STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1515-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL K. LORENTZ,
Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION
ENTERED IN THE PIERCE COUNTY CIRCUIT COURT,
THE HON. JOSEPH D. BOLES
PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUES PRESENTED

1. Once the defendant stipulated to the applicability of a "Domestic Abuse" injunction and three "Child Abuse" injunctions, was it error to publish the unredacted injunctions to the jury?

The trial court ruled that the words "Domestic Abuse" and "Child Abuse" were inadmissible but published the injunctions, labeled "Injunction-Domestic Abuse" and "Injunction-Child Abuse" to the jury over the defendant's objection.

2. Were Wis. Stats. §§ 813.12 and 813.122 unconstitutional as applied where the injunctions on which Mr. Lorentz was convicted failed to give him notice of what conduct was prohibited?

The court denied a pretrial motion challenging the constitutionality of the statutes as applied.

3. Was the evidence sufficient to prove that Mr. Lorentz failed to "avoid the residence" of his former wife where he drove on a public road separated from the house by fields on both sides of a long driveway?

The jury found him guilty and the court denied a motion for a directed verdict.

STATEMENT ON ORAL ARGUMENT/PUBLICATION

This case is a one-judge appeal, but the issues presented raise recurring issues for which there has been no case published. Therefore it is appropriate to publish.

FACTS

A. The defendant's stipulation to the status/existence of the injunctions.

The basic facts are not disputed. The State charged Mr. Lorentz with one count of knowingly violating a domestic abuse injunction, Wis. Stats. §§ 813.12(4) & (8) and threee counts of knowingly violating a child abuse injunction, violations of Wis. Stats. §§813.122 (5) & (11). Prior to trial, Mr. Lorentz filed a Motion in Limine in which he stipulated to his status as someone bound by the terms listed in the injunctions. (15:3) At the same time he moved to prohibit any reference to "domestic abuse" or "child abuse." The Motion stated:

> As to each count, the Defense hereby offers to stipulate to the existence of the underlying injunctions. This court must bind the State to this offer to stipulate, ***McAllister,*** 153 Wis. 2d at 529; ***State v. Alexander***, 214 Wis. 2d 628, 644, 571 N.W.2d 662 (1997) ("The status element is completely dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against the

> defendant...Accordingly, *there is no probative value* to this evidence other than to prove the defendant's status. Evidence of the status element is wholly independent of the concreate events that make up the gravamen of the offense.

(15: 3-4). When arguing the issue to the court before trial, defense counsel said that the "defense agrees there is an injunction that applies to S[.]L[.] and three of the children who were present on the premises." (53:75) Defense counsel specifically objected to the injunctions themselves going into evidence and "certainly move they not be given to the jury during deliberations." (53:77) The State argued that the injunctions were admissible because "it is important that the jury doesn't wonder, an injunction, why is that important to this case?" (53:8).

The injunctions themselves were labled, "Injunction-Domestic Abuse" and "Injunction-Child Abuse." Following the box indicating that there is a "substantial risk" that the respondent may commit 1st degree intentional homicide 1st, 2nd, or 3rd degree sexual assault pursuant to Wis. Stat. §940 or 1st or 2nd degree sexual assault under Wis. Stat. §948, the domestic abuse injunction included a handwritten note. That note said, "However there are, by stipulation, no specific factual findings." (25:2). The child abuse injunctions contained similar addenda. (26:2; 27:2; 28:2)

The court said it would admit the injunctions, but it agreed with the claim that the words "domestic abuse" and "child abuse" were not proper testimony. According to the court, "I don't think it's appropriate even though those injunctions are going to be evidence, I don't believe it's appropriate either in the arguments or actually in the instructions either to actually refer to them as domestic abuse injunctions or child abuse injunctions." (53:79)

The defense objected when the State moved to publish the injunctions to the jury during the trial. (53:128) The court denied the objection saying, "I think they are able to publish it. If you want to have a curative instruction, I would be willing to give it." (53:128) The defense argued that it did not make sense to prohibit use of the words "domestic abuse" and "child abuse" but to then have the jury read injunctions labeled "Domestic Abuse" and "Child Abuse." The court responded, "My rationale is these are the injunctions that are in effect and binding the parties. That's what they look like. I don't think that there is any unfair prejudice to the Defendant here." (53:129) The court then published the domestic abuse injunction and the three child abuse injunctions to the jury who read them in the jury box.

