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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP001619

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHYLLIS M. SCHWERSENSKA,

Defendant-Appellant.

On Notice Of Appeal From a Judgment of Conviction and Order Denying Post-Conviction Motion Entered in the Circuit Court for Adams County, the Honorable Paul Curran, presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

WISCONSIN STATUTES CITED

CONSTITUTIONAL PROVISIONS CITED

OTHER AUTHORITIES

STATEMENT OF ISSUES

Was the defendant's right to effective assistance of counsel violated by trial counsel's failure to introduce the joint savings account "Personal Signature Card"as an exhibit, move for judgement of acquittal at the conclusion of the case, and request special jury instructions on the law of joint savings accounts and powers of attorney?

How the circuit court ruled: The circuit court denied the defendant's post-conviction motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant believes oral argument would be helpful to the court in this case. Publication of an opinion on this case would be helpful to the development of law on issues of Ineffective Assistance of Counsel in Theft by Employee, Trustee, or Bailee (Embezzlement) cases.

STATEMENT OF THE CASE AND FACTS

Phyllis M. Schwersenska is the mother of HR. HR is deaf and an adult child of Schwersenska. By the time the trial in this matter commenced on May 11, 2016, HR had married and went by the name HS. At some point long before the filing of a criminal complaint in this case, HR and Schwersenska opened a joint savings account. At some point in 2008, a durable power of attorney was created. But this durable power of attorney document was subject to questions about its validity and format. And at some

later point, HR accused her mother of theft from this joint savings account from October 8, 2010 through July 30, 2012. Schwersenska has always maintained her innocence, and claimed she is not guilty of theft. (4:1-9; 78: 2-4; 145: 87-102, 102-112, 115-187).

For consistency's sake, throughout this brief, HR will be referred to as H.S., aka H.R.

Since childhood, H.S., aka H.R., has been receiving a social security payment because she is deaf. Payments are made into a joint savings account she shared with Schwersenska. In 2008, a power of attorney document is created. But the joint savings account continued to exist. H.S., aka H.R.'s name is on the joint savings account and Schwersenska's name is on the joint savings acccount. H.S., aka H.R. was approximately 30 years old when the power of attorney document was created. H.S., aka H.R.'s disability payments and a lump sum refund in the amount of $11,000.00 from Social Security are deposited in this joint savings account. In October 2010, H.S., aka H.R., also obtained a settlement from a discrimination lawsuit and received $30,335.00. The money from that settlement was deposited in the joint savings account she had with Schwersenska. H.S., aka H.R., withdrew $7,000.00 to purchase a vehicle. H.S., aka H.R., also gave Schwersenska $6,000.00 for her mother's assistance in making calls for her, attending court and talking to lawyers during the time of the lawsuit. From October through December of 2010, H.S., aka H.R., believed

approximately $22,000.00 was withdrawn from the account and her bills at that time were approximately $4,000.00. H.S., aka H.R. believed Schwersenska went to the Casino during the time periord in question two to three times per week. H.S., aka H.R., contended that Schwersenska was spending money from the joint savings account at the casino. H.S., aka H.R., was unable to say how much money she believed exactly was withdrawn from the joint savings account without her permission by Schwersenska. H.S., aka H.R., testified to a number of withdrawals by Schwersenska which she claimed were without her permission and knowledge. But insisted that she believed Schwersenska withdrew tens of thousands of dollars without permission in the period between October 8, 2010 through July 30, 2012. H.S., aka H.R., also believed that a number or withdrawals by Schwersenska from the joint savings account in the period between October 8, 2010 through July 30, 2010 were without her knowledge and without her permission. (4:1-9; 78:2-4; 145: 89-92,131-137, 139-141, 177-180,)

Only one bank employee testified at trial, Tanya Walsh-Laehn, as to the joint savings account discussed above. Marshall and Isley Bank is now BMO Harris Bank. She identified H.S., aka H.R., and Phyllis Schwersenska as the names on the joint savings account. She did say that her bank has savings accounts called joint accounts: a joint account is a bank account where to two or more people have rights over the ownership of the account.

She also said that joint accounts are a type of account in which account holders may deposit, withdraw, or deal with the funds in the account regardless of who puts the money in the account. When shown the “Durable Power of Attorney” document, Ms. Walsh-Laehn seemed to indicate that she had questions about the validity of this document. She said if this document had been presented to her as an official power of attorney at her bank she would not have immediately accepted the document. Instead, she “would have submitted this to the legal department.” She did not know whether the “Durable Power of Attorney” was submitted to the legal department. (146: 6-9; 61: 1-4)

