STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP2251-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYLER J. YOST,

Defendant-Appellant.

Appeal From Final Written Order Entered on November 16, 2018 in Waukesha County Circuit Court Case No. 2017CM1175, Denying Motion for Post-Conviction Relief, Circuit Court, Judge Michael P. Maxwell, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED FOR REVIEW

Did the trial court commit reversible error, when it barred a defense witness (Holland) from directly contradicting the State's only witness (Rode) about whether Yost had threatened to harm his probation agent, and by ruling at trial that the defense witness' testimony would have been hearsay, and at the postconviction motion hearing, that the witness was not credible?

At trial the court ruled that the witness' testimony was inadmissible hearsay (TR149):[1]

> I will sustain the State's objection in part and deny it in part. I guess I'm sustaining with regard to hearsay. . . .

At the postconviction motion hearing, the trial court ruled that the witness' testimony was inadmissible because the witness was not credible (PCM29):

> [T]here just wasn't a sufficient basis to believe whatever he was going to testify to was trustworthy and reliable because he couldn't appear to provide any testimony or any corroborating accounts.

[1] References to matters appearing in the trial transcript (R. 45) are denoted by "TR ___), followed by a page number. References to matters appearing in the postconviction motion hearing transcript (R. 76) are denoted by "PCM___), followed by a page number.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant Yost does not request oral argument, as the arguments can be fully developed in the parties' briefs.

Publication is not warranted because under Wis. Stat. (Rule) § 809.23(b) the issues involve no more than the application of well-settled rules of law, the issues can be decided based on controlling precedent, and there is no reason for questioning or qualifying the precedent.

STATEMENT OF THE CASE

On January 9, 2018 a jury found Tyler J. Yost guilty of disorderly conduct (repeater). Waukesha County Circuit Judge Michael P. Maxwell entered a judgment of conviction on January 11, 2018 and sentenced defendant to serve one year in the county jail consecutive to any other sentence being served.

Following a trial on January 9, 2018, Yost sought postconviction relief. The defense motion for postconviction relief was heard on November 15, 2018, and the trial court denied the motion in an oral ruling (App. 102-103) from the bench. The denial was formally entered by a written order (App. 101) on November 16, 2018.

STATEMENT OF FACTS

At trial the prosecuting attorney stated in her opening statement (TR66-67) that the evidence would show that Tyler Yost had stated, while seated with several Waukesha County Jail inmates in a day room area, that he intended to kill his probation agent, T. C., by crimping her brake lines. She stated that an inmate, Jacob Rode, would testify that he heard Yost make the threat.

In his opening statement (TR68-70), Yost's defense counsel stated that Yost never made a threatening statement that he would harm T. C. (TR70), and that another jail inmate, Nick Holland, whom Rode had previously named as a witness to his conversation with Yost, would testify that he did not hear Rode make a threatening statement (TR69).

The trial testimony then proceeded as follows:

According to Rode's testimony (TR73-93), while Yost was being held in the Waukesha County Jail on March 13, 2017, he and Rode talked about their probation agents in a day room. Yost stated, among other things, that his agent (T. C.) was "a bitch," that he hated her, that when he was released he would crimp the brake lines on her car because he knew how to do so without detection, and that he did not care if she died or if she had kids.

Rode also testified that "Nick" (referring to Phillip "Nick" Holland) was seated nearby during the conversation (TR79-80), and that Holland was present when the conversation took place (TR87,93). Specifically, Rode testified on direct examination (TR79,85):

> Q When you and Mr. Yost were having the conversation were there other inmates around you?
> A Yes, there were two or three, possibly more. The tables are close together so I mean if I'm talking at one table, people three tables down can hear

me. It's made out of brick. You can easily hear people. Around our table was two or three people.
Q Would that include you and Mr. Yost?
A Yes.
Q And maybe one or two other people?
A Yes.
Q Do you know the other people there?
A I don't know one of his names but the one guy I do know they called him Nick.
* * *
Q At the time this happened you said you were sitting around a table, right?
A Yes.
Q Is this like a dinner table, same place you eat dinner?
A Yes.
Q There were other people sitting down in chairs around the table as well?
A Yes

Rode also testified (TR86-87) that he had told a deputy sheriff, who thereafter was investigating the matter, about Holland's presence during the jail conversation:

Q And you told Deputy McDonald what happened in this conversation; is that right?
A Yes.
Q Did you tell him there were other people present at that time?
A Yes.
Q Did you tell him there were three to four others who heard the conversation?
A Yes.
Q Did you tell him you knew any of the individuals

by name or who they were?
A I believe I said Nick.

