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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP2340-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
TROY R. LASECKI,
Defendant-Appellant.

On Notice of Appeal to Review the Judgment of Conviction and the Order Denying Motion for Postconviction Relief in the Circuit Court for Outagamie County, the Honorable Mark J. McGinnis Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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The circuit court answered no.

II. If this offense is a crime, would an ordinary person have sufficient notice that this conduct constituted a crime?

The circuit court answered yes.

III. Did the circuit court impermissibly order twice any arguable pecuniary loss as restitution?

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Lasecki welcomes the opportunity for oral argument. This case is ineligible for publication. Wis. Stat. § 809.23(1)(b)(4).

SUMMARY OF THE CASE

This is a peculiar case in which the State created the crime of "failure to return a security deposit and/or a statement of withholdings within 21 days after the termination of a rental agreement" based on a bizarre jumbling of various obscure statutes and invalid administrative code regulations. Lasecki was convicted of two counts of this "crime," was sentenced to 18 months in jail, and was ordered to pay in excess of $8,000 as a result. This "crime" does not exist. Even if the Court arrives at the conclusion that it does, the

joining of these illogically connected statutes and invalid code regulations gave Lasecki insufficient notice that his passive conduct could constitute a crime. Although the misdemeanor designation of this case may suggest that the issues presented are simple, they are anything but based on the State's haphazard creation of a crime.

STATEMENT OF THE FACTS

On July 12, 2017, the State filed a criminal against Troy Lasecki Development, LLC (hereinafter "TLD, LLC") and the defendant, Troy Lasecki, charging two counts of a crime it titled "Returning Security Deposits." R. 2. The criminal complaint alleged that the defendants "did as a landlord fail to deliver or mail to [the tenant] the full amount of any security deposit paid by the tenant, less any authorized withholdings, within 21 days after termination of the rental agreement contra (sic) to Wisconsin Statute Section 100.20(2) and, contrary to sec. ATCP 134.06(2), 100.26(3) . . . ." R. 2. The complaint included two counts, one relative to tenant J.B. and one to tenant J.J.

Prior to conviction, Lasecki was never represented by counsel, although he repeatedly asserted his right to counsel. R. 70:4; R. 71:2-3; R. 75:23. Nonetheless, the court permitted Lasecki to represent himself at trial without conducting the mandatory colloquy and without determining whether Lasecki knowingly, intelligently, and voluntarily waived his right to counsel. *State v. Klessig*, 211 Wis. 2d 194, ¶¶ 13-14, 564 N.W.2d 716 (1997).[1] In addition,

[1] Lasecki does not raise this issue as an independent basis for relief.

even though the court "question[ed] whether or not you have competency-type issues," it failed to make a determination as to whether Lasecki was competent to proceed pro se. *Id.*, ¶ 23; R. 77:214. Lasecki repeatedly challenged the circuit court's jurisdiction over this case. R. 9; R. 19; R. 20; R. 25; R. 28; R. 70:3-4; R. 71:2; R. 72:3-4; R. 74:2; R. 75:3; R. 77:10.

Prior to trial, the State changed the crime it alleged Lasecki committed to be defined as follows: that he "did not return the security deposit *and/or a statement of withholdings* within 21 days after the termination of the rental agreement." R. 27:1 (emphasis added). According to the evidence at trial, TLD, LLC and J.B. entered into a one-year lease agreement commencing on February 15, 2016 and ending on February 14, 2017. R. 43; R.77:70, 72. J.B. was required to pay rent each and every month until the conclusion of the rental period. R. 43. Pursuant to the agreement, J.B. paid TLD, LLC a security deposit in the amount of $730. R. 77:71.

J.B. testified that he moved out of the apartment before the end of the lease agreement and that he paid rent only through September 2016. *Id.* at 73. When asked whether someone else moved into the apartment, J.B. testified that "[i]n September I saw. It's the two apartments above the garage. I saw people on a regular basis because I work. I work nearby other people in the apartment." *Id.* at 73-74. J.B. testified that he did not receive the security deposit back and that he did not receive a statement of the reasons the security deposit was not returned. *Id.* at 77.

As to tenant J.J., the evidence showed that on March 25, 2016, J.J. entered into a month-to-month lease agreement with TLD,LLC and paid a security deposit of $840. R. 40; R. 77:92-94. J.J. testified that he gave TLD, LLC written notice of his intent to vacate on April 29, 2016 and that he paid rent for the next two months. R. 77:94-95. Pursuant to the agreement between the parties, J.J. was required to give sixty days notice of his intent to vacate. R. 40, ¶ 27. J.J. paid rent only through June 2016. R. 77:95. J.J. testified that he did not receive the security deposit back and that he did not receive a statement of the reasons the security deposit was not returned. R. 77:95.

