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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Michael Lorentz, the appellant-defendant, replies to the State's brief as follows:

1. Element (1), whether an injunction existed, is a status element.

The State's only argument in support of its claim that the injunctions were admissible is that the existence of an injunction is not a status element because ***State v. Alexander,*** 214 Wis. 2d 628, 517 N.W.2d 662 (1997), is an OWI case. That argument is wrong. It ignores the definition of a status element. The definition of a status element comes down from the United States Supreme Court in ***Old Chief v. U.S.***, 519 U.S. 172, 190 (1997), where the Court said that, "evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events or later criminal behavior charged against him." *See also* ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), *quoting* ***Old Chief.***

In this case, the first element that the State had to prove was:

> (An injunction)...was issued against Michael Lorentz, the respondent, in favor of (name) the petitioner under §813.12 of the Wisconsin Statutes.

WIS JI-Criminal 2040. Under the definition handed down from ***Old Chief***, that is a status element. The injunction establishing Mr. Lorentz's legal status as a person subject to an injunction was "dependent on some judgment rendered wholly independently of the concrete events or later criminal behavior charged against him." The State has never explained why this definition does not apply and has never provided its own definition of what defines a status element.

Because it has not explained why Mr. Lorentz's definition is not the proper one—other than saying it is a different type of case—the State has conceded it. *See* ***Charolais Breeding Ranches, Ltd v. FPC Securities Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (Arguments not denied by respondents are deemed refuted). Nor has the State explained why the fact that the courts in ***Alexander*** and ***McAllister*** found harmless matters to the issue of whether element 1 is a status element. It does not. Whether element 1 is a status element depends not on the results in those cases but on whether it is a status element as defined by those cases. In this case, the fact that Mr. Lorentz was bound by an injunction was a status element and the fact that he was subject to an injunction told the jury nothing about whether he violated the injunction's terms.

2. The words "Injunction-Child Abuse" and "Injunction-Domestic Abuse" are irrelevant to whether Mr. Lorentz violated the terms of the injunctions.

The State wrongly disagrees with the trial court's finding that the terms "Injunction-Domestic Abuse" and "Injunction-Child Abuse" are not relevant and admissible. (53:129). According to the State this is so because, "The words correlate to the offense charged," and because "the injunction documents themselves were relevant because the charges being tried to the jury surrounded a violation of these injunction documents." (State's Br. at 4 and 7). The State provides no citation for these claims because no citation is possible. That is not the law.

Evidence is relevant only where it makes a fact of consequence more or less probable, Wis. Stat. § 904.01, and nothing about the existence of the injunctions themselves is relevant to prove that Mr. Lorentz knowingly violated the terms of the injunctions. It is the terms of the injunction that matters, and because the injunctions are a status element, nothing but the existence of them and their terms is relevant. No "evidentiary depth" is necessary "to tell a continuous story" as in ***Old Chief***, *supra.*.

The trial court correctly concluded that the Injunctions themselves were irrelevant, and the State has not raised a

valid argument to the contrary. The reason for labeling a separately issued judgment a status element is to ensure that such evidence is limited to minimize prejudice.

3. The State concedes that the phrases "Domestic Abuse" and "Child Abuse" are prejudicial.

Mr. Lorentz has argued that "publication was far more prejudicial than probative." (Lorentz Br. at 19). The State concedes this because it does not deny it. ***Charolais***, *supra.* Its only arguments are that because the words "correlate" to the facts before the jury, "[t]he evidentiary value could not be more probative." (State's Br. at 4) As discussed above, the argument that the injunctions create the necessary background for the allegations in this case is incorrect. Furthermore, the words "Domestic Abuse" and "Child Abuse" are inherently prejudicial.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. ***State v. Sullivan***, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). In this case the words "Domestic Abuse" and "Child Abuse" have

considerable potential to inflame passions. Most citizens have a viscerally adverse reaction to child abusers and wife beaters. The State says that there is no harm because no one said "child abuse" or "domestic abuse." It does not explain, however, why reading injunctions bearing those same words is not equally bad or worse.

Furthermore, the injunctions themselves made clear that Mr. Lorentz had been charged with abuse. There was a star after finding number 3 on the Domestic Abuse Injunction. That finding reads: "There is reason to believe that the respondent engaged in, or based upon prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner as defined in §813.12, Wis. Stats." The Child abuse injunctions contained similar handwritten words following the finding that "There are reasonable grounds to believe that the respondent has engaged in, or based upon conduct of the child and respondent, may engage in abuse as defined in §813.12." The charge in this case is that Mr. Lorentz violated Wis. Stat. §813.12.

These words and information on the injunctions are entirely prejudicial and the State has never proven otherwise. In fact, it was highly prejudicial. Spousal abuse and child abuse are not socially acceptable. Any hint that Mr. Lorentz may have engaged in such behavior is extremely likely to arouse the passions of the jury, and here the improperly

allowed the jury to read inunctions containing allegations of exactly that.