Also, Rode testified that he had told two probation agents (Frkovich and Sharp) prior to Yost's probation revocation hearing that Holland was present during this conversation (TR91-92):

Q And . . . did you have conversations with any probation agents?
A Yes.
Q Which agents?
A Kate Frkovich and I think Karen Sharp.
Q In that conversation did they mention another inmate would be testifying at that hearing?
A Yes.
Q And who is that individual?
A Nick or -- I don't know his real name.
Q The individual you previously testified as Nick or Nicky?
A Yes.
Q And when they indicated he would be testifying did you then tell them this was an individual that had been present for the conversation?
A Yes.

Rode also testified that he later separately spoke with Holland while they were in the jail about Yost's statements and sought Holland's advice as to what he should do about it, and that Holland advised him to report it (TR93).

Agent T. C. testified for the prosecution that she learned of Rode's report of Yost's threatening statement through an email that a jail supervisor sent her (TR109). She was aware that Yost would likely know how to crimp her car's brake lines

because she had observed him fixing cars at his parent's house when she did house visits.

Rode was the only State's witness alleging that Yost had threatened T. C.

Prior to the defense presenting its case, the prosecution objected (TR126, 132, 145) to Holland being permitted to testify (as defense counsel had predicted in his opening statement) that he had not witnessed Yost threaten harm to his probation agent during the March 13, 2017 jail conversation. The prosecution based its objection on hearsay (TR129).

The defense then submitted an offer of proof by calling Holland to testify (TR139-140) outside the jury's presence about the jail conversation. Holland testified about what he observed when Yost was talking about his agent, while other inmates also were seated around the table:

> Q Do you remember testifying that both Mr. Yost and Mr. Rode both said negative things about their agent?[2]
> A I would say that, yes. I did hear negative things said, but I never heard anything threatening.
> Q When you say threatening, did you ever hear Mr. Yost in a conversation between the three of you or possibly other individuals where he threatened to crimp the brake line of his agent's car?
> A No. The only thing I ever heard was basically disappointment as far as being treated unfairly by the PO.
> Q That was Mr. Yost being treated unfairly? Are you referring to Mr. Yost?
> A I'm referring to both.
> Q So Mr. Yost specifically expressed he was treated unfairly? That's what he expressed in these

[2] Holland had also previously testified at Yost's probation revocation hearing.

conversations, is that what you're telling me?
A Yes.

The trial court then heard the arguments of counsel. The prosecutor argued (TR145):

> I maintain my objection that any statements made by Mr. Yost to Mr. Holland are inadmissible hearsay and I also want to raise the issue that it's very unclear from Mr. Holland's testimony who he is referring to.

The court added (TR145-146) that Holland had not provided any specifics about the conversation:

> I have a general concern about the -- I'm not sure relevance is the best way to say it, but what I listened for very carefully is whether he was able to provide specifics about this particular conversation and I didn't hear that from him in any kind of specific detail. I heard we always sit out in the day room. I heard I always sit with Mr. Yost. I sometimes sit with Mr. Rode. So I am concerned at this point as to what relevant testimony he can offer since he doesn't have from this offer of proof any kind of specific recollection about this particular conversation.

This commentary was followed by an exchange (TR147) with defense counsel in which the court faulted Holland for not testifying that what he had heard Yost say had occurred at the precise same time as when Rode said Yost had made the threat. Defense counsel pointed out the inherent "Catch-22" in the court's reasoning:

> THE COURT: I'm saying the testimony in the offer of proof is I never heard him make a

threat at all.
MR. GAERTNER: That's the offer of proof that is inconsistent with what Mr. Rode is saying.
THE COURT: There's not a specific time element to this conversation. He is testifying that I never heard Mr. Yost utter a threat at all.
MR. GAERTNER: That's true, but if he didn't utter a threat at all, he can't put a specific time on it if it never happened.

After that exchange the court shifted back (TR147), despite a defense objection, to suggesting that Holland's proffered testimony would be inadmissible hearsay:

THE COURT: If we are specific about the testimony of did you ever hear Mr. Yost utter a threat, isn't that asking him to testify about hearsay? He's testifying about what Mr. Yost said for the truth of the matter asserted, right?

The court's final ruling (TR148-149), as part of an exchange with defense counsel, was:

Mr. Holland's offer of proof is wide ranging all the way out there and says I have trouble when it comes to remembering dates. There is a real danger here of allowing testimony in front of the jury that doesn't have the indicia of reliability around it. That's what I was hoping to get out of the offer of proof. I don't think it's there beyond the whole notion of him saying I never spoke to Rode. I never gave him any advice. I don't see beyond that what else is there that is not unreliable testimony because of the vagueness of his recollection or inadmissible hearsay.