The court instructed the jury that, "These injunctions have some titles that contain language that you are not to consider…I want you to disregard any of the labels on the top

of these documents that might label them as a certain type of injunction. You cannot use them as evidence." (53:130)

During jury deliberations, the jury requested to see the injunctions again. They also requested a legal definition of "a residence versus parcel." (53:205) The court said, "...what I would kind of like to do is just send back the exhibits but eliminate all irrelevant parts, but it's only the one line in there about avoiding the residence." (53:215). The court did not send the injunctions back. Instead it instructed them:

> The parties stipulated that the injunctions, Exhibits 6, 7, 8, and 9 were issued by the Court and were in effect at the time of the alleged crimes. *The only portion of these injunctions that are relevant is paragraph two of these court orders.* Paragraph two reads, paragraph two in each injunction reads, quote, the Court orders the respondent to avoid the Petitioner's residence." (53:213; emphasis added)

B. Claim of unconstitutional vagueness.

Prior to trial, Mr. Lorentz filed a motion to dismiss arguing that the statute was unconstitutionally vague as applied to him. (12:1-8) Specifically, he claimed that he did not have adequate notice that "avoid the residence" meant that he could not drive on a public road that is separated from his former wife's home by a corn field. (12:4) The trial court denied the motion.

C. The requirement to "avoid the residence."

In pertinent part, the domestic abuse injunction required that Mr. Lorentz "avoid the petitioner's residence and/or any location temporarily occupied by the petitioner." (25:2) The child abuse injunctions required him to "avoid the child's residence and/or any location temporarily occupied by the child." (26:2; 27:2; 28:2) Apart from Mr. Lorentz's knowledge, the facts underlying the dispute regarding whether Mr. Lorentz avoided the residence are themselves not disputed.

On May 17, 2014, Mr. Lorentz, the defendant, drove his pickup on the public highway, 390th St., onto which S.L.'s and the children's driveway to their house, barn and garage empties. Mr. Lorentz drove by slowly only once and did not stop, turn into the driveway, honk, wave or do anything otherwise unusual. The driveway has been described as being as long as 2/10's of a mile away.[1] (53:21, 109; *see* Appendix at 116 and 117) S.L.'s son, J.L., testified that between the house and the road is a field owned by someone else that is

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[1] S.L.'s son testified that he was in front of the house and "like 300, 200 feet" away from his father's truck when it drove by. He was not close enough to see without his glasses if his father waved. (53:109, 112)

usually planted in corn or beans. (53:113) After his father drove by, his mother dialed the police.

Deputy Langer, who responded to the call and then talked with Mr. Lorentz on the telephone, testified that there is a "long gravel driveway which leads to a house and some outbuildings." (53:136) It has "fairly open fields on both sides." (53:136) Deputy Langer tesified that Mr. Lorentz said that he knew about the restraining orders and wanted to see his children. However, Mr. Lorentz "maintained throughout [their] entire conversation" that "he did not believe he was violating" the injunctions "because he was on a public roadway." (53:138, 147) There was no evidence by any witness to the contrary.

Following the presentation of the State's case, the defense moved for a directed verdict. The State said that there was no dispute that "Yes, Mr. Lorentz drove on the roadway, 390th Avenue. Yes, the roadway passes by the property which the residence is situated on. Yes, this is a rural area." (53:165). The State claimed that this evidence established that Mr. Lorentz knowingly violated the injunctions. However, the State also conceded that: "Is the State at somewhat of a disadvantage because of how far the residence was situated on the property? Certainly." (53:166)

ARGUMENT

I. Once Mr. Lorentz stipulated to the injunctions, the court erred when it published unredacted copies to the jury as they were both prejudicial and irrelevant.

It was error to publish to the jury the unredacted domestic abuse injunction and the child abuse injunctions once Mr. Lorentz stipulated to them. The law says that once a defendant admits to a status element, the State not only cannot admit that evidence; it must accept a stipulation to that status element. In this case, it was error to publish the injunctions to jury because their existence is a status element and their very titles of "Injunction-Domestic Abuse" and "Injunction-Child Abuse" were far more prejudicial than probative. As the court itself found, "the only relevant portion of the injunctions" is the requirement that Mr. Lorentz "avoid the residence" of his former wife and their three sons. (53:214) It was error to admit the entire injunctions when—as the lower court itself noted--only one line of them was relevant and much of them was prejudicial. The court could have admitted the requirement that Lorentz "avoid the residence" without also informing the jury that the court had granted temporary restraining orders for domestic abuse and child abuse.

