STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. 2018AP2251-CR

Tyler J. Yost

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion for Postconviction Relief Entered by the Honorable Michael P. Maxwell, Circuit Judge, Branch 8, Waukesha County

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....1

ARGUMENT.....2

CONCLUSION.....13

CERTIFICATION OF BRIEF.....14

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....15

TABLE OF AUTHORITIES

Wisconsin Statutes

Wis. Stats. § 904.02 3

Wis. Stats. § 908.01(3) 2

Wisconsin Cases

Hughes v. State, 357 S.E.2d 80 (Ga. 1987) 3

State v. Bledsoe, 212 S.E.2d 232 (N.C. Ct. App 1975) 3

People v. Kass, 874 N.Y.S.2d 475 (2d Dep't 2008) 3

State v. Harvey, 2002 WI 93, 254 Wis.2d 442, 647 N.W.2d 189 9

State v. Hunt, 2014 WI 102, 360 Wis. 2d 576, 851 N.W.2d 434 9-11

State v. Scheidell, 227 Wis. 2d 285, 585 N.W.2d 661 (Wis. 1991) 4

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Appellant ("state") submits that oral argumentation is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCLUDED PHILLIP HOLLAND'S TESTIMONY ABOUT STATEMENTS MADE BY TYLER YOST AS HEARSAY, PURSUANT TO WISCONSIN STATUTE SECTION 908.01(3).

Tyler Yost argues it was error for the court to rule that Phillip Holland could not testify that during a conversation that he overheard between Yost and Jacob Rode, Yost had not threatened to harm his probation agent.

According to Wisconsin statute section 908.01(3), " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3).

The charge against Yost stemmed directly from the statement made about harming his probation agent. (R 51: 67) Yost's defense was that he never made the threat. (R 51: 143) It is not possible to separate the content of the statement from the existence of the statement. Holland would be asked to testify about a statement made (or not made) by Yost. (R 51: 142) Further, Holland's testimony was offered to prove the truth of the matter asserted by Yost; that is, he never uttered the words. Therefore, it was hearsay by definition.

Yost relies on *People v. Kass,* 874 N.Y.S.2d 475 (2d Dep't 2008), but that case is factually distinct. The proposed question in *Kass* was vague and nonspecific as to any one declarant, inquiring merely about "word around" the prison. *People v. Kass*, 874 N.Y.S.2d 475, 481 (2d Dep't 2008). Here, Yost intended to ask Holland specifically about words spoken or not spoken by Yost directly. (R 51:155) The *Kass* court concluded the question there was not offered for the truth of the matter, therefore was not hearsay. *Kass,* 874 N.Y.S.2d at 481. To the contrary, the question to Holland went directly to the truth of whether or not the threat was made. (R 51: 142)

Yost further directs this court's attention to *Hughes v. State*, 357 S.E.2d 80 (Ga. 1987) and *State v. Bledsoe,* 12 S.E.2d 232 (N.C. Ct. App. 1975). However, hearsay was not an issue in either case and the portions quoted by Yost are *dicta*, only explaining factual background to the issues that were being decided in each case.

II. THE TRIAL COURT PROPERLY PROHIBITED HOLLAND'S IRRELEVANT TESTIMONY, PURSUANT TO WISCONSIN STATE STATUTE SECTION 904.02.

Wisconsin statute section 904.02 reads, "All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or

by other rules adopted by the supreme court." *Evidence which is not relevant is not admissible.* (Emphasis added). Wis. Stat. § 904.02

Yost contends it was the province of the jury to decide Holland's credibility. Generally, that is true; but the evidence must be relevant in the first place. The trial court ruled Holland's proffered testimony about the conversation with Yost and Rode was vague and confusing, due to his inability to provide an approximate time when the supposed conversation occurred. (R 51: 146, 148-149.)

"Simply put, an accused has no right, constitutional or otherwise, to present irrelevant evidence." *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661, ¶ 19 (1999) (citing *State v. Robinson*, 146 Wis.2d 315, 332, 431 N.W.2d 165 (1988)).

During the offer of proof, Holland first stated:

Q Were you ever present for a conversation back on

March 13, 2017, where Mr. Rode, Mr. Yost and you

and maybe some other inmates were sitting around a

table in the jail?

A I would say this happened numerous times.

Q When you say this happened numerous times, what are you referring to?

A There would be all sorts of conversations around a table with a group of guys. Yes, I heard I'm sure -- I would have to say 99 percent of them.

Q And was there a conversation where Mr. Yost was expressing anger toward his agent?

A Not that I recall, no.

(R 51: 138)

Further, he said:

Q Do you recall when you were in jail with Mr. Rode?

A The only thing I can remember it was a few months back. I have a little trouble when it comes to dates.

Later, he said:

Q So your testimony is that you never heard a conversation where Mr. Yost threatened to harm his agent in any manner; is that right?

A I never heard anything threatening at all.

(R 51: 142)

Holland also contradicted himself:

Q And when you were in these conversations did people in the jail sometimes talk negatively about their probation agents?

A I hear that pretty much on a daily basis. I don't know too many people who are happy with their PO when they are sitting in jail.

Q You had indicated -- at some point you had testified in a hearing regarding this incident; is that correct?

A Yes, I did.

Q Do you remember testifying that both Mr. Yost and Mr. Rode both said negative things about their agent?

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 conversations, is that what you're telling me?

A Yes.