The court instructed the jury that the crime is defined as follows:

> 1. The defendant was a landlord.
>
> 2. The defendant rented an apartment to the tenant.
>
> 3. The defendant collected a security deposit from the tenant.
>
> 4. The defendant did not return the security deposit *and/or* a statement of withholdings within 21 days after the termination of the rental agreement.
>
> 5. The defendant intentionally failed to return the security deposit to the tenant.

R. 30:2; R. 77:168 (emphasis added). In closing arguments, the State relied on this duplicitous theory asserting, "[e]ven if he was [entitled to retain the security deposit], he would still have to have a

statement of withholdings to explain why he kept that money." R. 77:181, *see also* R. 77:187.

The jury found Lasecki[2] guilty of both counts. R. 31-32. Following the verdicts, the court proceeded to sentencing immediately. R. 77:197-98. The court placed Lasecki on probation for two years and imposed the following conditions: 1) that Lasecki notify the Wisconsin Real Estate Association of his convictions within ten days;[3] 2) that Lasecki give notice to each of his 100 current tenants of his convictions for "mishandling and illegally keeping the security deposits of tenants"; and 3) that Lasecki provide notice in future business transactions that he has been convicted of "mishandling and illegally keeping security deposits of two tenants." *Id.* at 215-17.

In addition, the court imposed a fine of $2,000 on each count, for a total fine of $4,000, payable within thirty days. *Id.* at 217-18. The court further ordered restitution, plus the surcharge, for a total of $1,727 due within ten days. *Id.* at 218. Also, the court ordered that Lasecki pay "[J.B.] an additional $730 and [J.J.] an additional $840, which is another $1,570; and those amounts will be paid to them within the next ten days as well in the form of restitution or amounts that you are required to do because the statutes and the code in the state of Wisconsin allow for double damages when a landlord violates that section of the code." *Id.* at 218-19.

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[2] Before the trial began, the State moved to dismiss the charges against the company, TLD, LLC, and proceeded only against Lasecki personally. R. 77:11.

[3] The court indicated it hoped the Association would take administrative action against Lasecki's real estate license. R. 77:202, 215-16

Finally, the court ordered conditional jail time of nine months on each count consecutive but stayed all nine months on count two and stayed seven of the nine months on count one. *Id.* at 219. Lasecki was immediately taken into custody to serve sixty days in jail.[4] *Id.* at 220.

Lasecki subsequently retained counsel and, on August 16, 2018, filed a motion for postconviction relief on the following grounds: 1) the court lacked subject matter jurisdiction because the crimes are not known to law; 2) Lasecki was denied due process to sufficient notice that his conduct constituted a crime; and 3) the court impermissibly ordered restitution above the victims' pecuniary losses. R. 57; R. 62. The court denied the motion, and this appeal follows.[5] R. 67-68.

ARGUMENT

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE CRIME OF WHICH LASECKI WAS CONVICTED IS NOT KNOWN TO LAW

A. Legal Principles and Standard of Review

Criminal subject matter jurisdiction is the "'power of a court to inquire into the charge of the crime, to apply the law, and to declare the punishment in the court . . . .'" *Kelley v. State*, 54 Wis. 2d 475, 479, 195 N.W.2d 457, 459 (1972)(quoting *Pillsbury v. State,*

[4] After Lasecki spent fourteen days in jail and paid all of the restitution and fines, the court stayed the remaining jail time. R. 59.

[5] Given the complexity of the issues raised, Lasecki will outline the circuit court's reasons for denying the motion in his argument.

31 Wis. 2d 87, 94, 142 N.W.2d 187 (1966)). Where the offense does not exist, the trial court lacks jurisdiction. *State v. Christensen,* 110 Wis. 2d 538, 542, 329 N.W.2d 382 (1983).

To determine whether a crime is recognized under law, the Court engages in statutory interpretation, starting with the statutory language. *State v. Henning*, 2013 WI App 15, ¶ 12, 346 Wis. 2d 246, 828 N.W.2d 235 (citing *State ex rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110). If the meaning of the statute is plain, the Court ends the inquiry and applies the plain meaning. *Kalal,* 271 Wis. 2d 633, ¶ 45. In interpreting a statute, the court gives "reasonable effect to every word, in order to avoid surplusage." *Id.*, ¶ 46. Whether a court has jurisdiction presents an issue of law, which this Court reviews de novo. *State v. Webster*, 196 Wis. 2d 308, 316, 538 N.W.2d 810 (Ct. App. 1995).

The initial inquiry is to determine what the "crime" is in this case, a difficult task in itself. In this case, the "crime" of which Mr. Lasecki was convicted is not contained within the criminal code or within any single statute for that matter. Rather, the State created this crime by the piecemeal application of several obscure statues and administrative code regulations. The criminal complaint titled the crime "Returning Security Deposits" and alleged that the defendants "did as a landlord fail to deliver or mail to [the tenant] the full amount of any security deposit paid by the tenant, less any authorized withholdings, within 21 days after termination of the rental agreement contra (sic) to Wisconsin Statute Section

100.20(2) and, contrary to sec. ATCP 134.06(2), 100.26(3) . . . ."[6] R. 2. The complaint included two counts, one relative to tenant J.B. and one to tenant J.J.