4. The error in admitting the injunctions was not harmless.

The State's primary argument on harmless error, beyond saying that admission of the Injunctions was not error and the word "Domestic Abuse" and "Child Abuse" were not spoken,[1] is to claim that any error is harmless because the court issued a cautionary instruction. (State's Br. at 5).

The cautionary instruction did not make admission of the injunctions harmless. While a curative instruction presumptively cures any prejudice, it is not conclusive that there has been no harm. Rather, "the court's admonition to the jury to disregard the evidence may be considered" when determining whether an error was harmless. ***Harris v. State***, 52 Wis. 2d 703, 705-06, 191 N.W.2d 198 (1971). "A cautionary instruction is at best only a partial remedy," and the court will not find harmless error where the evidence was devastating and there is an overwhelming probability that the jury will be unable to follow the instruction. ***Greer v. Miller***, 483 U.S. 756, 774 and 766, n. 8. (1987). Depending on the

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[1] Which is a silly distinction considering they were published to the jury and read by the jurors.

circumstances, the error can be too great to be harmless despite a curative instruction. ***State v. Pitsch***, 124 Wis. 2d 628, 645 fn. 8, 369 N.W.2d 711 (1985). As stated by the Federal Court of Appeals, "[O]ne cannot unring a bell; ...if you throw a skunk into the jury box, you can't instruct the jury not to smell it." ***Dunn v. U.S.***, 307 F.2d 883, 886 (5th Cir. 1962).

The evidence of domestic abuse and child abuse threw a skunk in the jury box. It was devastating to Mr. Lorentz and the cautionary instruction was insufficient to cure the error. The evidence changed the entire tenor of the trial and effectively disrupted the burdens of proof. Once the jury read that injunctions were entered to protect against abuse, a reasonable juror could reasonably conclude that Mr. Lorentz is a violent and potentially dangerous man. The issue then becomes less whether he was a man who crossed a poorly defined line and more whether he was someone from whom his ex-wife and children required protection.

Furthermore, the effectiveness of the cautionary instruction was inherently limited by the fact that the court published the injunctions to the jury. This is not a case where the court told the jury to disregard completely improper evidence that had been mistakenly introduced. Instead, the court told the jury that the injunctions themselves were proper

but they should ignore the most inflammatory words. This contradiction limited the curative powers of the instruction.

As beneficiary of the error allowing improper and prejudicial information into evidence, the State has the burden to prove beyond a reasonable doubt 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). ***State v. Jorgenson***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. In this case, it cannot carry its burden. The evidence of prior abuse allegations is so potentially harmful that the State cannot carry its burden of proving that it created no reasonable possibility that the error contributed to the conviction. It was extremely prejudicial, and it almost certainly contributed to the conviction.

Given the inherent prejudice of the evidence and the paucity of evidence regarding Mr. Lorentz's knowledge, the error was not harmless.

5. The State concedes that Wisconsin Stats. §§ 813.12 and 813.122 are unconstitutional as applied

The State concedes that the statutes are unconstitutional as applied because it only once mentions the words "constitutional" or "unconstitutional" as applied and it never addresses the issue. Specifically, the State admits because it never refutes it that, "[T]he definition of 'avoid' is

too indefinite to provide Mr. Lorentz notice of what he was proscribed from doing." (Lorentz Br. at 24). The State's only arguments are that "avoid" has a commonsense definition, and Mr. Lorentz's "argument is eclipsed by conduct." (State's Br. at 9). Nor does the State explain how the word "residence" is defined. Neither are.

The State does not explain how Mr. Lorentz's conduct defines these vague terms. Without supporting this claim, the State adds that by driving by the home Mr. Lorentz proved that he knew where his ex-wife lived. That is true but entirely irrelevant to defining the word "avoid." The State's entire argument begs the question of what "avoid the residence" means. Even common sense does not answer the question.

The State itself introduces yet another new definition of the word "avoid." According to the State, Mr. Lorentz had to know where his ex-wife and children lived "so he could have the opportunity to get a possible view of his children." (State's Br. at 9). Nothing in the injunctions prohibits Mr. Lorentz from seeing his children from a distance, and yet by making this claim that the State argues that he has violated the injunctions. It thereby invents its own standard, a clear indicator that the statutes are vague as applied. Because the courts, the defendant, and now the State must speculate as to what "avoid" means, the statute is vague as applied to Mr. Lorentz.

The claim that the statutes are overbroad as applied is derivative of and dependent on the broader question of whether they are too vague to provide notice. If the word "avoid" is as highly expansive as the State seems to believe it to be, then the statutes arguably are overbroad because they improperly impinge the constitutional right to travel. Furthermore, this Court may exercise its discretion to consider issues not fully briefed below. ***State v. Caban,*** 210 Wis. 2d 597, 609, 563 N.W.2d 501 (1997).

The State also admits that the "attempts to amend the bond with more specificity is evidence that the State itself recognizes that the notice in the injunctions is unreasonably vague" because it does not deny it. (Lorentz Br. at 25).