(R 51: 139-140)

This proffered testimony was vague and unreliable and therefore, irrelevant. Holland, by his own admission, was a poor historian of the facts. Holland first denied any negativity by Yost toward his agent but then said Yost was upset for being treated unfairly. (R 51: 139) Most importantly, Holland's ultimate conclusion was basically, "I never heard anything" which is different from, "that was never said." (R 51: 139-40, 142.) Holland never clearly testified he was there for the conversation when Yost was upset with his probation agent but did not threaten her. His testimony was too confusing to be deemed relevant.

III. A REASONABLE JURY WOULD HAVE STILL FOUND THE DEFENDANT GUILTY, DESPITE WHETHER THE COURT ERRONEOUSLY EXCLUDED THE TESTIMONY.

If the court erroneously excluded the testimony, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, 254 Wis.2d 442, 647 N.W.2d 189, ¶ 49 (quoting *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

In *State v. Hunt*, Hunt was charged with one count of sexual assault of a child in violation of Wis. Stat. §948.02(1), and one count of causing a child under 13 to view or listen to sexual activity in violation of Wis. Stat. §948.055(1) and (2)(a). *State v. Hunt*, 2014 WI 102, 360 Wis. 2d 576, 851 N.W.2d 434, ¶ 4. A girl reported that Hunt had shown her three inappropriate images on his cell phone when she was 12 years old. *Id.* The girl said Hunt had received the images from his friend, Matt Venske. Hunt denied showing her the images. *Id.* at ¶ 5.

An officer testified at trial that he asked Venske if he had sent the images to Hunt and that Venske denied sending any videos from his cell phone. *Id.* at ¶ 10. Venske then testified for the defense. *Id.* at ¶ 5. During Venske's testimony, "Hunt's counsel then attempted to ask Venske the following question: 'There has been allegations against my client that you sent something to Mr. Hunt and he showed it to his daughter involving a man and woman engaging in intercourse. Did you ever send such—' The court interrupted counsel mid-question and

pointed out that there was no allegation that the disputed video came from Venske." *Id.* at ¶ 12. The court did not allow the question to be answered. *Id.* at ¶ 13.

Hunt also testified at trial that Venske had never sent him any videos and, specifically, had never sent him a video of a man and woman engaging in sexual intercourse. *Id.* at ¶ 30.

Hunt was convicted and appealed, claiming the trial court erred by not allowing Venske to answer the question, which would have corroborated Hunt's testimony. *Id.* at ¶ 35. The Supreme Court concluded it was error, but that the error was harmless. *Id.* at ¶ 56. The Court defined the rule as follows:

> The erroneous exclusion of testimony is subject to the harmless error rule. See Wis. Stat. § 901.03(1) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...."). Harmless error analysis requires us to look to the effect of the error on the jury's verdict. *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis.2d 434, 666 N.W.2d 485. For the error to be deemed harmless, the party that benefited from the error—here, the State—must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Harris*, 307 Wis.2d 555, ¶ 42, 745 N.W.2d 397 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Stated differently, the error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Harvey*, 254 Wis.2d 442, ¶ 49, 647 N.W.2d 189 (quoting *Neder*, 527 U.S. at 18, 119 S.Ct. 1827).

> This court has previously articulated several factors to assist in a harmless error analysis, including but not limited to: the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case. *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis.2d 506, 664 N.W.2d 97.

Hunt, 851 N.W.2d at ¶ 26-27.

Further, the court reasoned:

> Although Venske's testimony on this point was excluded by the circuit court, we agree with the State that Officer Nachtigal's testimony functionally served the same purpose by corroborating Hunt's version of events. *See State v. Everett*, 231 Wis.2d 616, 631, 605 N.W.2d 633 (Ct. App. 1999) (holding that exclusion of evidence was harmless where other evidence was heard by the jury that "functionally conveyed the same theory of defense....").

Hunt, 851 N.W.2d at ¶ 30.

In this case, Holland's testimony could not corroborate Yost for the reasons stated above. Holland was not able to say directly that Yost did not make the threat. The portion that Holland was allowed to testify about did bolster the defense by impeaching Rode.

Rode testified that he heard Yost say, "he hated his PO and when he got out he would crimp the brake lines on her car. He would

stalk and videotape her in her car to find out the best way to disable or crimp her brakes. He stated he didn't care if she died or if she had kids. He said it was casualties of war." (R 51: 101) Rode further testified that these words upset him and he wasn't sure what to do so he went to another inmate, later determined to be Holland, for advice. (R 51: 93)

Holland testified that Rode never came to him for advice, contradicting Rode's testimony and impeaching his credibility. (R 51: 138)

Meanwhile, Yost testified at trial and admitted anger toward his agent, admitted to making disparaging remarks about his agent, admitted that he had the mechanical ability to crimp a brake line, but denied making the threat. (R 51: 167-169) Quite simply, the jury believed Rode. Even if the jury had heard Holland testify he never heard a threat, the outcome would not have been different; Yost would have been convicted. Rode was consistent in his statement at all times, from his report to Holland, to talking to probation officers, to the statement he gave police, to his testimony at trial. He was truthful and believable and Holland would not have been able to change that fact.

CONCLUSION

For all the reasons stated above, the state respectfully requests that the Court affirm the circuit court's decision.

Dated this 13th day of June, 2019.

Respectfully,

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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 4,279 words long.

Dated this 13th day of June, 2019.

Respectfully,

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 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 Wis. Stat. § 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 this 13th day of June, 2019.

Respectfully,

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