The State then expanded the definition of the crime by asserting that Lasecki was guilty when he "did not return the security deposit *and/or a statement of withholdings* within 21 days after the termination of the rental agreement." R. 27:1 (emphasis added). In closing arguments, the State repeatedly asserted that Lasecki was guilty either by failing to return the security deposit or by failing to provide a statement of withholdings. R. 77:179-183, 185, 187. The court instructed the jury that one of the elements of the crime is that Lasecki "did not return the security deposit and/or a statement of withholdings within 21 days after the termination of the rental agreement." R. 30:2; R. 77:168. The jury found Lasecki guilty based on these elements. *Id.* at 192.

Neither the offense charged nor the offense of which Lasecki was convicted is a crime.

B. The Offense Charged is not a Crime

The State created this crime by attempting to apply the criminal penalties contained within Wis. Stat. § 100.26(3)[7] to a violation of Wisconsin Adm. Code § ATCP 134.06(2) by stacking various laws. R. 2; Wisconsin Adm. Code § ATCP 134.06(2)(Register, Aug.

[6] The complaint also cited the provisions relating to the imposition of the DNA surcharge. R. 2.

[7] Unless otherwise noted, Lasecki will reference the 2013-14 version of the statutes, published January 1, 2015, as the State alleged that the crimes were committed on or about September 21, 2016. R. 2.

2016)[8]. Reaching this conclusion requires the Court to travel through several obscure and illogically connected provisions to determine whether a violation of Wisconsin Adm. Code § ATCP 134.06 is subject to criminal sanctions under Wis. Stat. § 100.26(3). The rules of statutory construction, however, prevent the Court from reaching this result. In addition, the code provision on which the State relies, § ATCP 134.06, is invalid.

1. The rules of statutory construction prohibit the criminal penalties of Wis. Stat. § 100.26(3) from applying to violations of § ATCP 134.06

We must first start our journey with the chapter from which the criminal penalty is derived, Wisconsin Statutes Chapter 100. This chapter is not contained anywhere in relation to the criminal code (Wis. Stat. Chpts. 939-951) or landlord tenant laws (Wis. Stat. Chpt. 704); rather, it is a catchall chapter addressing various topics including, "guessing contests," "fitness center staff requirements," "vehicle rustproofing warranties," and "hour meter tampering," among others. *See e.g.*, Wis. Stats. §§ 100.17, 100.178, 100.205, 100.48.

The particular penalty provision, Wis. Stat. § 100.26(3), provides that "Any person … who intentionally refuses, neglects or fails to obey any regulation or order made or issued under s. 100.19 or 100.20, shall, for each offense, be fined not less than $25 nor more than $5,000, or imprisoned in

[8] All references to Wisconsin Adm. Code § ATCP 134.06 will be to the August 2016 register.

the county jail for not more than one year or both." Knowing what the penalty is, one must next determine what conduct results in this penalty, which brings us to Wis. Stat. § 100.20(2), referenced in Wis. Stat. § 100.26(3) and in the complaint. Wis. Stat. § 100.26(3); R. 2. Wis. Stat. § 100.20(2)(a) provides that,

> The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

The "department" is not defined in Chapter 100; thus, it is unclear from Chapter 100 whose "orders" one must follow and what those "orders" are. The State attempted to criminalize Lasecki's conduct by interpreting the "department" to mean the "Department of Agriculture, Trade, and Consumer Protection" (hereinafter "DATCP") and by interpreting "orders" to mean the administrative regulations contained in Wisconsin Adm. Code § ATCP 134.06. R. 2. According to the State's logic, Lasecki violated Wisconsin Adm. Code § ATCP 134.06, which is an "order" issued under the authority of Wis. Stat. § 100.20(2); because Lasecki violated an "order" issued under Wis. Stat. § 100.20(2), he is subject to the criminal penalties of Wis. Stat. § 100.26(3). *See* R. 2. The rules of statutory interpretation, however, prohibit the Court from reaching this conclusion.

Administrative code provisions are considered to be "rules and regulations." *Moonlight v. Boyce*, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985); *Paulik v. Coombs*, 120 Wis. 2d 431, 436, 355 N.W.2d 357 (Ct. App. 1984). However, Wis. Stat. § 100.20(2) gives the "department" authority to issue only "orders," not regulations. Thus, Wis. Stat. § 100.20(2), by its plain language, does not give the "department" the authority to issue the "regulations" of Wisconsin Adm. Code § 134.06.