In this case the trial court misused its discretion because it applied the wrong law and did not apply the facts to reach a reasonable determination. Whether to admit evidence is a discretionary act by the the trial court. "A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record." ***King v. King***, 224 Wis. 2d 235, ¶23, 590 N.W.2d 480 (1999); ***State v. Raye,*** 2005 WI 68, ¶¶16, 49, 281 Wis. 2d 339, 697 N.W.2d 407 (Circuit court erroneously exercised its discretion when it did not grant a mistrial). A discretionary decision "must be the product of a rational mental process by which the facts of the record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.*** Whether the the court has applied the wrong law is an issue that this court reviews *de novo.* ***Id.***

Wisconsin Stat. §813.12(8) makes it a misdemeanor to "knowingly violate[] a temporary restraining order or injunction...." Wisconsin Stat. §813.122(11) similarly makes it a crime to "knowingly violate[]" a temporary child abuse restraining order or injunction. These two statutes require the State to prove that (1) an injunction existed, (2) Mr. Lorentz violated the injunction, (3) Mr. Lorentz knew that an injunction had been issued, and (4) he *knew* that he violated

the injunction. Wis. Stat. §§ 813.12(8)(a), 813.122(11); *see also* Wis. JI–Criminal 2040.[2]

Element (1) listed above, whether an injunction existed, is a status element. Whether it exists depends "completely on some judgment rendered wholly independently of the concrete events or later criminal behavior charged against [the defendant]." ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), *quoting* ***Old Chief v. United States***, 519 U.S. 172, 190 (1997). In ***Old Chief*** the defendants' stipulations meant essentially "I agree that I have one prior conviction" and "I agree that I have two prior convictions." "In other words," said the Wisconsin Supreme Court, "the defendants agreed to a status element of the crimes." ***State v. Veach***, 2002 WI 110, ¶128, 255 Wis. 2d 390, 255 Wis. 2d 390, 648 N.W.2d 447.

According to the United States Supreme Court in ***Old Chief***, "This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous

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[2] Mr. Lorentz acknowledges that the jury instruction sets forth three elements, but submits that the offense can more clearly be understood when broken apart into four elements. The third element in Wis. JI–Criminal 2040 contains two separate requirements that the State must satisfy.

story has, however, virtually no application when the point at issue is the defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." ***Old Chief***, 519 U.S. at 190.

In ***Alexander***, the defendant attempted to stipulate that he had a certain number of prior convictions, suspensions or revocations for the purposes of counting prior offenses for reckless and drunk driving offenses. Instead, the circuit court erroneously exercised its discretion by admitting evidence of the prior offenses. ***Alexander***, 214 Wis. 2d at 633-34, 639-40. This was error. ***Id.*** at 634. According to the Wisconsin Supreme Court, the fact that a status element is completely dependent on some judgment rendered wholly independently of the current charges means: "Accordingly, *there is no probative value* to this evidence other than to prove the defendant's status. Evidence of the status element is wholly independent of the concrete events that make up the gravamen of the offense." ***Id***. at 45 (emphasis added)

When a defendant stipulates to a status element, the circuit court must bind the State to accept it. ***McAllister***, 153 Wis. 2d 523, 529, 451 N.W.2d 764 (Ct. App. 1989); ***State v. Alexander***, 214 Wis. 2d at 644. In ***McAllister***, this court cited ***United States v. O'Shea***, 724 F.2d 1514, 1516 (11th Cir. 1984) for the rule that "where a prior conviction is part of an

offense and the defendant offers to stipulate to the prior conviction, it may constitute an abuse of discretion to allow the nature of the offense to be admitted." ***McAllister*** at 529. It was error to admit evidence that McAllister had been convicted of robbery where he had offered to stipulate that he had been convicted of a felony at his trial for felon in possession of a firearm. ***Id.*** at 525.