> MR. GAERTNER: Again, I think it's impossible to put a date on something that didn't happen. He is saying it didn't happen. We're asking him to put a date on it, he can't do it.
> THE COURT: He can't do it though because you couldn't get him to say I specifically remember a conversation on the 13th of March. That is where the reliability issue comes in. So I'm going to -- I will sustain the State's objection in part and deny it in part. I guess I'm sustaining with regard to hearsay any testimony from Mr. Holland beyond the narrow issue of did Mr. Rode ever come to talk to you for advice on March 13th.

Thus, the trial court ruled that, while Holland could testify that Rode never asked Holland for advice about whether to report the alleged statements by Yost (TR147), Holland could not testify that during the conversation that he overheard between Yost and Rode, Yost had not threatened to harm his probation agent.

Holland still testified in the defense case (TR152-160), but only that Rode had never asked him on March 13, 2017 whether he (Rode) should report a threat to harm that he claimed he had heard Yost make about his probation agent (TR154-158).

Yost then testified (TR161-169) that, while he was upset with his agent because he had been jailed over the holidays, he did not threaten her and did not say to Rode that he planned to crimp her brake lines (TR163-164).

ARGUMENT

I. HOLLAND'S PROFFERED TESTIMONY WAS NOT HEARSAY.

A. Standard of review.

When deciding whether evidence that a statement was *not* made constitutes "hearsay" under Wis. Stat. [Rule] §908.01, review by this Court is *de novo*. "[I]f an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented, and our review is de novo." *State v. Richard G.B.*, 2003 WI App 13, ¶ 7, 259 Wis.2d 730, 656 N.W.2d 469.

B. Holland's testimony, which would have directly contradicted the State's only witness to the alleged threat, was not hearsay; instead it constituted an acknowledged form of impeachment known as "specific contradiction impeachment."

Although it first ruled that the testimony would be allowed (TR 128-129), the trial court later ruled that Phillip "Nick" Holland could not testify to hearing the conversation between Yost and Rode, and that Yost did not threaten to harm his probation agent during the conversation.

The controlling factor for the trial court, it seemed, was that by testifying that he had *not* heard Yost make a threat against T. C., Holland was offering a hearsay statement.

Defense counsel's question to Holland would not have elicited hearsay. The court erred because testimony about a statement *not having been made* is not hearsay and it is not

inadmissible. That is precisely what defense counsel argued (TR134):

> If Mr. Holland is essentially saying I was there and that's not what was said, he has a right to be presented as a witness against Mr. Rode to say, no, that is not what happened. It's just like any other situation if I'm going to impeach a witness, I can certainly bring a witness in to say, no, that is not what was said. It's impeachment. I'm not having him come in to say this is what was said. I'm not offering that for the truth of the matter. I'm impeaching Mr. Rode's statements. I'm allowed to impeach a witness that testifies if I have another witness or have other evidence and that's and that's what this is. It's for impeachment purposes.

This scenario has been reviewed in other courts. In *New York v. Kass*, 59 A.D.3d 77, 874 N.Y.S.2d 475, 481 (N.Y.App.Div.2008), the court was presented with a strikingly similar jail conversation setting in which Kass allegedly made threats to a jail informant. The court considered whether a question directed to a defense witness (Cruz) about whether he had overheard Kass asking the informant to help arrange two murders, as prosecution witnesses had claimed, sought to elicit inadmissible hearsay.

The appeals court ruled that the question did not call for testimony about the contents of a *statement* or an *assertion*, and therefore it was improper for the trial court to grant the prosecution's hearsay objection.

> Cruz's testimony was intended in part to counter a central premise of the prosecution's case that the defendant had simply approached the informant, knowing him only as another prisoner, and asked whether he could put him in

> contact with someone who would murder two people for money.
>
> * * *
>
> This question simply asked Cruz to testify as to whether he personally had heard such a statement uttered, and therefore did not call for a hearsay response. . . . The court's contrary ruling was erroneous and prejudicial because it precluded the defense from supporting its argument that, if the inmate closest to the defendant never heard him say that he wanted to hire contract killers and never heard "any word around [the jail]" that he wanted to do so, it was unlikely that the defendant had simply approached the informant, a fellow inmate who was a stranger to him, to ask whether he could arrange a murder-for-hire.