In interpreting a statute, the court starts with the language of the statute. *Kalal*, 271 Wis. 2d 633, ¶ 45. If the meaning is plain, the inquiry ends. *Id.* To the extent there is any ambiguity in the statute, the rules of statutory construction dictate that the terms "orders" and "regulations" be given separate meanings. *See id.*, ¶ 46. The Court interprets a statute "to give reasonable effect to every word, in order to avoid surplusage." *Id.*

In other areas of the statutes, the legislature used separate terms for "orders" and "regulations." The most poignant example is in the criminal penalty statute at issue, which states that whoever does not "obey any *regulation* or *order* made or issued under . . . s. 100.20 . . . ." Wis. Stat. § 100.26(3)(emphasis added). Interpreting the words "regulation" and "order" to be synonymous renders one of the words superfluous. Thus, the legislature intended these words to have separate meanings, and Wis. Stat. § 100.20(2) authorizing the department to issue "orders," does not authorize it to issue the "regulations" of Wisconsin Adm. Code § 134.06. *See Kalal*, ¶ 46.

The connection between the criminal penalties of § 100.26(3) and the regulations of Wisconsin Adm. Code § ATCP 134.06 short-circuits at the proffered–and essential–connecting point: §100.20(2). As a result, a violation of the regulations of Wisconsin Adm. Code § ATCP 134.06 is not a crime under § 100.26(3).

2. Even if the criminal penalties of Wis. Stat. § 100.26(3) apply to violations of § ATCP 134.06, the legislature usurped any authority the department had to regulate a landlord's duties with respect to security deposits when it enacted Wis. Stat. § 704.28

In 2012, the legislature created Wis. Stat. § 704.28, in which the legislature sought to regulate a landlord's return and withholding of a tenant's security deposit. 2011 ACT 143, § 22. At the same time, the legislature also enacted § 704.95, which indicates that "the department of agriculture, trade and consumer protection may not issue an order or promulgate a rule under s. 100.20 that changes any right or duty arising under this chapter." Wis. Stat. § 704.95; 2011 ACT 143, § 36. The statute regulating a landlord's return or withholding of a security deposit largely mirrors a landlord's duties regulated by Wisconsin Adm. Code § ATCP 134.06. Wis. Stat. § 704.28.

There is, however, one critical difference: § 704.28 does not require a landlord to provide the tenant with a written statement accounting for the amounts withheld. Wis. Stat. § 704.28; Wisconsin Adm. Code § ATCP 134.06(4). As a result, in enacting

§ 704.28, the legislature usurped the department's authority to regulate a landlord's duties relative to the return or withholding of a tenant's security deposit, and the code regulation promulgating different duties is invalid.[9] *See* Wis. Stat. § 704.95. Accordingly, there is no crime known to law for a violation of the invalid regulations of Wisconsin Adm. Code § ATCP 134.

C. The Crime the State Prosecuted, and the Crime for which Lasecki was Convicted, does not Exist.

Although the State charged Lasecki with violating the requirements of § ATCP 134.06(2), a failure to return security deposits less authorized withholdings, the crime for which it prosecuted Lasecki, was very different. This is an unusual case where we cannot look to a specific statute or pattern jury instruction to determine the definition of the crime. When the State invents a crime, as it did in this case, the elements of the offense become a crucial component in evaluating whether the crime exists. The State defined the crime as follows:

> 1. The defendant was a landlord.
>
> 2. The defendant rented an apartment to the tenant.
>
> 3. The defendant collected a security deposit from the tenant.
>
> 4. The defendant did not return the security deposit and/or a statement of

[9]This Court recently questioned whether the DATCP retains authority to regulate the withholding and return of security deposits since the enactment of Wis. Stats. §§ 704.28 and 704.95. *Wenger v. Swaine*, No. 2017AP985, ¶¶ 7-11, slip. op. (Wis. Ct. App. Issued Feb. 8, 2018).

> withholdings within 21 days after the termination of the rental agreement.
>
> 5. The defendant intentionally failed to return the security deposit to the tenant.

R. 27. Even if § ATCP 134.06 remains valid and the criminal penalties of § 100.26(3) attach, the offense prosecuted by the State is not a crime.

1. Wisconsin Adm. Code § ATCP 134.06(2) does not require the return of an entire security deposit; rather it requires the return of a security deposit, *less authorized withholdings*

Under the code, "[a] landlord shall deliver or mail to a tenant the full amount of any deposit paid by the tenant, *less any amounts that may be withheld* under sub. (3) within 21 days . . . ." Wisconsin Adm. Code § ATCP 134.06(2)(emphasis added). The code permits a landlord to retain the deposit for a variety of reasons[10] and thus does not prohibit a landlord's failure to return a security deposit in all circumstances. In this case, the jury was asked to determine only whether Lasecki failed to return the deposits; it was not asked to determine whether Lasecki had an *obligation* to return the deposits or whether he failed to return the deposits *less any amounts that may be withheld.* R. 77:168. A mere failure to return a tenant's security deposit is not a crime. Wisconsin Adm. Code § 134.06(2)-(3).

[10] A landlord may withhold from the deposit amounts to pay for tenant damage, waste, or neglect; unpaid rent; utilities; unpaid municipal permit fees; and any other reason provided in the lease agreement. Wisconsin Adm. Code § ATCP 134.06(3)(a).

