STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP1619-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHYLLIS M. SCHWERSENSKA,

Defendant-Appellant.

ON APPEAL FROM A JUDGEMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN ADAMS COUNTY CIRCUIT COURT, THE HONORABLE PAUL S. CURRAN, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Phyllis M. Schwersenska renews and preserves all arguments advanced in her earlier brief. In this brief, she will concentrate on replying to a number of major issues. However, she, by no means, abandons any of the grounds for relief argued in the appellant's original brief.

ARGUMENT

I. Schwersenska right to effective assistance of counsel was denied by the deficient performance of trial counsel.

The State makes the argument that Schwersenska has not proven that trial counsel's performance was deficient. The State reasons along these lines, trial counsel "articulated a reasonable strategic reason for not introducing the personal signature card for the joint savings account: he already elicited information from the bank manager concerning joint ownership rights with a joint account, and therefor concluded that admission of the card would have been redundant."(State's Brief at 19-21). This argument is without merit for a number of reasons.

First, 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., Schwersenska 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.. Only two people owned the funds in this account, Phyllis Schwersenska and H.S.. 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.. 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).

Second, Phyllis Schwersenska had an ownership interest in the joint savings account opened with her daughter, H.S., in 2007. Phyllis is not guilty of theft of property belonging to another because the property belonged to Phyllis and H.S., jointly. "The Durable Power of Attorney" document created in 2008 did not create a relationship change between Phyllis and H.S., 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.. 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.. 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).

Third, 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., Schwersenska 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 Schwersenska 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.

II. Schwersenska has proven prejudice that resulted from trial counsel's failure to make arguments that would have resulted in dismissal and acquittal .

The State argues that Schwersenska can not prove prejudice (State's Brief at 24-29). This argument is without merit.

The State fails to address a number of compelling arguments based on case law which demonstrate that the circuit court erred in rejecting Schwersenska's ineffective assistance of counsel claim. (State's Brief at 8-32). These arguments were raised in the defendant-appellant's initial brief (see Defendant-Appellant's Brief 22-32).

The circuit court decided Schwersenska's ineffective assistance of counsel claim by relying on case law interpreting the concept of an "account of convenience". 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).

The circuit court erred in denying Schwersenska's motion for a new trial on ineffective assistance of counsel grounds. (161: 26-34; App. 2: 1-18). 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 Schwersenska'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 account 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).

The State's brief places great reliance on the circuit court's erroneous decision that an "account of convenience" existed as to the joint account which Schwersenska owned along with H.S..The State also seems to have placed great reliance on the misguided notion that this wholly invalid power of attorney document carries some weight. The State is wrong on both scores. (State's Brief 8-32). And two witnesses at the trial of the case make

these two theories fall apart.

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., 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 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 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., money at least a couple of times a month. She witnessed Phyllis and H.S. 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).

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.

The State fails to understand a key component of the prejudice caused by trial counsel's deficient performance. 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.

CONCLUSION

For the reasons stated above, Phyllis M. Schwersenska respectfully requests that this Court reverse the judgement of conviction and reverse the circuit court's decision denying her motion for a new trial.

Dated this 16th day of July, 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 2408 words.

Dated at Milwaukee, Wisconsin, this 16th day of July, 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 16th day of July, 2019.

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