Other reported cases demonstrate that it is not uncommon for defense witnesses to be allowed to testify that the defendant was not heard to have made an alleged threat. See, *State v. Bledsoe*, 225 N. C. App. 32, 12 S.E.2d 232, 233 34 (1975) ("Defendant denied threatening Walters . . . . Other witnesses for defendant testified that they did not hear defendant threaten to kill Walters . . . ."); *Hughes v. State*, 257 Ga. 200, 203 357 S.E.2d 80, 84 (1987) ("the defense called a witness who saw that confrontation and testified that she did not hear defendant Hughes threaten the victim.").

In a well-recognized evidence treatise,[3] the authors discuss this permissible form of impeachment where an opposing attorney impeaches a witness by showing the

[3] Imwinkelried and Blinka, *Criminal Evidentiary Foundations,* Third Edition (2016), § 5.08, PROOF THAT ANOTHER WITNESS SPECIFICALLY CONTRADICTS THE TESTIMONY OF THE WITNESS TO BE IMPEACHED.

"nonexistence" of any fact that was testified to by the witness. "This impeachment technique is usually termed contradiction or specific contradiction. . . . The courts continue to permit attorneys to employ specific contradiction impeachment."

The trial court made a fundamental mistake by characterizing Holland's proffered testimony, which would have specifically contradicted Rode and would have impeached Rode's credibility, as inadmissible hearsay.

II. IT WAS THE PROVINCE OF THE JURY, AND NOT THE TRIAL JUDGE'S ROLE, TO DETERMINE HOLLAND'S CREDIBILITY.

A. Standard of review.

The issue of whether the circuit court erred by excluding Holland's specific contradiction impeachment testimony involves a trial court decision that is reviewed for erroneous exercise of discretion. *State v. Hunt*, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434.

B. It was province of the jury to determine whether Holland was a credible witness, and the trial judge erroneously usurped the role of the jury by deciding that question.

At the postconviction hearing the trial court offered a different reason for its trial decision barring Holland's testimony; it asserted (PCM 129) that Holland was not a credible witness:

> The court is going to deny the motion for post-conviction relief.
>
> • * *
>
> My inclination at the time I didn't require just a simple offer of proof from the attorneys, we actually had the witness

> himself testify so that I could see that and there just wasn't a sufficient basis to believe whatever he was going to testify to was trustworthy and reliable because he couldn't appear to provide any testimony or any corroborating accounts. He was all over the place in terms of his memory, what he could remember, what he couldn't remember. I thought at the time then and I still believe today is that *although it's true that ultimate credibility determinations are things we want to have the jury determine, it's not required of me to put basically junk in front of the jury and say what is the credibility of this junk. It seemed like his testimony was so unreliable from that point at the offer of proof that exclusion -- again it was limited in part. It wasn't full exclusion. I did allow him to testify in parts that was appropriate.*

(Emphasis added).

This postconviction decision contravened a well-known tenet of trial procedure that a determination of the credibility of witness is to be made by the jury, not the trial judge.

Wisconsin's appellate courts have endorsed this principle in a long line of cases, including *Stewart v. Olson*, 188 Wis. 487, 496, 206 N.W. 909, 913, 44 A.L.R. 1292 (1926) ("The testimony of a witness may be confused, inconsistent, even so contradictory as to greatly impair his credibility, but it is generally the province of the jury, not that of the court, to determine its weight."); *Haley v. State*, 207 Wis. 193, 196, 240 N.W. 829, 831(1932) ("Discrepancies in the testimony of a witness do not necessarily render it so incredible that the 'court may say that they are unworthy of belief'"); *Burlison v. Janssen*, 30 Wis.2d 495, 501, 141 N.W.2d 274 (1966) ("Credibility of witnesses is peculiarly for the jury."); *State ex rel. Brajdic v. Seber*, 53 Wis.2d 446, 450, 193 N.W.2d 43 (1972) ("It is the function of the jury to determine where the truth lies in a normal case of confusion,

discrepancies, and contradictions in testimony of a witness."); *Kohlhoff v. State*, 85 Wis.2d 148, 154, 270 N.W.2d 63, 66 (1978) ("Inconsistencies and contradictions in a witness' testimony are for the jury to consider in judging credibility and the relative credibility of the witnesses is a decision for the jury."); *State v. Reid*, 166 Wis.2d 139, 147, 479 N.W.2d 572, 575 (Ct. App. 1991) ("The trial court did not invade the province of the jury and make credibility determinations. The court did not decide whether the witnesses were worthy of belief.").