The State appeared to believe that it need only establish that Lasecki did not return the deposits, and that the issue of whether he was justified in retaining the deposits was an affirmative defense. R. 27; R. 80:26. The State is incorrect. Lasecki was prosecuted for failing to act: for failing to return the security deposits "and/or" failing to provide a statement of withholdings. R. 2; R. 27: R. 77:168. Criminal liability for a failure to act can attach only if the defendant has a legal duty to act. *State v. Williquette*, 129 Wis. 2d 239, 251-53, 385 N.W.2d 145 (1986). Thus, the State was required to prove that Lasecki had a duty to return the entire deposit, that is, that the amounts he withheld were not authorized. *See id.*; Wisconsin Adm. Code § ATCP 134.06(2).

In addition, "'[a]n affirmative defense does not implicate proof of elements of the crime.'" *State v. Watkins*, 2002 WI 101, ¶ 40, 255 Wis. 2d 265, 647 N.W.2d 244 (quoting *State v. Stoehr*, 134 Wis. 2d 66, 84 N. 8, 396 N.W.2d 177 (1986)). Under the code, "[a] landlord shall deliver or mail to a tenant the full amount of any deposit paid by the tenant, *less any amounts that may be withheld* under sub. (3) within 21 days . . . ." Wisconsin Adm. Code § ATCP 134.06(2)(emphasis added). The elements of the "crime" implicate the issue of whether the retained amounts were lawfully withheld. *Id.* Thus, Lasecki need not establish an affirmative defense that he lawfully withheld the deposits; rather, this was an element required to be proved beyond a reasonable doubt by the State. *See Watkins*, 255 Wis. 2d 265, ¶ 40.

At trial, it was undisputed that Lasecki did not return the security deposits of the two former tenants. R. 77:77, 95, 156-57. Indeed, Lasecki was entitled to keep the deposits as a result of the tenants' breach of their lease agreements.[11] R. 77:148-49, 153, 156. The crime defined by the State and the court, however, asked the jury to determine only whether Lasecki failed to return the deposits ("and/or a statement of withholdings"); the jury was not asked to determine whether Lasecki had an obligation to return the deposits or whether he wrongfully retained the deposits. Thus, the conduct for which the State prosecuted Lasecki, and for which he was convicted, is not prohibited by the code.

2. The State impermissibly combined multiple–and invalid–provisions of § ATCP 134.06 to create one crime

Under Wis. Stat. § 704.28, a landlord can retain a deposit for authorized reasons without advising the tenant of the reasons he retained the deposit, and any contrary duty imposed by the DATCP is invalid. Wis. Stats. §§ 704.28, 704.95. Here, the requirement that Lasecki provide notice to the tenants of the reasons he

[11] As to tenant J.B., he signed a one-year lease agreement obligating him to pay rent from February 15, 2016 to February 14, 2017. R. 43. J.B. breached this contract when he failed to pay rent after September 2016. R. 77:73. As to tenant J.J., he signed a month-to-month lease agreement commencing on March 25, 2016 and gave the required notice of sixty days to vacate. R. 40, ¶ 27; R. 77:94-95. J.J.'s notice, however, came on April 29, 2016, during the second monthly rental period; thus, his sixty-day notice was effective at the start of the next rental period, May 25, and he was obligated to pay rent through July 24, 2016. R. 40; R. 77:94. J.J., however, paid rent only through June. R. 77:95. Accordingly, Lasecki rightfully retained J.B.'s and J.J.'s security deposits as unpaid rent. R. 77:148-49, 153, 156; Wis. Stat. § 704.28(1)(b).

retained their deposits was inextricably linked to the definition of the crime. R. 30:2; R. 77:168. As the State asserted in closing arguments, "[e]ven if he was [entitled to retain the security deposit], he would still have to have a statement of withholdings to explain why he kept that money." R. 77:181, *see also* R. 77:187. The State prosecuted Lasecki for a crime based, in part or in whole ("and/or"), on his failure to comply with a duty that was not required of him. R. 27; R. 77:168. Based on the way the crime was defined to the jury, it is impossible to determine whether the jury found that Lasecki failed to return the deposits to *which the tenants were entitled*, that Lasecki lawfully retained the deposits but failed to provide notice of the reasons, or a combination of the two.

In addition to inviting the jury to convict Lasecki in part or in whole ("and/or") for his failure to comply with a duty that did not exist–to provide a statement of withholdings–the crime created by the State presents a perilous duplicity and unanimity problem. Based on the crime defined, the jury could have convicted Lasecki for his mere failure to return the deposits (without a finding that he was required to do so) "and/or" his failure to provide notice of the reasons he retained the deposits. R. 30:2; R. 77:168. As a result, we do not know whether the jury unanimously agreed on what "crime" Lasecki committed. *See State v. Lomagro*, 113 Wis. 2d 582, 586-87, 335 N.W.2d 583 (1983); *State v. Derango*, 2000 WI 89, ¶¶ 13-15, 236 Wis. 2d 721, 613 N.W.2d 833. Accordingly, the peculiar offense the State chose to prosecute, Lasecki's mere failure to return the deposits "and/or" his failure to provide a statement of withholdings, is not a crime recognized under Wisconsin law.