Finally, the statutes are unconstitutionally vague because they do not answer, and the State makes no attempt to answer whether "avoid" requires Mr. Lorentz to keep away or merely contrive not to meet someone; whether Mr. Lorentz must have trespassed on a piece of his ex-wife's property; whether he was prohibited from being near the end of her driveway; whether he was too close and if so how close is too close; whether he could be on 390th street and if so how near the residence? (Lorentz Br. at 24-25). The State fails to answer any of these, and therefore fails to explain why the word "avoid" is not vague.

Because the words "avoid" and "residence" are not defined the statutes are vague as applied.

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

The State makes two minor claims regarding the sufficiency of the evidence. First, it claims that "Mr. Lorentz was well aware of the location of his former wife's residence." (State's Br. at 9). Second it claims that the evidence is sufficient because "this is the precise conduct the injunction aims to prevent." ***Id***. at 10.

Unfortunately for the State, neither claim addresses the fact that the State had to prove that Mr. Lorentz failed to avoid the residence and **knew** that he was violating the injunction when he drove on the public highway past the end of his ex-wife's driveway. The fact that Mr. Lorentz knew where his former family lived is irrelevant to determining either of those facts. Furthermore, the State concedes because it does not deny it, that, "By any definition, the public road, 390th St., which Mr. Lorentz drove upon is not part of the residence" and that "Mr. Lorentz never came near to the residence." (Lorentz Br. at 27-28).

The fact that the injunctions were intended to protect Mr. Lorentz's ex-wife and children from "alarm" and to make

the residence a "place of safety and security" (State's Br. at 10), tells this court nothing about whether Mr. Lorentz violated the specific terms of the injunctions. The relevant issue is whether he avoided the residence as required by the injunctions.

7. The evidence is insufficient to prove that Mr. Lorentz knew he was violating the injunctions.

The State has presented no evidence, claims, or authority to challenge Mr. Lorentz's claims that:

> 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 not believe Mr. Lorentz's claim that he believed he was not violating the injunctions. (Lorentz Br. at 28-29).

The State has admitted this because it has not refuted it. ***Charolais***, *supra.* Knowing where his ex-wife and children lived would be relevant to proving that Mr. Lorentz knew he was violating an injunction only if the evidence also proves that he knew that he was prohibited from driving on the public road that was separated from the residence by large fields on both sides. He could not know that because in fact the injunctions did not prohibit that. The phrase "avoid the residence" is so ambiguous as to fail to provide Mr. Lorentz

notice that he could not drive on 390th St. Furthermore, none of the evidence introduced at trial establishes that Mr. Lorentz knew that he was violating the injunctions by driving on the public road.

The only evidence presented at trial was Mr. Lorentz's statement that he believed he could drive on the public highway. That belief was not unreasonable. There simply is no evidence or even any reason for a finder of fact to find that Mr. Lorentz knew beyond a reasonable doubt that he was prohibited from driving on the public road that went past the end of his ex-wife's driveway. Were it the State's burden to prove that Mr. Lorentz questioned whether he could drive on the road, then perhaps the State could make a straight-faced argument that the evidence was sufficient, but that is not the State's burden of proof. It had to prove that, "The defendant knew that the (injunction)(restraining order) had been issued and knew that (his)(her) acts violated its terms." Wis. JI-Criminal 2040, Element #3, p. 2. As the Commentary to Wis JI-Criminal 2040 notes, injunctions must be "narrowly drawn," and they "must be specific as to the acts and conduct which are enjoined. ***Id.*** at Comment #5, p. 4. There is no evidence in the record that Mr. Lorentz knew he that he was specifically prohibited from driving on the public road that was separated from his ex-wife's house by large fields. As

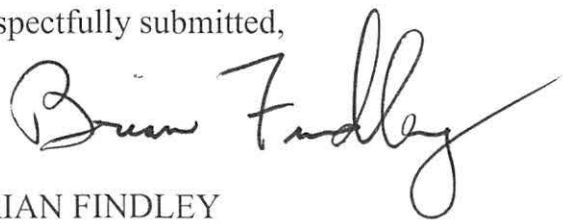
listed above, that is not at all clear by the terms of the injunctions.

Because the record does not prove beyond a reasonable doubt that Mr. Lorentz knew that driving on the public road "violated (the injunction's) terms," the evidence was insufficient. This Court must reverse.

FOR THESE REASONS, Michael Lorentz, the defendant-appellant, respectfully requests that this Court vacate the convictions and judgments entered against him in this case.

Dated this 17th day of December, 2018.

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 2947 words.

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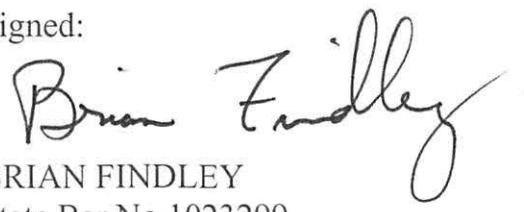

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CERTIFICATE OF COMPLIANCE

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.

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 17th day of December, 2018.

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