With the exception of the requirement that Mr. Lorentz "avoid the residence" of his former wife and his sons, the injunctions were not relevant to any element before the jury and therefore they were not admissible. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Furthermore, "Evidence which is not relevant *is not admissible*." Wis. Stat. §904.02 (emphasis added). Finally, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. §904.03.

Additionally, before the court may admit evidence of prior bad acts it must first determine that the evidence is relevant to an issue in the case. ***State v. Roberson***, 157 Wis.

2d 447, 453, 459 N.W.2d 611 (Ct. App. 1990). From there, the court must determine if the evidence is admissible pursuant to one of the exceptions in Wis. Stat. §904.04(2). If it is admissible, then the court must determine whether any prejudice from the evidence outweighs the probative value. ***Id.***

In this case, the court has found that the words "domestic abuse" and "child abuse" listed in the injunctions are not relevant. They therefore have no probative value and should not have been admitted. Furthermore, the prejudice is extreme. In ***Whitty v. State***, the Wisconsin Supreme Court noted that "evidence against an accused should be confined to the very offense charged, and neither bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him." ***Whitty v. State***, 34 Wis. 2d 278, 292-93, 149 Wis. 2d 557 (1967). Character evidence is not admissible because such evidence "is not legally or logically relevant to the crime charged." ***Id.*** at 291. For this reason, "Evidence of prior crimes or occurrences should be used sparingly by the prosecution and only when reasonably necessary." ***Id.*** at 297. In this case, the evidence of prior bad acts was not relevant or necessary. It was entirely prejudicial and therefore admission of that evidence was error.

The trial court's analysis of the facts and the law was correct up to the point that it published the injunctions to the jury. The court was correct when it ruled evidence of "domestic abuse" and "child abuse" to be inadmissible. Whether Mr. Lorentz had committed domestic abuse or child abuse in the past was not relevant to any of the elements before the jury. The issues before the jury did not call upon the jury to determine either (1) whether Mr. Lorentz' past conduct made any significant fact more or less relevant, and (2) whether Mr. Lorentz is any type of "abuser."

Additionally, the trial court properly concluded that the injunctions themselves were not relevant and were prejudicial. According to the court, "I don't think it's appropriate even though those injunctions are going to be evidence, I don't believe it's appropriate either in the arguments or actually in the instructions either to actually refer to them as domestic abuse injunctions or child abuse injunctions." (53:79)

Having properly found that evidence of "Child Abuse" and "Domestic Abuse" was irrelevant and prejudicial, it was a misuse of discretion to publish the full injunctions titled "Injunction-Domestic Abuse" and "Injunction-Child Abuse" to the jury. The decision to publish the injunctions to the jury was not a reasonable result and created extreme prejudice to

Mr. Lorentz. The publication was far more prejudicial than probative.

In addition, the court's decision to publish the injunctions to the jury was not reasonable or fair because the court's reason for doing so does not apply in this case. The court published the injunctions saying: "My rationale is these are the injunctions that are in effect and binding the parties. That's what they look like." (53:129) In this case "fairness" did not require publication of the injunctions to the jury so that the jury could understand "what they look like." The full injunctions were not needed to correct an unfair and misleading impression created by the relevant information from the injunctions that Mr. Lorentz was under court order to "avoid the residence" of his former wife and his three sons. There is nothing unfair about the terms of the restrictions placed on Mr. Lorentz. On the contrary, admission of the full injunctions was unfair because the injunctions introduced inflammatory and irrelevant information regarding abuse.

As beneficiary of the error allowing improper and prejudicial information into evidence, the State has the burden to prove that there is no reasonable possibility that the error contributed to the conviction. ***State v. Dyess,*** 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The State must carry this burden beyond a reasonable doubt. ***State v. Jorgenson***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77 (Reversal

ordered as a result of admission of other acts, the transcript being read to the jury where transcrit contained inadmissible evidence, and the State's improper closing argument). Given the facts of this case and the court's own finding that the words "domestic abuse" and "child abuse" were so prejudicial that they must be excluded, the State cannot carry its heavy burden to prove that the conviciton would have occurred without publishing the injunctions to the jury.

Since the evidence of domestic abuse and child abuse violates multiple rules of admissibility, and since it is very prejudicial, this court must reverse.