D. The Circuit Court's Decision

The circuit court denied Lasecki's postconviction motion to dismiss. R. 81:30. The court concluded that criminal liability can arise out of a failure to comply with an administrative rule, citing to *Lambert* and *Balistreri*. *Id.* at 25. *State v. Lambert*, 66 Wis. 2d 523, 229 N.W.2d 662 (1975); *State v. Balistreri*, 87 Wis. 2d 1, 274 N.W.2d 269 (Ct. App. 1978). However, those cases did not address the challenges presented in this case. In addition, those cases did not involve administrative regulations that have since been usurped by the legislature, as in this case. The circuit court in this case acknowledged that the DATCP "may have overstepped its authority in promulgating the rule requiring a withholding statement[,]" but that "[a]rguably the State meets the burden" to show that 134.06 is a valid rule. *Id.* at 26-27.

The court further concluded that the verdicts "clearly indicate that [the jury] concluded beyond a reasonable doubt that Mr. Lasecki had an obligation to return the security deposit to each tenant and that Mr. Lasecki intentionally failed to return the security deposit to each of the tenants." *Id.* at 30-31. The circuit court arrived at this conclusion despite the fact that the jury was asked to find only that Lasecki intentionally failed to return the deposits ("and/or a statement of withholdings") and was not asked to determine whether Lasecki had an obligation to do so. *Id.*; R. 77:168. The court further concluded that the jury's verdict had nothing to do with the statement of withholdings, despite the fact that the failure to provide a statement of withholdings was defined as part of the crime of which the jury found Lasecki

guilty. R.77:168; R. 81:31. As developed above, the crime defined for the jury belies the court's conclusion.

II. IN THE ALTERNATIVE, LASECKI WAS DENIED DUE PROCESS TO SUFFICIENT NOTICE THAT HIS CONDUCT CONSTITUTED A CRIME

If anything is clear in this case, it is that a determination as to whether the crime of which Lasecki was convicted exists requires a complex construction of various obscure and illogically connected statutes and code regulations. If the Court concludes that such a crime exists, the next question is whether an ordinary person was sufficiently apprised that his conduct constituted a crime? Based on the mental gymnastics required to answer the question presented in the first issue, the plain answer is no.

A. Legal Principles and Standard of Review

The Fourteenth Amendment of the United States Constitution provides that no person shall be deprived of his liberty without due process of law. *State v. Steffes*, 2003 WI 55, ¶ 18, 260 Wis. 2d 841, 659 N.W.2d 445. The due process clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . ." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *U.S. v. Harriss*, 347 U.S. 612, 617 (1954). A due process determination is a

question of law, which this Court reviews de novo. *State v. Sorenson,* 2002 WI 78, ¶ 25, 254 Wis. 2d 54, 646 N.W.2d 354.

B. An Ordinary Person had Insufficient Notice that the Conduct at Issue in this Case Constitutes a Crime

If this Court concludes that the crime exists, it must arrive at this conclusion through a maze of complex and confusing logic navigated by combining several obscure statutes and code regulations. An ordinary person would have insufficient notice that Lasecki's conduct constituted a crime.

To evaluate whether an ordinary person had sufficient notice to know that this conduct constituted a crime, the Court must first determine what the wrongful conduct was in this case. This too is a challenging inquiry based on the haphazard way the State defined the crime and the various ways the State argued Lasecki was guilty. As discussed above, the code does not prohibit a landlord's failure to return a security deposit, so long as he is authorized to retain the deposit. Wisconsin Adm. Code § ATCP 134.06(2), (3). We do not know whether the jury found that Lasecki was obligated to refund the deposits or whether he rightfully retained them because the question was never asked of it. R. 30:2; R. 77:168. The most that can be said from the record is that Lasecki was wrong in failing to provide notice of the reasons he withheld the deposits, to the extent this code regulation even remains valid. R. 77: 90, 95. Lasecki, or any other ordinary person, had insufficient notice that this omission–the failure to provide a statement

of withholdings–constituted a crime for which one could be imprisoned for up to one year on each count.

A landlord would first need to be aware that the catchall Wisconsin Statutes Chapter 100, from which the criminal penalties are derived, governed his conduct. This chapter makes no reference to landlord-tenant laws, but rather is a haphazard collection of various topics including, "guessing contests," "fitness center staff requirements," "vehicle rustproofing warranties," and "hour meter tampering," among others. *See e.g.* Wis. Stats. § 100.17, 100.178, 100.205, 100.48. Assuming a landlord somehow realized that Chapter 100 governed his conduct, he would then need to understand that he could be criminally sanctioned if he fails to "obey any regulation or order made or issued under . . . 100.20 . . . ." Wis. Stat. § 100.26(3).

