the case before this Court presents a rare situation where the test is one of common sense, not hyper-technicality, wordplay, or the length of string-cites. That is, with regard to the absurdity doctrine, "[t]he term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense." Dougherty, *Absurdity*, 44 AM. U. L. REV. at at 133. The Judge's common sense observation about the legislative intent when it created a misdemeanor statute needs no further support or even explanation.

C. The Circuit Court properly held that the six felonies as charged were absurd based upon the specific circumstances of this case.

In our case, the Trial Judge dismissed the six (6) felonies because they were absurd within the context of our specific facts.

There is little reason to have a sophisticated judiciary as a co-equal branch of government if all that the judiciary is allowed to do is apply statutes blindly without considering the justice of the application. Without a check by the judiciary, those convicted of laws that were not intended to apply to their circumstance will have no recourse. Jellum, *But That is Absurd!*, 76 BROOK L. REV. at 936. In addition, "although non-absurdity and text may clash only rarely, every time they do, text must bow to non-absurdity." Dougherty, *Absurdity*, 44 AM. U. L. REV. at 151. "[T]he difficulty of defining absurdity, and the historical lack of attempts to do so, can now be explained in part by the fact that the principle represents a collection of values that are fundamental to our legal system, yet seldom made explicit in the course of the principle's application." *Id.* at 165.

Therefore, in order to demonstrate the concept of specific absurdity, examples, rather than attempts at definition, are useful.

For instance, a statute that prohibits individuals from interfering with the delivery of mail only becomes absurd when [the prosecutor charges] a sheriff [for] arresting a mail carrier wanted for murder. *U.S. v. Kirby*, 74 U.S. (7 Wall.) 482 (1968). A statute that prohibits anyone from drawing blood in the street only becomes absurd when [the prosecutor charges] a doctor [for] offering medical treatment. *Id.* at 487. A statute that prohibits anyone from owning a fur-bearing animal only becomes absurd when [the prosecutor charges] a person who rescued a squirrel that would otherwise die. *Ohio Div. Wildlife v. Clifton*, 89 Ohio Misc. 2d 1 (Mun. Ct. 1997). A statute that prohibits prisoners from escaping from prison only becomes absurd when [the prosecutor charges] a prisoner who escaped from a prison that was on fire. *Kirby*, 74 U.S. at 487. Jellum, *But That is Absurd!*, 76 BROOK L. REV. at 932 (citations added to block quote). Just as statutes that criminalize interference with mail delivery, prohibit the drawing of blood in the street, ban the ownership of squirrels, and criminalize escape from prison are

reasonable on their face and nearly always in their application, so too are the statutes with which the Defendant-Respondent is charged: the criminalization of luring a minor into a secluded place and exposing oneself to a minor.

In other words, it is intended by the legislature, and perfectly proper, to prosecute: (a) the person who lures a minor into a room with the intent to "exercise force and control over the child" (*State v. Hanson*, 182 Wis. 2d 481, 487, 513 N.W.2d 700, 702 (Ct. App. 1994)); and (b) "the sexual pervert who exposes himself to a child in a park." (*State v. Stuckey*, 349 Wis. 654, 656, 837 N.W.2d 160, 161 (Ct. App. 2013)

The problem, however, is the prosecutor's application of these statutes to the facts of our case. The State wants to prosecute the Defendant-Respondent with felonies for going into a residence with his girlfriend where the two (2) removed some of their clothing, even though the completed act of sexual intercourse is only a misdemeanor. This is absurd, as it "offends us at some gut level; it offends our sense not only of fairness, but of rationality and common sense." Dougherty, *Absurdity*, 44 AM. U. L. REV.

at 151. That is, the results are "very unsuitable… ridiculous, foolish." *Id.* at 157 (citing OXFORD AMERICAN DICTIONARY).

In other words, it is unsuitable, ridiculous, and foolish to conclude that the legislature intended the following. To begin, a defendant would be guilty of a *misdemeanor* if he inserted his finger into his nearly eighteen-year-old girlfriend's vagina with her agreement, or even if the two (2) had full-blown, penis-to-vagina intercourse which would have exposed her to "the consequences of sexual intercourse, including the dangers and problems associated with pregnancy, damage to reproductive organs, and sexually transmitted diseases." *State's Brief* at 20. However, because during the course of their friendship, dating relationship, and sexual relationship leading to the misdemeanor act, the two (2) conducted their activities in a residence instead of in open and public view, and removed clothing prior to having intercourse, the defendant is guilty of six (6) felonies.

The State attempts to save our fact scenario from the fate of absurdity with the aid of two (2) analogies:

A felon who commits a crime with a handgun may face a charge on the underlying crime, and also a charge of felon-in-possession. In the context of sexual misconduct, a defendant who has non-marital sexual intercourse with a child age sixteen (16) or older who is also a sibling could potentially face both the misdemeanor charge, as well as a felony charge for incest. *State's Brief* at 20. The State's analogies miss the point of the absurdity doctrine. As a preliminary matter, with regard to the gun example, being a felon is a *status* of which a defendant would be aware by virtue of his prior conviction. But more to the point for our purposes, it is entirely possible to commit a misdemeanor crime with a handgun, i.e., firing it while intoxicated, pointing it at a person, or carrying it without a concealed carry permit, *without also being a felon*. Similarly, it is entirely possible, and in fact the norm, to have sexual intercourse with a seventeen-year-old girlfriend *who is not also the defendant's sibling*.