Sgt. Paul Morrison of the Adams County Sherrif's Office recieved a packet of information from Attorney Arendt who represented H.S., aka H.R., in 2013. This attorney asked Sgt. Morrison to look into a matter involving H.S., aka H.R. and some missing money from her account in February of 2013. Sgt. Morrison made contact with H.S., aka H.R.. He also arranged an interview of Schwersenska in April of 2013. At that meeting, Schwersenska provided Sgt. Morrison with records including what he believed to be paperwork from an insurance settlement. In February 2013, he obtained bank records related to Schwersenska from BMO Harris, formerly M&I Bank, in response to a subpoena. From these records, he prepared a summary of transcations, withdrawals, deposits and the balance in the joint savings account of H.S., aka H.R., and Schwersenska. He also

prepared a summary of withdrawals, deposits, and the balances by day for a separate bank account held by Schwersenska and her husband, Tom Schwersenka, Sr. Finally, he prepared a summary of H.S., aka H.R.'s receipts and bills paid by month from October 2010 to July 2012. During Sgt. Morrison's testimony, errors were noticed in his summary of H.S., aka H.R.'s receipts and bills paid from October 2010 to July 2012. A new summary was created of H.S., aka H.R.'s receipts and bills paid from that time period with corrections and was admitted into evidence. The general trust of Sgt. Morrison's presentation was that his summaries demonstrated tens of thousands of dollars were withdrawn from the joint savings account by Schwersenska. And these withdrawals were without the knowledge and consent of H.S., aka H.R.. (4:1-9; 78:2-4; 146: 17-64; 147: 33-51)

Todd Burbey, the survellience director for Ho-Chunk Gaming Wisconsin Dells, determined from examining records related to a players club account with Ho-Chunk Gaming that Schwersenska had spent $18,442.44 on slot machines from October 2010 through July 30, 2013. During the same period of time, Schwersenska netted a loss of $800.14. He also concluded during a 22 month period the players club card was used every month. In the period of the first half of the year 2011, he also concluded that Schwersenska's players card was used three days a week every week. (4:1-9; 78:2-4; 146: 109-115; 147: 33-51)

On August 27, 2013, the state filed a criminal complaint charging Phyllis M. Schwersenska with one count of Theft- Business Settings (Special Facts) contrary to Wisconsin Statutes Section 943.20(1)(b)&(3)(d) and another count of Felony Bail Jumping contrary to Wisconsin Statues Section 946.49(1)(b). An Initial Appearance was held on October 8, 2013. (141: 1-5). Schwersenska waived her right to a Preliminary Hearing on May 7th, 2014. (13: 1-1). On May 7th, 2014, an Information was filed charging Schwersenska with the same two counts in the criminal complaint. Schwersenska stood mute. A not guilty plea was entered on her behalf. (148: 1-14; 13:1-1; 14: 1-1).

Following a jury trial held in Adams County Circuit Court from May 11, 2016 to May 13, 2016, the jury returned verdicts of guilty on both counts of the Information, the Theft and Bail Jumping charges. The jury also made a finding that as to the Theft charge that the value of money used was more than ten thousand dollars. (145:1-191; 146: 1-147; 147: 1-116: 52: 1-4; 147: 109-110). On August 4, 2016, the circuit court sentenced the defendant on the Theft charge in Count 1 as follows. Sentence was withheld and Schwersenska was placed on probation for five years. As a condition of probation, Schwersenska was ordered to serve a one year at the Adams County Jail. As to the Bail Jumping charge in Count 2, the circuit court ordered a three year period of probation with the same conditions of probation as

set in regard to Count 1. The probation periods are running concurrently as to both counts. The State requested that Schwersenska be ordered to pay $35,000 in restitution. The court denied the request for restitution because the court found that Schwersenska lacked the ability to pay restitution. The Judgement of Conviction was entered on August 5, 2016. On August 15, 2016, Schwersenska filed a Notice of Intent to Pursue Post-Conviction Relief. (95; 1-3; 96: 1-1; App.1: 1-3; 149: 13, 44-48, 63-71).

On February 21, 2018, Schwersenska filed a post conviction motion and an amended post conviction motion seeking a new trial. A post conviction motion hearing was held on June 4, 2018. Trial counsel Michael Hughes, testified at this hearing. On June 22, 2018 the State filed a post hearing brief. On July 2, 2018, Schwersenska filed a post hearing brief and an amended and corrected post hearing brief. On July 20, 2018, after hearing arguments from both parties, the circuit court ruled from the bench and denied the Schwersenska's motion for post-conviction relief. On July 25, 2018, the circuit court entered a formal written Order Denying Defendant's Post-Conviction Motion which was electronically signed by the Honorable Paul S. Curran on July 24, 2018. Schwersenska timely filed a notice of appeal on August 1, 2018. She continues to serve the probation sentence imposed by the circuit court. (117: 1-11; 118: 1-11; 123: 1-9; 125: 1-17; 126: 1-17; 161: 1-37; App. 2: 1-18; 129:

1-1; App. 3: 1-1; 130: 1-5).

Further facts will be discussed where necessary below.