The landlord would then need to recognize that § 100.20 authorized the creation of regulations with which he was required to comply. The plain statutory language, permitting the "department" to issue "orders," the does not give such notice. Wis. Stat. § 100.20(2)(a). First, the "department" is not defined in Chapter 100, so it is unclear whose "orders" one must follow. Second, as discussed above, the statute gives the authority to issue only "orders," not regulations. Thus, the landlord would need to understand that the statutory language "order" was really intended to reference the "regulations" of § ATCP 134.06. The creation of this "crime" by the connection of § 100.20(2), § 100.26(3), and § ATCP 134.06 is so illogical and tenuous, it is unreasonable to conclude that an ordinary person would have sufficient notice that a failure to provide a statement of the reasons one

withheld a tenant's security deposit could result in imprisonment for a year.

A much more reasonable assumption is that a landlord is familiar with Wis. Stats. Chapter 704, titled "landlord and tenant." This chapter does not set forth any criminal penalties with respect to a violation of Wis. Stat. § 704.28, "withholding from and return of security deposits." Had the legislature intended to criminalize a landlord's failure to comply with § 704.28, it could have easily done so when it enacted the statute, but it did not. In addition, the duties imposed with respect to withholding and returning security deposits under § 704.28 are inconsistent with the duties in § ATCP 134.06. Notably, § 704.28 permits a landlord to retain the deposit for authorized reasons without giving the tenant notice of those reasons. The legislature could have imposed such a notice duty, but it did not. It is certainly reasonable to conclude that a landlord had sufficient notice that he must comply with the duties outlined in § 704.28. It is unreasonable to conclude that a landlord had notice that he must comply with the inconsistent duties outlined in § ATCP 134.06, and that, via the bizarre jumbling of Wis. Stats. § 100.20(2), §100.26(3), and § ATCP 134.06, a failure to do so would result in criminal penalties.

At a minimum, there is confusion as to the extent of the department's authority to issue *regulations* subject to criminal penalties under Wis. Stat. § 100.20(2). This is particularly true in light of the enactment of § 704.28, which sets forth a landlord's duties, and § 704.95, which prohibits the department from changing the duties imposed by chapter 704. As

such, the rule of lenity requires that the Court interpret the statutes in favor of Lasecki. *State v. Cole,* 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700.

Of additional due process concern is the fact that this "offense" is a strict liability crime requiring no mens rea element. The Supreme Court has noted that due process notice concerns are implicated "where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case," such as the case with strict liability crimes. *Lambert v. California*, 355 U.S. 225, 228 (1957). "It is a fundamental principle of law that an actor should not be convicted of a crime if he had no reason to believe that the act he committed was a crime or that it was wrongful." *State v. Jadowski*, 2004 WI 68, ¶ 43, 272 Wis. 2d 418, 680 N.W.2d 810.

The regulation of which Lasecki was convicted of violating, § ATCP 134.06, is a strict liability provision. *Boelter v. Tschantaz,* 2010 WI App 18, ¶ 8, 323 Wis. 2d 208, 779 N.W.2d 208. That is, there is no requirement that he intentionally, recklessly, or, negligently failed to provide the written statement of withholdings; his passive failure to do so is sufficient. While ignorance of the law is not a defense, there are circumstances where there must be sufficient notice that a failure to act could result in imprisonment. *See Lambert*, 355 U.S. at 228. This is such a case, as this requirement is not contained within the landlord/tenant chapter of the statues but rather is derived from a complex, abstract, and contradictory legal maze. The course one must navigate to arrive at

the conclusion that Lasecki's passive actions constitute a crime is insufficient to give adequate notice to an ordinary person.

C. The Circuit Court's Decision

The court concluded that Lasecki had notice that his conduct would subject him to criminal penalties. R. 81:27. The court relied on the fact that other statues creating criminal liability are spread throughout multiple statutory sections and that this fact alone does not invalidate the conviction. *Id.* at 28. The court also relied on the fact that "criminal liability in this case only became a sanction when Mr. Lasecki refused to work with the [DATCP] to mediate the tenants' complaints." *Id.*

At trial, the State called Howard Phillips, an investigator with the DATCP, who investigated the tenants' complaints that Lasecki did not return their security deposits or give them an itemized deduction list. R. 77:102, 104. Phillips testified that he attempted to "contact" Lasecki. *Id.* at 105. The State however presented no evidence as to the contents of that contact or whether Lasecki was advised that he could be subject to criminal penalties. *See id.* at 102-05. In any event, the standard is whether an ordinary person would have known this was a crime. *Lawson*, 461 U.S. at 357. There is no indication in the statutes or the administrative code regulations that a suspect must first be given an opportunity to remedy any wrongdoing before a crime can be charged.