II. Wisconsin Stats. §§813.12 and 813.122 are unconstitutional as applied to Mr. Lorentz.

Because the phrase "avoid the residence" is both vague and overbroad, Wis. Stats. §§813.12 and 813.122 are unconstitutional as applied to Mr. Lorentz. The statutes as applied failed to provide him adequate notice of the behavior that was prohibited.

Whether a statute is unconstitutional is a question of law reviewed de novo. ***State v. Cole***, 2003 WI 1122, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Whether a statute is vague and overbroad as applied depends on whether the notice provided to the defendant allows the courts to enforce the law without creating their own standards. "The prohibition on vagueness

in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" ***Johnson v. United States***, 135 S. Ct. 2551, 2557 (2015) (quoting ***Connally v. Gen. Constr. Co.***,269 U.S. 385, 391 (1926)). The Supreme Court has further stated: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." ***Lanzette v. New Jersey***, 306 U.S. 451, 453 (1939).

Two types of vagueness challenges exist: (1) facial challenges, and (2) as-applied challenges. Facial challenges involve an allegation that the statute operates unconstitutionally under all circumstances. ***State v. Smith***, 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. Alternatively, as-applied challenges involve an allegation that a statute operates unconstitutionally "on the facts of a particular case or with respect to a particular party." ***Smith***, 2010 WI 16 at ¶ 10 n.9. The Defense raises only an as-applied challenge in this brief.

Even though there is a strong presumption that a statute is constitutional, the Wisconsin Supreme Court has upheld an as-applied constitutional challenge to injunction terms. ***Bachowski v. Salamone***, 139 Wis. 2d 397,404, 414,

407 N.W.2d 533 (1987) In ***Salamone,*** the Wisconsin Supreme Court said that,

> The violation of an injunction . . . is a criminal offense. Substantial fines and imprisonment could result. Accordingly, injunctions . . . must be specific as to the acts and conduct which are enjoined. We conclude that the injunction issued in this case does not meet these standards. . . . *The enjoined conduct is described too broadly.*"

Id. at 414 (emphasis added). The injunction terms must "permit law enforcement officers, judges, and juries to enforce and apply the law without forcing them to create their own standards." ***Id.*** at 406.

The Wisconsin Supreme Court defines the issue as follows:

> To survive a vagueness challenge a statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the law sufficient notice of the proscribed conduct. A vague law "may trap the innocent by not providing fair warning." It must also permit law enforcement officers, judges and juries to enforce and apply the law without forcing them to create their own standards. "The danger posed by a vague law is that officials charged with enforcing the law may apply it arbitrarily or the law may be so unclear that a trial court cannot properly instruct the jury as to the applicable law."

Id. at 406-07 (citations omitted). A statute is overbroad "when its language, given its normal meaning is so sweeping that its sanctions may be applied to constitutionally protected

conduct which the state is not permitted to regulate. ***Id.*** at 411.

In the ***Salamone*** case, the injunction restrained the respondent from "harassing petitioner, having any contact with petitioner or coming upon petitioner's premises." ***Id.*** at 404. The Court found that the definition of "harass" was sufficiently definite to pass the test listed above.[3] In part this was because the definition of "harass" requires "repeated acts" without any legitimate purpose and because the legislature intended that actor must intend to bother or intimidate by those acts. Despite this, the Wisconsin Supreme Court found, "the statute is unconstitutional with respect to the notice required by due process. The statute is neither vague nor overbroad. However, because the statute was improperly applied, we reverse the decision of the court of appeals." ***Id.*** at 414–15. Specifically, the statute was overbroad as applied. The court had enjoined Salamone from "harassing petitioner, having any contact with petitioner, or coming upon petitioner's premises." ***Id.*** at 414. The Wisconsin Supreme Court found this language overbroad because, "This language, unfortunately, could proscribe

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[3] The concurring opinion found that, "The majority fails in its attempt to make the word definite by using the dictionary." ***Salamone***, 139 Wis. 2d at 419, (Abrahamson C.J. and Heffernan, J., concurring).

conduct which is constitutionally protected, e.g., distributing campaign literature, or which simply would not constitute harassment under the statute, e.g. saying good morning...." ***Id.***