I. SCHWERSENSKA'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY TRIAL COUNSEL'S FAILURE TO INTRODUCE THE JOINT SAVINGS ACCOUNT "PERSONAL SIGNATURE CARD" AS AN EXHIBIT, MOVE FOR JUDGEMENT OF ACQUITTAL AT THE CONCLUSION OF THE CASE, AND REQUEST SPECIAL JURY INSTRUCTIONS ON THE LAW OF JOINT SAVINGS ACCOUNTS AND POWERS OF ATTORNEY.

A. The Standard of Review

Ineffective assistance of counsel claims present mixed questions of fact and law. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *State v. Harvey*, 139 Wis.2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which an appellate court reviews *de novo. Pitsch*, 124 Wis.2d at 634, 639 N.W.2d 711.

B. The Law of Ineffective Assistance of Counsel

"In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." U.S. CONST. Amend. VI (applicable to the States by U.S. CONST. Amend. XIV; *See State v. Doe*, 78 Wis. 2d 161, 254 N.W.2d 210 (1977)); See *Strickland v. Washington*, 466 U.S. 668 (1984); WIS. CONST. Art. 1, Sec 7. Assistance of counsel must be "effective" to satisfy the Sixth Amendment. *State v Felton*, 110 Wis, 2d 485, 499, 329 N.W.2d 161, 167 (1983); *State ex.rel. Seibert v Macht*, 244 Wis.2d 378, 389, 627 N.W.2d 881, 886 (2001). To establish a claim for inefffective assistance of counsel in violation of the United States and Wisconsin Consitutions, a defendant must show: 1) that counsel's peformance was deficient and 2) the deficient performance prejudiced the defense. *State v Smith*, 207 Wis. 2d 258, 274, 558 N.W.2d 379, 386 (1997).

1. Prong one of an ineffective assistance of counsel claim: deficient performance.

"To prove deficient performance [prong one] a defendant must establish that counsel 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment. '" *Smith*, 207 Wis. 2d at 274, 558 N.W.2d at 386 (citation omitted). The standard for deficient performance is if the "counsel's representation fell below an objective standard of

reasonableness."*Strickland*, 466 U.S. at 688; *State v Ambuehl*, 145 Wis. 2d 343, 351, 425 N.W.2d 649 652 (Ct.App.1988). In assessing the reasonableness of counsel's conduct, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

2. Prong two of an ineffective assistance of counsel claim: prejudice to the defense.

The second prong under *Strickland* requires counsel's performance to be prejudicial. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *State v. Moffet*, 147 Wis.2d 343, 354, 433 N.W.2d 572, 576 (1989) (quoting *Strickland***,** 466 U.S. at 693). Instead, a defendant only needs to demonstrate that if not for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694: "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* , 466 U.S. at 694: *Smith* 207 Wis, 3d at 276, 558 N.W.2d at 387. All that is required is that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith* 539 U.S. 510, 537 (2003). "Even if the odds that the defendant would have been acquitted had he received effective representation appear to be

less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible. '" *U.S. v. Leibach*, 347 F. 3d 219, 246 (7th Cir. 2003) (quoting *Miller v Anderson*, 255 F.3d 455, 459 (7th Cir.2001)). This court should not make an inquiry into the "reliability" or "fundamental fairness" of the proceedings. See *Goodman v. Bertrand* 467 F.3d 1022, 1028-29 (7th Cir.2006); *Washington v Smith*, 219 F. 3d 620, 632-33 (7th Cir. 2000).

C. Factual Background Particularly Relevant to the Ineffective Assistance of Counsel Claim.

H.S., aka H.R., is the adult daughter of the defendant, Phyliss Schwersenska. A joint savings account was opened and signed by the joint owners of the account, H.S., aka H.R., and Schwersenska, at Marshall and Isley Bank on February 23, 2007 as confirmed by a “Personal Signature Card”. H.S., aka H.R., is deaf, and has been since she was 18 months of age. (160: 17-18; 122: 1-1; 145: 87, 90,119-120). H.S., aka H.R., claimed the joint savings account was opened as a child during her testimony at trial. But she must have been confused. The account was in fact opened when she would have been 29 years old. (117: 1-11; 118: 1-11; 160: 17-18, 122: 1-1; 145: 143-144;168).