III. IN THE ALTERNATIVE, THE COURT IMPERMISSIBLY ORDERED RESTITUTION ABOVE THE VICTIMS' PECUNIARY LOSS

A. Standard of Review

The circuit court's calculation as to the appropriate amount of restitution is subject to the erroneous exercise of discretion standard of review. *State v. Gibson*, 2012 WI App 103, ¶ 8, 344 Wis. 2d 220, 822 N.W.2d 500. However, whether the circuit court is authorized to order restitution under Wis. Stat. § 973.20, under a certain set of facts, presents a question of law, which this Court reviews de novo. *Id.*

B. Legal Principles and Analysis

In this case, the Court ordered that Lasecki pay J.B. $730 and J.J. $840 as restitution for the security deposits. R. 77:218. The court further ordered that Lasecki pay J.B. an additional $730 and J.J. an additional $840, for a total of $1,570, "in the form of restitution or amounts that you are required to do because the statutes and the code in the state of Wisconsin allow for double damages when a landlord violates that section of the code." *Id.* at 218-19.

The primary purpose of imposing restitution is to compensate the victim for the loss sustained as a result of the defendant's conduct; that is, to return victims to the position they were in before the defendant injured them. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Wis. Stat. § 973.20 governs the restitution the Court can impose on a defendant convicted of a crime. Under the

restitution statute, the Court may require the defendant to "Pay all special damages, *but not general damages*, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing." Wis. Stat. § 973.20(5)(a)(2015-16) (emphasis added). Special damages represent "'the victim's actual pecuniary losses, and general damages [are] those which are not readily susceptible to direct proof or 'easily estimable in monetary terms.'" *State v. Stowers*, 177 Wis. 2d 798, 804-05, 503 N.W.2d 8 (Ct. App. 1993)(quoting *Lawrence v. Jewell Cos., Inc.,* 53 Wis. 2d 656, 660, 193 N.W.2d 695 (1972)). Restitution cannot be used to award general damages, that is, "to compensate a victim for any nonpecuniary injury she may have suffered as a result of [the defendant's] actions . . . ." *Stowers*, 177 Wis. 2d at 805-06. The purpose of restitution is not to punish the defendant. *State v. Canady*, 2000 WI 87, ¶ 8, 234 Wis. 2d 261, 610 N.W.2d 147.

Although the entire restitution amount is arguably invalid, as the jury never determined whether the tenants were entitled to a return of their original security deposit, Lasecki challenges only the court's imposition of twice the amount of the original security deposits. The circuit court's award of double damages was twice any arguable pecuniary loss suffered by the tenants and was used either to punish Lasecki or to compensate the tenants for a nonpecuniary injury. *Canady*, 234 Wis. 2d 261, ¶ 8; *Stowers*, 177 Wis. 2d at 805-06. Here the restitution award resulted in a windfall to the tenants.

Accordingly, § 973.20(5)(a) does not permit the award of double the victims' pecuniary loss.

C. The Circuit Court's Decision

At the postconviction hearing, the circuit court hesitated as to whether this additional amount was restitution stating, "There is a statute that allows them in these cases to collect double damages; and based upon that, I believe that I am entitled to incorporate that into a sentence in a criminal case and *call it either restitution or some other term* to put them in the position that they are lawfully entitled to be in." R. 81:43 (emphasis added). The record supports the conclusion that these amounts were imposed as restitution. First, the court used the term "restitution" when it ordered these amounts to be paid "*in the form of restitution* or amounts that you are required to do . . . ." R. 77:218-19 (emphasis added). Second, these amounts were directed to be paid to the victims. *Id.* Lasecki is unaware of any other statute that authorizes a court to require a criminal defendant to pay a victim other than the restitution statute. Finally, the written judgment of the court confirms that these amounts are restitution. R. 53; R. 55; R. 59.

If the Court adopts the circuit court's conclusion that these amounts might not be restitution, the question becomes under what authority did the court have to impose these amounts? In imposing sentence on a defendant convicted of a crime, the circuit court has the authority to require the defendant to pay restitution, fines, costs, fees, and surcharges. Wis. Stats. §§ 100.26(3), 973.06, 973.20, There is no statutory authority for the court to impose "other amounts" to be paid to victims as a result of a crime.

Accordingly, the circuit court either 1) improperly ordered restitution twice the amount of any arguable pecuniary loss or 2) lacked statutory authority to impose these amounts as a result of a criminal conviction.

CONCLUSION

Lasecki requests that this Court vacate the judgment of conviction and dismiss the case with prejudice. In the alternative, Lasecki requests that the Court reduce the restitution amount by $1,570.

Dated this 23rd Day of February, 2019

Signed:

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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 7,097 words.

Dated this 23rd Day of February, 2019

Signed:

_____

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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 this 23rd Day of February, 2019

Signed:

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CERTIFICATE AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

Dated this 23rd Day of February, 2019

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APPENDIX

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