The trial judge improperly took from the jury the question of which witness was more credible: jail inmate Rode, who testified that Yost threatened his probation agent, or jail inmate Holland, who would have testified that Yost did not threaten his agent. The judge's main rationale for excluding Holland's testimony was that Holland had not testified in the offer of proof to being present when Yost talked at a jail common room table with other inmates (including Rode) and made the threat. There are two glaring flaws in the judge's ruling: first, Rode himself had testified that Holland was present when Yost made the threat; and second, it is self-evident that Holland would not testify about when Rode had made a threat because Holland was averring just the opposite – that Yost had not made a threat. Defense counsel's logical, yet respectful objections to the trial judge's irrational thinking should have prevailed.

III. THE TRIAL COURT'S EXCLUSION OF HOLLAND'S SPECIFIC CONTRADICTION IMPEACHMENT TESTIMONY PREJUDICED YOST'S DEFENSE AND DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A. Standard of review

Whether a defendant was denied the constitutional right to present a defense through the exclusion of evidence is a question of constitutional fact, which is reviewed de novo. *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis.2d 499, 643 N.W.2d 777.

B. The exclusion of Holland's testimony that Yost did not threaten his probation agent when Yost was conversing with Rode led to prejudicial error and constitutional error.

The excluded testimony directly supported Yost's defense which was described by trial counsel in his opening statement (TR69):

> Holland indicated there were no threats made to the probation agent. There was never an indication that the brakes would be crimped, that he was trying to kill his probation agent. What is and what we have always admitted to is Mr. Yost was upset with his probation agent at the time. He may have used profane words regarding speaking to his probation agent, but that is not disorderly conduct.

Analogous cases demonstrate that this was prejudicial, reversible error. The erroneous omission of witness testimony contradicting the prosecution's core evidence has led to reversals in Wisconsin in circumstances where the defense failed to present it. The prejudicial nature of the error should be even more apparent where, as here, defense counsel had sought to introduce critical contradiction evidence that rebutted the core allegation against Yost. *E.g.*, *State v. Jenkins*, 2014 WI 59, 355 Wis.2d 180, 848 N.W.2d 786

(defense counsel failed to present testimony at trial of potentially exculpatory witness, namely an eyewitness other than the State's witness with evidence that another person committed the homicide for which the defendant was convicted); *State v. Honig*, 2016 WI App 10, 366 Wis.2d 681, 874 N.W.2d 589 (defendant was prejudiced by trial counsel's deficient performance in failing to impeach one victim's trial testimony indicating that defendant touched her sexually with her inconsistent video statement that defendant "didn't do nothing to me"); *State v. Coleman,* 2015 WI App 38, 362 Wis.2d 447, 865 N.W.2d 190 (trial counsel was ineffective in failing to impeach alleged sexual assault victim's credibility that she went to bed at about 6:00 p.m. to avoid defendant, where her father had stated that he saw alleged victim watching television until past 8:00 p.m.); *State v. White,* 2004 WI App 78, 271 Wis.2d 742, 680 N.W.2d 362 (trial counsel's performance was deficient for failure to call witnesses who would have brought in evidence that "went to the core of [the] defense.").

Under these many scenarios, where the defendant was deprived of presenting evidence that would have undermined a crucial prosecution witness' contention and would have instead corroborated the defendant's own version of the facts, the courts have found reversible error.

The trial court's exclusion of critical defense testimony also deprived Yost of his constitutional right to present a defense. The exclusion of defense evidence violates an accused's right to present a defense "'where the restriction is arbitrary or disproportionate to the purposes' [it is] designed to serve, and the evidence implicate[s] a sufficiently weighty interest of the accused." *State v. Lynch*, 2016 WI 66, ¶58, 371 Wis. 2d 1, 885 N.W.2d 89, citing *Harris v. Thompson*, 698 F.3d 609, 626 (7th Cir. 2012). See also, *State v. Johnson,* 118 Wis.2d 472, 479, 348 N.W.2d 196 (1984). The right to

present a defense "includes the right to offer the testimony of witnesses." *Brown County v. Shannon R.*, 2005 WI 160, ¶ 65, 286 Wis.2d 278, 706 N.W.2d 269 and "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

CONCLUSION

The trial court's ruling was arbitrary, improperly interfered with the jury's consideration of the evidence, and invaded the province reserved to the jury that it should decide the credibility of the witnesses. For the foregoing reasons Yost's conviction should be reversed and this matter should be remanded for a new trial.

Dated April 12, 2019

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 4,364 words.

Dated April 12, 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 § 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 April 12, 2019.

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