Only one joint savings account was the subject of the State’s theory that Schwersenska by virtue of her office as a power of attorney stole

significant sums of money deposited in this same joint savings account over the course of a few years. The State believed, in essence, that Schwersenska had possession and control of money in trust owned only by H.S., aka H.R., subsequent to the creation of a "Durable Power of Attorney" form on April 9, 2008. And that this same document made Schwersenska an attorney in fact for H.S., aka H.R.. The State explained the theory of prosecution in opening statement, "So at this time, Phyllis, having power of attorney, can go to the bank, fill out a slip and withdraw [H.S.'s, aka H.R.] money without question, without restriction. Nobody at the bank asks her why she's doing that. Nobody at the bank makes her prove what she's going to do with the money. She essentially has unfettered access to the money. And there's quite a lot of it. Now, as power of attorney, a person is supposed to exercise that authority for the benefit of the person they're representing. So Phyllis is supposed to use that authority only for [H.S., aka H.R.]. Unfortunately, and this is in the contract, this is essentially explained in the power of attorney, what your duty is. Phyllis didn't respect that responsibility. Power of Attorney is trusted to do the right thing. That's why they're called a trustee. But you're going to see that Phyllis violated this trust. And in doing so, she committed the crime of theft. She took thousands of dollars of [H.S.'s, aka H.R.] money, and she used it for herself. She gave it to other people. . . . "(117: 1-11; 118: 1-11; 160: 17-18; 122: 1-1; 145: 90-92; 87-102; 143-144; 61: 1-4).

And a little over one year after opening the joint savings account with her mother, the defendant, on April 9, 2008, H.S., aka H.R., now age 30, signed a document called a “Durable Power of Attorney”. At the time the trial of this matter commenced on May 11, 2016, H.R. had married and went by the name H.S.. H.R. is the name H.S. went by in February 23, 2007 and is the name on the “Personal Signature Card” by which she opened with her mother, Phyllis Schwersenska, the joint savings account at Marshall and Isley Bank. At the time she signed the “Durable Power of Attorney” document, she also went by the name H. R.. (160: 17-18; 122: 1-1; 145: 87, 90, 115-116, 119-120; 61: 1-4).

The opening paragraph of the “Durable Power of Attorney” document declares, “I, H.R., . . . make and appoint Phyllis Schwersenska Thomas Schwersenska as my attorney in fact (hereinafter “agent”). . .”. But by the terms of this “Durable Power of Attorney” document, Phyllis Schwersenska never agreed in writing, as acknowledged and confirmed by her signature, to act as attorney in fact or, for that matter, agent for H.R. aka H.S.. H.R. signed the document and merely agreed to be her own agent. However, the document appoints Phyllis or Thomas Schwersenska as H.R.’s successor agent. In the spot on the document where a signature of a person agreeing to be an agent only the signature of H.R. is found. By its terms and by the place in

the document which bares her signature, H.R. is agreeing to be her own power of attorney and her own agent. Phyllis Schwersenska did not sign this section of the document. Even H.S., aka H.R. acknowledged as much. (145: 145-146; 61: 1-4). At most, by their signatures on this same document, Phyllis and Tom Schwersenska, only and specifically signed and accepted an appointment to act as successor agents to the agent, H.R., but only "if the agent is unwilling or unable to act." (145: 145-146; 61: 1-4).

Only one bank employee testified at trial, Tanya Walsh-Laehn, as to the joint savings account discussed above. Marshall and Isley Bank is now BMO Harris Bank. She identified H.S., aka H.R., and Phyllis Schwersenska as the names on the joint savings account. She did say that her bank has savings accounts called joint accounts: a joint account is a bank account where to two or more people have rights over the ownership of the account. She also said that joint accounts are a type of account in which account holders may deposit, withdraw, or deal with the funds in the account regardless of who puts the money in the account. When shown the "Durable Power of Attorney" document, Ms. Walsh-Laehn seemed to indicate that she had questions about the validity of this document. She said if this document had been presented to her as an official power of attorney at her bank she would not have immediately accepted the document. Instead, she "would have submitted

this to the legal department." She did not know whether the "Durable Power of Attorney" was submitted to the legal department. (146: 6-16; 61: 1-4).

H.S.'s, aka H.R., daughter, Melissa, testified on behalf of the defendant. She made clear a number of important matters. Phyllis Schwersenska, her grandmother, did not control family members. She described her own mother's shopping habits as expensive. She recalled seeing Phyllis give H.S., aka H.R., money at least a couple of times a month. She witnessed Phyllis and H.S., aka H.R. reviewing the joint savings account bank book, exhibit 4, regarding the joint savings account and she made clear, "My mom. Well, it was a joint account, so it was both of their bank accounts. So they would sit down with the joint account bank book and look at it." And again when shown the bank book, Melissa, when asked to identify whose bank book it was, said, "it looks like the joint one for my mom and my grandma." (146: 123-130, 128-129, 129-130; 60: 1-5).

"The Durable Power of Attorney" document was received in evidence as exhibit 5 and the joint savings account bank book described above was received in evidence as exhibit 4. (60: 1-5; 61: 1-4; 145: 188-190).