In our case, however, the felony crimes with which the Defendant-Respondent is charged with are necessary predicate acts to the misdemeanor. That is, going into a residence and undressing is necessary in order for two (2) persons to have voluntary sexual intercourse. The Trial

Judge implored the prosecutor to explain how charging the felonies under our set of facts was not absurd; the prosecutor, and now the Attorney General, offer no explanation.

Rather, to paraphrase the Trial Judge, the State is left to defend this position: the legislature has chosen to classify the Defendant-Respondent's voluntary sexual intercourse with his seventeen-year-old girlfriend as a misdemeanor, but only if they commit the act in an open space in plain view of others, while at the same time managing not to expose either of "their intimate parts to the other." State's A-App., 121.

The Trial Judge inquired how this would even be possible. "How would they do that?" he asked. "I don't know how," the prosecutor responded. "Well, that's the problem," the judge replied. *Id.*

Prosecution of these felonies under our facts is not only "unjust," "nonsensical," "ridiculous," "unreasonable," "unsuitable," "foolish," and "odd," but is the height of "absurdity"—particularly given the harsh consequences associated with this prosecution, including putting the Defendant-Respondent at serious risk of lengthy consecutive

prison sentences, oppressive sex-offender supervision by the Department of Corrections, life-ruining sex-offender registration and its restrictions on his basic liberties, and even the stress and anxiety experienced from merely standing accused of such crimes.

Rather, while the State's analogies fail, the better analogy is *State v. Asfoor*, 75 Wis.2d 411 (1977). There, the Court addressed a statutory scheme not involving sex, but rather injury. Nonetheless, that case closely parallels our case. In *Asfoor*, the Court addressed this absurdity: "a conviction of injury by negligent use of a weapon is a felony while conviction of homicide by negligent use of a weapon… is a misdemeanor." *Id.* at 541. This mirrors our case in that a defendant cannot commit the most serious act or end result (death, in *Asfoor*, and sexual intercourse in our case) both of which are misdemeanors, without also committing the predicate acts (injury, in *Asfoor*, and so-called enticement and exposure in our case) all of which are felonies. Even if one could possibly conceive of a theoretical way to do so, such an absurd scheme "is unconstitutional in that it denies equal protection of the law as required by the Fourteenth

Amendment to the United States Constitution." *Id.* at 542. In short, it is absurd.

Asfoor does differ from our case in that it deals with the general absurdity, rather than the specific absurdity, of the statute and in particular the penalty scheme. That is why the Court in *Asfoor* was required to strike down part of the statute. *Id.* at 543. No such action is required in our case, however, as the statutes at issue can be applied in a non-absurd fashion to most defendants. For example, as demonstrated by the case law cited by the State on legislative intent, the person who entices a child into a secluded place to "exercise force and control over the child" or "the sexual pervert who exposes himself to a child in a park."

These goals and justifications do not apply to our facts. Consequently, the Trial Judge acted properly in dismissing the six (6) felony counts, rather than "apply[ing] statutes blindly without considering the justice of the application." Jellum, *But That is Absurd!*, 76 BROOK L. REV. at 936.

D. There are insufficient factual allegations to support Counts Two and Four.

In Counts Two and Four, the Defendant-Respondent is charged with allegedly violating Wisconsin Statute Section 948.07(3), Child Enticement. To violate this section, one must cause a child under the age of eighteen (18) to go into a building with intent to cause a child to expose intimate parts. (R. 16:1.) The Amended Criminal Complaint is devoid of any factual allegations stated or that can be inferred to support that the Defendant-Respondent caused MJH to go into a building, nor that the Defendant-Respondent had the intent to cause MJH to expose intimate parts.

In Count Two, the Defendant-Respondent allegedly caused MJH to go to his brother's residence on September 11, 2017. However, according to the complaint, MJH left her phone at work and traveled to the residence. The Defendant-Respondent did not drive her to the residence, force or threaten her to go to the residence, or even accompany her to the residence. The Defendant-Respondent merely invited her to the residence, and MJH went to the residence through her own volition. A mere invitation does not equate to *causing* MJH to go into a building.

In Count Four, the Defendant-Respondent allegedly caused MJH to go to his home on September 18, 2017. On that date, the Defendant-Respondent and MJH drove together to his parents' home. However, there is no factual allegation that the Defendant-Respondent *caused* MJH to go into the residence once they arrived at the home.

The lack of factual allegations regarding *how* the Defendant-Respondent caused MJH to enter a residence aligns with the Defendant-Respondent's and MJH's dating relationship that the parties entered into during September 2017. This also aligns with the statement by MJH at the close of the Amended Criminal Complaint, wherein she states that the Defendant-Respondent "never forced her." Therefore, Counts Two and Four should be dismissed, as there are insufficient factual allegations to support the counts.

CONCLUSION

This Court should affirm the decision of the Circuit Court on March 19, 2018.

Dated at Kenosha, Wisconsin, this 9th day of November, 2018.

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a monospaced courier font. The length of this brief is twenty-five pages.

Dated this 9th day of November, 2018

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CERTIFICATION OF E-FILING

I hereby certify that this brief conforms to the rules contained in §809.19(12) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 9th day of November, 2018

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