In this case, the definition of "avoid" is too indefinite to provide Mr. Lorentz notice of what he was proscribed from doing. Neither the injunctions nor Wis. Stat. §813.12 or 813.122 define "residence" or "avoid" but courts may use reference to a dictionary to ascertain the common and accepted meaning of terms. *See, e.g.,* ***State ex rel. Kalal v. Circuit Court for Dane County,*** 271 Wis. 2d 633, ¶53 681 N.W.2d 110 (2004). The New Oxford Dictionary, online, defines "avoid" as "Keep away from" or "Contrive not to meet someone." A residence is defined as "A person's home" or "The fact of living in a particular place." ***Id.*** The term "residence" therefore does not normally include the end of a driveway or a mailbox or even a property line.

Even were it to include those items, however, the injunction does not define what "avoid" means. Does it require Mr. Lorentz to keep away from the dwelling or merely contrive not to meet someone? Must Mr. Lorentz have touched or trespassed upon a piece of property owned by his former wife or was he prohibited from being near the end of her driveway and her mailbox? If he was too close, how close is too close? Could he have driven on 390th St. but

not within 100 feet of the driveway, a quarter of a mile away, a mile, 10 miles away? The injunction gives no distances and Mr. Lorentz had no notice of what "avoid the residence" means. The lack of specific notice forced the police officer, the lower court, and this court to create their own standards. It made Mr. Lorentz speculate on what behavior was prohibited. Therefore, it was unconstitutionally vague.

In addition, the statute as applied was overbroad with respect to Mr. Lorentz because it swept so broadly as to interfere with the fundamental right to travel. As stated in ***Ervin v. State***, 41 Wis. 2d 194, 200, 163 N.W.2d 207 (1966), the right to travel is "inherent, not only in the Bill of Rights, but in the original document itself. It has been termed 'engrained in our history' and a 'part of our heritage.'" ***Id.*** at 200-01. Depending on what the injunctions forbade, they are overbroad as well as vague.

The State's attempts to amend the bond with more specificity is evidence that the State itself recognizes that the notice in the injunctions is unreasonably vague. Unlike the injunction, the bond entered in this case provides: "No contact with S[.]L[.] or 390th Avenue, Ellsworth, WI 54011." (4:2) Contrary to the language of the injunction the bond is not unconstitutionally vague. It prohibits all contact with the road that runs in front of his former wife's home. The fact that it was a quite simple problem to solve highlights the

vagueness of the injunction language, and it shows that the injunctions need not have been vague and overbroad.

The requirement that Mr. Lorentz "avoid the residence," is described so vaguely and so broadly that it forced him to speculate about what was prohibited. It forced the police officer and the trial to create their own standards, and it forced the jury to define for themselves whether residence meant the dwelling or included the entire parcel of land on which the home was situated. Because the notice provided is so vague as to require these efforts to create ad-hoc standards, this Court should, as the Supreme Court did in ***Salamone***, reverse because the statute was unconstitutionally vague as applied.

III. The evidence is insufficient to establish that Mr. Lorentz violated the injunctions' requirement that he "avoid the residence."

This court should also reverse because the evidence is insufficient as a matter of law for the State to carry its burden of proving beyond a reasonable doubt that Mr. Lorentz failed to "avoid the residence[s]" of his former wife and children. The record is undisputed that he did not go onto the property of S.L. but merely drove on a public highway without honking, waving, or stopping. The public road is a considerable distance from the house and is separated from it

by "open fields" on both sides of the driveway. In short, he avoided the residence.

In order to overcome the presumption of innocence accorded a defendant in a criminal trial, the state bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The evidence "must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***Id.*** at 502. An appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990); *see e.g.*, ***Gilbertson v. State***, 69 Wis. 2d 587, 230 N.W.2d 874 (1975) (Evidence insufficient to prove beyond a reasonable doubt that defendant entered building with intent to commit a felony); ***State v. Miller***, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188 (Evidence insufficient to convict defendant of first-degree reckless injury).