D. Trial Counsel's Failure to Introduce Into Evidence the Joint Savings Account "Personal Signature Card".

Trial counsel never argued that Phyllis Schwersenska did not commit a theft and could not have committed a theft because, as party to the joint savings account opened with her daughter, H.S., aka H.R., Shwersenka was the owner of the monies in the account. Therefore she could not have been convicted of stealing her own property. Only two people opened this account, Phyllis Schwersenska and H.S., aka H.R.. Only two people owned the funds in this account, Phyllis Schwersenska and H.S., aka H.R.. The invalid boiler plate, "Durable Power of Attorney" document, changed nothing about the nature of the account or the relationship between Schwersenska and H.S., aka H.R.. The jury never heard or saw the language below from the bank document creating this joint savings account, "Personal Signature Card": "If this account is designated as 'joint', THE ACCOUNT IS JOINTLY OWNED BY THE PARTIES NAMED HEREON, UPON THE DEATH OF ANY OF THEM, OWNERSHIP PASSES TO THE SURVIVOR(S). IF THERE ARE TWO OR MORE SURVIVING PARTIES, THEY SHALL TAKE AS JOINT TENANTS. THE SURVIVOR IS NOT REQUIRED TO SURVIVE THE DEATH BY ANY SPECIFIED PERIOD." (160: 17-18; 122: 1-1).

Phyllis Schwersenska had an ownership

interest in the joint savings account opened with her daughter, H.S., aka H.R., in 2007. Phyllis is not guilty of theft of property belonging to another because the property belonged to Phyllis and H.S., aka H.R., jointly. “The Durable Power of Attorney” document created in 2008 did not create a relationship change between Phyllis and H.S., aka H.R., because Phyllis never agreed to assume responsibility as a power of attorney. She and her husband by the terms of this document only agree to act as successor agents to the agent, H.S., aka H.R.. Whatever this document is it cannot be said that the intent of the parties was to clearly and convincingly establish a power of attorney over this account. Therefore it is invalid as a power of attorney as creating a relationship where Phyllis Schwersenska would be the power of attorney for H.S., aka H.R.. There was no evidence admitted at trial that this joint savings account itself had been transformed into a trust account or any type of fiduciary account by bank personnel, bank legal department, or any other bank official. And the jury in Schwersenska’s case never got to see the language in the joint savings account “Personal Signature Card” establishing joint ownership of the funds in the account. (117: 1-11; 118: 1-11; 122: 1-1; 160: 17-18, 6-32; 145: 87, 90, 87-102; 143-144; 61: 1-4; 146: 6-16).

One very important point in regard to this joint savings account must be clarified here. It was not clarified at trial. Perhaps H.S., aka H.R., was

confused in her testimony. But this joint savings account was actually opened when she was an adult, not as a child. She would have been a 29 year old woman when she opened this account with her mother, the defendant, as H.S.'s, aka H.R., date of birth on the signature card, confirms. It would have been helpful for the jury to know this important fact. But they would, of course, not know this important fact because trial counsel failed to introduce the "Personal Signature Card" opening the joint savings account into evidence at trial.(117: 1-11; 118: 1-11; 122: 1-1; 160: 17-18, 6-32; 145: 87, 90, 87-102; 143-144; 188-190; 61: 1-4; 146: 6-16).

The failure to introduce into evidence the joint savings account "Personal Signature Card" was deficient performance because this error precluded trial counsel from successfully arguing a motion for judgement of acquittal at the conclusion of the case and also deprived him of a solid closing argument that the defendant had committed no crime because she owned the account. She was not guilty of stealing from another. She also was not guilty of bail jumping because she had committed no criminal offense while on bond.

E. Trial Counsel Failed to Argue a Motion for Judgement of Acquittal at the Conclusion of the Case.

And without introduction of the joint savings

account “Personal Signature Card” into evidence, trial counsel would have had little evidentiary support for a motion to dismiss based on the argument Phyllis Schwersenska did not commit a theft and could not have committed a theft because, as party to the joint savings account opened with her daughter H.S., aka H.R., Shwersenska was the owner of the monies in the account jointly with her daughter. Therefore she could not have been convicted of stealing her own money. Trial counsel’s error in failing to introduce this key piece of evidence was deficient. And Shwersenska has shown she was prejudiced by his deficient performance because she stands convicted of a Theft she could not have committed and a Bail Jumping offense she could not have committed because she did not commit an offense when out on bond, i.e. the alleged Theft in this case.

Schwersenska believes that she would have prevailed on a motion for judgement of acquittal at the conclusion of all the evidence in the case if the “Personal Signature Card” was introduced. This is so for a number of reasons. First, Wisconsin’s Theft Statute, 943.20, does not explicitly contemplate the crime of theft from a joint savings account. Secondly, while Wisconsin Courts have not specifically addressed the issue of whether a defendant can face criminal prosecution for making unauthorized withdrawals from a joint account, a number of other courts have reached the issue.

