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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REPLY BRIEF OF DEFENDANT-APPELLANT

James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
324 East Wisconsin Avenue, Suite 1410
Milwaukee, Wisconsin 53202
(414) 202-2300

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THE EXCLUSION OF DEFENSE WITNESS HOLLAND'S EXCULPATORY TESTIMONY WAS UNDULY PREJUDICIAL; IT WAS BASED ON MISAPPLICATIONS OF THE EVIODENCE RULES GOVERNING HEARSAY AND RELEVANCY.

In courtrooms throughout the United States, trial disputes arise every day about whether a particular statement was made by a party, a witness, or a declarant. Because this is such common fodder for resolution in our courts, it is shocking to read a lead Wisconsin prosecutor voice the view in an appellate brief (as well as the court below), without any case authority, that only one side can be heard in a dispute about whether a statement was made. Yet that is what the prosecution is arguing in this case.

The prosecution advances the absurd proposition that it may introduce evidence from a witness claiming that he heard the defendant make a particular statement in the presence of others, and yet the defense may not introduce evidence from a different witness (who even was named by the prosecution's

witness as being present during the subject conversation) that he did *not* hear the defendant make such a statement.

The simple issue in this case was whether a certain event occurred in the Waukesha County Jail and whether the State could prove that fact beyond a reasonable doubt. That event was whether Yost uttered words that were overheard by others that were "true threats" to harm or kill his probation agent. Prosecution witness Rode testified before the jury that the event happened. Witness Holland testified to the court that the event did not happen. But his obviously exculpatory testimony never reached the jury, based on a total misapplication of the hearsay rule, Wis. Stat. § 908.01(3), that was pushed by the State and adopted by the trial court.

The State quotes the hearsay rule at page 2 of its response brief, but glaringly omits comment on the fact that hearsay, as defined there, is a statement offered to prove "the truth of the matter asserted." Here, the supposed "true threat" was not a declarative assertion, for example, that Yost said he had taken steps to injure the agent. There was no such alleged assertion by Yost. Instead the State was introducing the

alleged threat to prove only that words had been uttered that could be viewed as threatening, portending future action by Yost. The State's proof went to establish only *the act of an utterance* by Yost, not whether the content of the utterance was as "assertion" which Wisconsin case law describes as a "particular expression of fact, opinion, or condition." *State v. Klutz*, 2003 WI App 205, ¶¶ 38-39, 267 Wis.2d 531, 671 N.W.2d 660.

Hence, what the State claims was inadmissible hearsay by Holland was thoroughly admissible, specific contradiction evidence. Aside from the case examples cited in Yost's opening brief at page 15-16, other cases show how widely this specific contradiction evidence appears in trials, including in Wisconsin. See, *e.g*., *State v. Jones*, 228 Wis.2d 593, 599–600, 598 N.W.2d 259, 262 (Ct. App. 1999) ("The only element in dispute was whether there had been a threat of violence. Jones denied any threat, and *his denial was corroborated by Patterson's testimony.* Their testimony was in conflict with Shogren's. Which testimony was credible was for the jury to decide.") (Emphasis added); *People v. Hanson*,

92 Ill. Dec. 901, 905, 138 Ill.App.3d 530, 536, 485 N.E.2d 1144, 1148 (1985) (“Testimony by some witnesses that Whitehurst threatened to stab defendant was contradicted by other witnesses who heard no such remarks.”).

Exclusion of Holland’s testimony on the theory that is was hearsay was an arbitrary misapplication of Wisconsin’s hearsay rule.

Next, the State offers no case authority for the proposition that a defense witness’s contradiction of a prosecution witness, about whether the defendant made a threatening statement, is irrelevant evidence. The State noticeably neglects to cite Wis. Stat. § 904.01: “Relevant evidence" means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” (Emphasis added.) Holland’s testimony, that negated Rode’s testimony, had *a tendency* to make it less probable that Yost had made a threat against his agent. “[N]egative evidence may not disprove a defendant's guilt, but it certainly has a “tendency” to make it

"less probable." *State v. DelReal*, 225 Wis.2d 565, 574, 593 N.W.2d 461, 465, (Ct..App.1999). The State's vociferous, and desperate efforts to keep Holland's evidence out at trial actually betrayed just how "relevant" Holland's testimony was.

Finally, the State argues that any error in excluding Holland's testimony was harmless because Yost was able to impeach Rode on a collateral issue of whether Rode came to ask Holland for advice about reporting Yost's alleged threat, a fact that Holland also disputed. The State overreaches to *State v. Hunt*, 2014 WI 102, 360 Wis.2d 576, 851 N.W.2d 434 for support. It neglects to notice that the key reason the Court in *Hunt* found the exclusion of defense witness Venske's testimony to be harmless was precisely because a police officer testified to the same point that Venske would have made, to corroborate Hunt's denial that he had received pornography from Venske. But no police officer or any other witness corroborated Yost's denial that he had made a threat, as Rode had charged. *Hunt* does not make the State's point at all.

Accordingly, this case is about the arbitrary exclusion of crucial exculpatory evidence for the defense. The error could not have been harmless. Yost was denied "one of the essential ingredients of due process in a criminal trial [,] . . . the right to a fair opportunity to defend against the State's accusations." *State v. Johnson,* 118 Wis.2d 472, 479, 348 N.W.2d 196 (1984).

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 witnesses Rode and Holland. For the foregoing reasons Yost's conviction should be reversed and this matter should be remanded for a new trial.

Dated June 27, 2019

Respectfully submitted,

/sJames A. Walrath
James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
324 East Wisconsin Avenue, Suite 1410

Milwaukee, Wisconsin 53202
(414) 202-2300

Attorney for Tyler J. Yost

CERTIFICATION AS TO FORM/LENGTH

I certify that this reply 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 1,451 words.

Dated June 27, 2019.

Signed:

/s/James A. Walrath

James A. Walrath
State Bar No. 1012151
Law Offices of James A. Walrath, LLC
324 East Wisconsin Avenue, Suite 1410
Milwaukee, Wisconsin 53202
(414) 202-2300

Attorney for Tyler J. Yost

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 June 27, 2019.

Signed:

/s/James A. Walrath

James A. Walrath

State Bar No. 1012151