In this case, Mr. Lorentz complied with the requirement that he avoid the residence. By any definition,

the public road, 390th St., which Mr. Lorentz drove upon is not part of the residence. There are no published cases establishing that driving on a public road, much less one a considerable distance from the petitioner's house and separated from the house by fields on both side of the driveway, violates the requirement that a subject of an injunction must avoid the petitioner's residence. In this case, neither the injunctions nor Wis. Stat. §813.12 or 813.122 define "residence" or "avoid" and, as listed above, avoid can mean keep away from or contrive to not meet. The phrase "keep away from" does not help the State as it does not define what Mr. Lorentz was prohibited from doing in this case. The contrive-not-to-meet definition is even worse for the State as Mr. Lorentz did not contrive to meet anyone. Nothing in the standard definitions of "avoid" or "residence" changes the reality that Mr. Lorentz never came near to the residence. He stayed far away from his former wife's dwelling, the building where she actually lives.

In addition, there is no evidence, none, that Mr. Lorentz "knowingly violate[d] a temporary restraining order or injunction...." Wis. Stat. §813.12(8)(a). The only evidence in the record is that Mr. Lorentz "maintained throughout [his] entire conversation" with the police officer that "he did not believe he was violating" the injunctions "because he was on a public roadway." (53:138, 147). The

State produced no evidence indicating why the jury should doubt Mr. Lorentz's claim that he believed he was not violating the injunctions.

Given this record the State cannot carry its burden of proving that Mr. Lorentz did know. There are several reasons for this. First, for circumstantial evidence to be sufficient:

> All the facts necessary to warrant a conviction on circumstantial evidence must be consistent with each other and with the main fact sought to be proved and the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.

State v. Johnson, 11 Wis. 2d 130, 136, 104 N.W.2d 379 (1960). "The test for circumstantial evidence is whether it is strong enough to exclude every reasonable hypothesis of evidence." ***State v. Hirsch***, 2002 WI App 8, ¶5, 249 Wis. 2d 757, 640 N.W.2d 140. Since Mr. Lorentz told the officer that he believed he was not violating the injunction, "all of the facts" do not establish that he in fact did know. On the contrary, Mr. Lorentz believed—and had reason to believe—that the injunction did not prohibit him from driving on a public road. All of the facts are not consistent with a claim that Mr. Lorentz knew.

Second, none of the facts produced at trial provide any reason to doubt Mr. Lorentz's claim that he did not know he was prohibited from driving on 390th St. The phrase "avoid the residence" is so ambiguous as to not prohibit him from believing he could drive on the public road. This creates a reasonable alternative hypothesis that Mr. Lorentz truly believed that he could legally drive on the public road. Not only did "all of the evidence" not support the charge that Mr. Lorentz knew that he was violating the restraining order, all of the evidence produced at trial established the opposite. Therefore, the evidence is insufficient as a matter of law.

CONCLUSION

It was reversible error to publish evidence of prior domestic abuse and child abuse to the jury where that evidence was wholly irrelevant and highly prejudicial. In addition, the wording of the injunctions made the statutes unconstitutional as applied because the phrase "avoid the residence" forced Mr. Lorentz to speculate about their meaning and forced the police officer, the lower court and the jury to create their own standards in interpreting them. Finally, the evidence was insufficient to prove the Mr. Lorentz knowingly violated injunctions to "avoid the residence[s]" both because nothing prohibited him from

driving on the public road and nothing in the record indicates that he knew he was violating the injunctions.

For these reasons, Michael Lorentz, the defendant-appellant, respectfully requests that this court vacate the convictions and judgments entered against him in this case.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in 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 of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6943 words.

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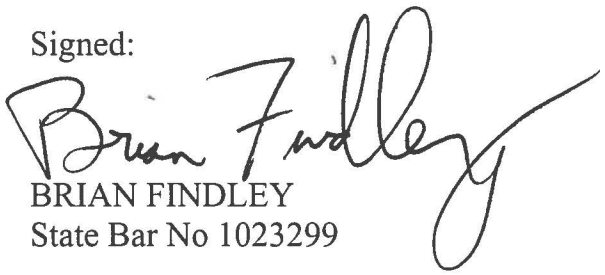

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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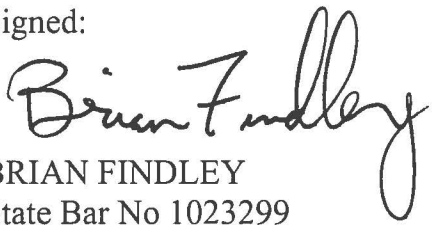

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APPENDIX

INDEX
TO
APPENDIX

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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