See, e.g., Hinkle v. State, 355 So.2d 465, 467 (Fla. Dist. Ct. App. 1978) (noting that a "a co-owner of a joint bank account cannot be guilty of larceny of funds in the joint account"); *State v. Kane*, 992 P.2d 1283, 1286 (Mont. 1999) (holding that the district court did not err in finding that a co-owner of a joint checking account could not be prosecuted for theft of funds from the joint account when no fraud had been alleged in establishment of the account); *State v. Haack*, 713 P.2d. 1001, 1003 (Mont. 1986) (explaining that the special relationship between joint tenants in a bank account precludes application of the theft laws). Third, Wis. Stats., § 705.03, Ownership During Lifetime, provides Schwersenska with a statutory and absolute defense to this charge because unless there is clear and convincing evidence of a different intent, "A joint account belongs, during the lifetimes of all parties, to the parties **without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment.** The application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability . . ." (emphasis added).

And finally, counsel failed to argue that the purported "Durable Power of Attorney" document did not change the nature of the joint account here. The joint account remained a joint account. Trial

counsel failed to argue for a motion for judgement of acquittal on the basis of a controlling Wisconsin precedent. The Supreme Court of Wisconsin has ruled that ". . . [W] hen a POA agent and a principal share a preexisting joint checking account, the execution of a POA document, in and of itself, is not 'clear and convincing evidence of a different intent' under Wis. Stat. § 705.03." *Russ v Russ*, 2007 WI 83 ¶¶ 28-31, 302 Wis 2d 264, 734 N.W.2d 874. Trial counsel should have argued for acquittal of the Theft charge and the Bail Jumping charge under the facts and holding in this Wisconsin Supreme Court decision. The State had not proved by the lesser standard of clear and convincing evidence a different intent under Wis. Stat. 705.03. But since Schwersenska was being prosecuted in a criminal case and not the subject to a civil lawsuit, Schwersenska contends the State was obligated to prove a different intent under Wis. Stat. 705.03 **by proof beyond a reasonable doubt,** not the lesser standard of clear and convincing evidence. This argument is consistent with Schwersenska's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Schwersenska is not obligated to prove her innocence. The State is obligated to prove her guilt beyond a reasonable doubt. Under the due process clause of the United States Constitution, the State and a trial court may not shift the burden of proof to the defendant through the use of jury instructions. *Sandstrom v. Montana*, 442 U.S. 510 (1979). And since Wis. Stats. 705.03 and the holding in the *Russ* decision

seem to establish an affirmative defense to the charge here, the State would be obligated to prove beyond a reasonable doubt that Schwersenska was not entitled to this defense. Well established state procedure places the burden on the state to disprove an affirmative defense. *See Moes v. State*, 91 Wis. 2d 756, 768, 284 N.W.2d 66 (1979): "Though we conclude that the federal due process clause does not require the state to disprove beyond reasonable doubt the statutory defense of coercion, this burden is imposed upon the state as a matter of Wisconsin law."

The failure to argue a motion for judgement of acquittal at the conclusion of the case was deficient performance by trial counsel for the reasons above. Schwersenska was prejudiced by this deficient performance.

F. Trial Counsel Failed to Request a Special Jury Instruction Based on the Language in Wis. Stat. § 705.03(1) and *Russ v Russ*, 2007 WI 83 ¶¶ 28-31, 302 Wis 2d 264, 734 N.W.2d 874.

In the event that the trial court had denied a motion for judgement of acquittal, trial counsel's performance was still deficient and Schwersenska was thereby prejudiced by a failure to request that the Court instruct the jury as to the law of joint accounts as they relate to a power of attorney executed subsequent to the opening of a joint

account based on the language in Wis. Stat. § 705.03(1) and language from *Russ v Russ*, 2007 WI 83 ¶¶ 28-31, 302 Wis 2d 264, 734 N.W.2d 874. The jury therefore along these lines should have been instructed as follows "Under Wisconsin law, a joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment. When a Power Of Attorney agent and a principal share a preexisting joint checking account, the execution of a Power Of Attorney document, in and of itself, is **not proof beyond a reasonable doubt** of a different intent as to ownership of the joint account and ownership of the sums on deposit without regard to the proportion of their respective contributions."

The jury here was left in the dark as to an important area of the law. Thus depriving the defendant of an acquittal. Again trial counsel's performance is deficient in failing to seek jury instructions which would have supported a theory of defense. The defendant was thereby prejudiced.

G. Trial Counsel's Testimony at the Post Conviction Motion Hearing Does Not Refute the Validity of Schwersenska's Ineffective Assistance of Counsel Claims.

Trial counsel explained at the post conviction

motion hearing. “The pretrial strategy between Mrs. Schwersenska and I was to accept the fact that Mrs. Schwersenska was the power of attorney for her daughter and that she was not mishandling the money, but actually was handling the money very well, but the money was missing because Mrs. Schwersenska [H.S., aka H.R.] was a spendthrift and could not account for her own withdrawals. And that’s why we had filed motions with the Court to admit the fact that Mrs. Schwersenska had appropriately managed the money of all of her other children, as well as her granddaughter, as a way to show that everything else is going well with the rest of the family, so clearly the problem is with [H.S., aka H.R.]. We had also submitted to the prosecution through discovery a copy of a ledger that Mrs. Schwersenska had kept to document how well the money was being managed from the joint account between her and [H.S., aka H.R.]. So we had intended to tackle this issue head-on and take the offensive by saying the money was missing due to [H.S., aka H.R.], not due to Mrs. Schwersenska. So I didn’t think that it would have been appropriate in the pretrial to advance that strategy as well as the fact that Mrs. Schwersenska did not have any responsibility to the money because she felt she did pursuant to our strategy.” (160: 17-18).

As the record reflects the pretrial motions to introduce evidence that Schwersenska had demonstrated sound financial practices in management of other family members’ financial

accounts were denied by the circuit court prior to trial. (144: 31-33). And so from the start, trial counsel chose a doomed strategy. **Trial counsel should never have conceded that the "Durable Power of Attorney" created an office of power of attorney for Phyllis Schwersenska or that Phyllis Schwersenska was acting as an attorney in fact or agent for her daughter as it relates to the joint savings account.** By making this concession at trial, trial counsel doomed any chance of acquittal. This is so because in doing so he relieved the State of proving beyond a reasonable doubt one of the elements of offense of Theft, Wis. Stats. 943.20(1)(b), in this case. (Under Wisconsin Criminal Jury Instruction 1444, that State had to prove the defendant had possession of money belonging to another because of her "office." The circuit court here instructed the jury, "the office of attorney in fact can be created by a power of attorney document."). (147: 31-32). Trial counsel conceded one of the most important elements of this offense. That is Schwersenska had possession of the money belonging to another by virtue of being the power of attorney.

Trial counsel failed to make the most crucial argument. Schwersenska did not commit a theft. Schwersenska was an owner of the monies in the account because this was a joint savings account. The jury should not convict her of stealing what the law recognizes as her own property. In short,

Schwersenska did not violate the law and did not commit a crime.

H. The State's Arguments, Raised in Its Post Hearing Brief, that Trial Counsel Provided Effective Assistance of Counsel Are Unconvincing.

The State made the argument below that presentation of the joint savings account "Personal Signature Card" was not necessary to convince the jury that a joint account existed and did not support the defense's theory of its relevance in any way. (123: 3). The State's argument misses the mark. The joint savings account "Personal Signature Card" would have established much more than that a joint account existed. This bank document would have offered the first definition showing that Schwersenska owned the same account that H.S., aka, H.R., owned. It would have been the first step showing that no theft occurred here as a matter of law. Schwersenska is not guilty of theft. She did not commit a theft. And she could not have committed a theft because as party to the joint savings account opened with her daughter, H.S., aka H.R., Schwersenska was the owner of the money in the account. Therefore she could not have been convicted of stealing her own property.

The State goes on to cite the many instances in closing argument where trial counsel argued, among other things, that Schwersenska had authority over the account, had control over the

account, and "had control by virtue of simply having a joint bank account." (Id; 147: 52-60). These arguments advanced the State's theory of prosecution. Trial counsel failed to claim Schwernska's ownership of this joint savings account. He used prosecution phrases such as, "control", "authority", which conceded Schwersenska was in a position of trust rather than ownership. Trial counsel failed to advance in his closing argument the fact that Schwersenska is an owner of the money in the account as much as H.S., aka H.R..

A few parting thoughts in reply to the State's arguments. What would have been the harm of introducing into evidence a bank document which clearly showed the jurors and the circuit court that Schwersenska was not just a name on an account? What would have been the harm of introducing into evidence a bank document which would have proved Schwersenska was an owner of the monies in this account as a matter of law? What would have been the harm of litigating a motion for judgement of acquittal on both the Theft and the Bail Jumping charges as a matter of law? What would have been the harm of requesting a jury instruction that would have assured acquittal and supported a successful theory of defense? Here the errors by trial counsel establish a reasonable probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Schwersenska argued that the circuit court should

have concluded that “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537.

I. Trial Court Erred in Denying the Post Conviction Motion

The circuit court rejected Schwersenska's ineffective assistance of counsel claim as without merit and ruled as follows. "It is the intent of the donor in this case, [H.S., aka H.R.], that is determinative and it must be determined by all of the evidence. If the evidence is clear that there is intent to establish a single-party account with agency or constructive trust, then it is an account of convenience. And the testimony of [H.S., aka H.R.] established that this was an account of convenience. . . . So since that is the linchpin upon which all of the arguments about Mr. Hughes's performance hinges, perhaps in a different context, I agree that the power of attorney didn't change anything regarding this joint account and, more significantly, regarding the conviction. Because if the jury decided the case based on the power of attorney, then there was a breach of fiduciary duty. There was an agency there, and that jury verdict would be supported by the law. If they decided it based on the joint account without concern of the power of attorney, well, it was an account of convenience. [H.S., aka H.R.] owned it. Phyllis Schwersenska did not own it and took money out of it for her own purposes. . . . [T]he crucial thing

here is this is an ineffective assistance of counsel claim. Should Mr. Hughes have pursued the issue of joint ownership more aggressively by marking the signature card, by arguing the Russ case? All of that is a red herring. It would not have mattered because Phyllis Schwesenska had no ownership interest in that account. As a result, there is no prejudice to her. And as a result of that, there is no ineffective assistance of counsel." (161: 26-34; App. 2: 1-18).

The circuit court decided Schwersenska's ineffective assistance of counsel claim by relying on case law interpreting the concept of an "account of convienence". In support of its reasoning, the court cited to the following decisions *Estate of Michaels*, 26 Wis.2d 382, 132 N.W.2d 557 (1965) (Although the form of the account is not conclusive, an account opened in joint names raises a rebuttable presumption that the creator of such an account intended the usual rights incident to jointly owned property, such as rights of survivorship, to attach to it. Evidence showing a different intent, for instance that the **joint names were adopted for convenience** without the intent of conferring ownership, may serve to prove agency or trusteeship in the third party in respect to the account but in the absence of such evidence, which must be clear and satisfactory, the presumption that the depositor intended the usual incidents of jointly held property when he or she opened a joint account is sufficient to support a

finding to that effect.). *Selchert v Selchert,* 90 Wis.2d 1, 280 N.W.2d 293 (Ct. App. 1979) (In this appeal of a divorce action, Mrs. Selchert and her mother were co-owners of two savings accounts containing approximately $18,000. Mrs. Selchert testified they were "convenience" accounts, that the money in the accounts was deposited entirely by her mother, that Mrs. Selchert never withdrew any money from the account, and that Mrs. Selchert's name was removed from the account after the divorce action was commenced. On the basis of this uncontroverted testimony, the Court of Appeals held that the money in the account was not the property of the parties to the divorce action, and accordingly should not have been subject to division by the trial court.), and *Bell v Newgart***,** 2002 WI App 180, 256 Wis.2d 979, 650 N.W.2d 52. (This appeal arose out of a dispute concerning two bank accounts of the deceased, June Ann Christopherson. The bank accounts were in the names of Christopherson and Mae Neugart, Christopherson's sister and personal representative of the estate. Joan Jameson and Leonard Kosobud, children of deceased siblings of Christopherson, sought to prove that the accounts were not true joint accounts and to have Neugart removed as personal representative. The Court of Appeals reversed the court's determination that the bank accounts are true joint accounts and remanded for a hearing on the issue of Christopherson's intent). (161: 1-37; App. 2: 1-18)

For a number of reasons, the circuit court erred in denying Schwersenska's motion for a new trial on ineffective assistance of counsel grounds. First, the above three cases relied upon by the circuit court in denying Schwersenska's motion for new trial are not on point because the State's theory of prosecution was never that the joint savings account in this case was a "account of convenience" rather than a true joint savings account. Second, the cases relied upon by the circuit court in denying Schwarsenska's motion for new trial are not on point because the State's theory of prosecution was based on the idea that the invalidly drafted and executed power of attorney somehow created a special fiduciary relationship of trust, changing the ownership nature of the joint savings account, which had not existed before the creation of the power of attorney. (145: 87-102; 147: 33-51, 83-97). Third the cases relied upon by the circuit court in denying Schwersenska's motion for new trial are not on point because nothing in the record confirms that trial counsel made a strategic decision not to argue that the account was a true joint account, because he believed the account was an "account of convenience". In fact, his questioning of witnesses throughout the trial seemed to indicate he believed that the joint savings acccount was a true joint savings account rather than an account of convenience. (145: 143-164, 180-187; 146:10-15, 66-89, 105-107, 115-117, 133-138, 140-141, 143-144).

No theft occurred because Schwersenska and her daughter jointly owned the savings account. Schwersenska could not steal from an account in which she had a joint ownership interest. She was free to withdraw money from the account. She was also free to make deposits to the account. The invalidly drafted and executed power of attorney changed nothing. Schwersenska was wrongly convicted of Theft and Bail Jumping. If trial counsel had made the arguments and introduced evidence as argued above, Schwersenska would not have suffered any criminal convictions in this matter.

CONCLUSION

In light of the arguments advanced above, Phyllis M. Schwersenska requests that this Court reverse the circuit court's order denying a new trial and vacate the Judgement of Conviction.

Dated this 15th day of March, 2019.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font:

Arial: 14 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The brief's word count is 7514 words.

Dated at Milwaukee, Wisconsin, this 15th day of March, 2019.

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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 s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of 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 at Milwaukee, Wisconsin, this 15th day of March, 2019.

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CERTIFICATION OF 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 Wis.Stat. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinions of the trial court;

(4) portions of the record essential to an under- standing of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

(5) and a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

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.

Dated at Milwaukee, Wisconsin, this 15th day of March, 2019.

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