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.

REPLY BRIEF OF DEFENDANT-APPELLANT

ANA L. BABCOCK
State Bar No. 1063719
Attorney for Defendant-Appellant

BABCOCK LAW, LLC
130 E. Walnut Street, St. 602
P.O. Box 22441
Green Bay, WI 54305
(920) 884-6565
ababcock@babcocklaw.org

REPLY ARGUMENT

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

If the Court is perplexed after reading the State's brief, it is for good reason: the State never defines the "crime" for which Lasecki was prosecuted and convicted. Indeed, the State does not even include the issue of whether this crime is known to law in its questions presented. *See* State's Brief at 5-7. The fact that the State cannot define this illusive crime supports the conclusion that this crime does not exist and certainly shows that a person of ordinary intelligence did not have sufficient notice that his conduct constituted a crime.

The State makes repeated references to "stealing" a security deposit, but does not go much further than that. State's Brief at 19, 21, 25. Of course, Lasecki was not charged under any theft statute. In his opening brief, Lasecki–with great difficulty–made his best attempt to define the "crime" pursued by the State, and the State has offered no clarification. Lasecki's Brief at 7-8, 13-14. To recap:

- The State charged Lasecki for failing "to deliver or mail to [the tenants] the full amount of any

security deposit paid by the tenant[s], less any authorized withholdings, within 21 days . . . ." R. 2.

- The State then changed the crime to allege 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. 27; R. 77:168.

- The State now argues that "it is clear" that the State prosecuted Lasecki for not sending a statement of withholdings. State's Brief at 38.

- The verdict forms read Lasecki is guilty of "failure to return [tenant's] security deposit." R. 31-32.

- The judgment of conviction indicates Lasecki was found guilty of "returning security deposits," contrary to § ATCP 134.06(2), which mandates the return of security deposits, less authorized withholdings, without regard to the statement of withholdings.[1] R. 53; R. 55; R. 59.

Lasecki remains unable to define the "crime" in this case, and the State has not done so either. This undefined and illusory crime does not exist; thus, the Court lacked subject matter jurisdiction. *See State v. Christensen,* 110 Wis. 2d 538, 542, 329 N.W.2d 382 (1983).

[1] The statement of withholdings requirement is found in subsection (4) of § ATCP 134.06.

A. The State's theory of a crime disconnects at § 100.20

In creating this crime, the State connects the criminal penalties of § 100.26(3)[2] to a violation of § ATCP 134.06 via § 100.20(2), which gives the department authority to issue "orders" but not rules or regulations. Lasecki Brief at 10-12. The State responds that the DATCP made clear in its *rule-making* proceedings that § ATCP 134 was adopted as an "order" of the agency. State's Brief at 34-35. For support, the State recites a litany of administrative tasks and purported documents related to the rule-making process. *Id.* at 33-35. The State, however, provides no citation for that on which it relies and has not appended this "authority" to its brief. Thus, Lasecki is unable to confirm the accuracy or relevancy of this information.

In any event, the fact that the DATCP *believed* it adopted these regulations as an "order" of its agency does not mean it had authority to do so.[3] As discussed, the rules of statutory construction prohibit the Court from reading the terms "regulation" and "order" as synonymous; the legislature's use of these terms separately shows it intended that they have separate meanings. Lasecki's Brief at 11. Thus, the

[2] All references will be to the 2013-14 version of the statutes, unless otherwise noted.
[3] The State's contention that "§ 100.20 *requires* the [DATCP] to promulgate *rules* forbidding unfair trade practices[,]" is simply wrong. State's Brief at 33 (emphasis added). § 100.20(2) *permits* ("may") the Department to issue *orders*. *Lambert*, cited as support by the State, confirms this. *State v. Lambert*, 68 Wis. 2d 523, 528, 229 N.W.2d 622 (1975).

statute permitting the DATCP to issue orders does not authorize it to issue the rules or regulations of § ATCP 134. *Id.* In this vein, Lasecki does not contend that the entire ATCP code is invalid; instead, Lasecki asserts that the authority to promulgate the code regulations is not derived from § 100.20(2), the essential connecting point between the ATCP code regulations and the criminal penalties of § 100.26(3). *Id.* at 10-12.

Unlike in *Lambert*, Lasecki is not claiming that § 100.20 is unconstitutional or invalid. *Lambert*, 68 Wis. 2d at 527-28. The language of § 100.20(2) is clear: it gives the department the authority to issue *orders*. Lasecki simply maintains that the department's authority to issue the rules or regulations of § ATCP 134.06 is not derived from the plain language of § 100.20(2). Similarly, Lasecki does raise the same challenge at issue in *Balistreri*, where the court concluded that a county court, as opposed to a circuit court, had jurisdiction over a violation of the administrative code and that § 100.26(3) is a strict liability crime. *State v. Balistreri*, 87 Wis. 2d 1, 5, 7, 274 N.W.2d 269 (Ct. App. 1978).

B. The legislature has usurped the department's authority to regulate a landlord's duties with respect to withholding and returning security deposits

The State argues that § ATCP 134.06(4), does not change the duties of a landlord outlined in § 704.28 because nothing in § 704.28 permits a landlord to

withhold a security deposit without providing notice of the reasons for withholding. State's Brief at 19, 31. While the statute does not indicate "a landlord need not give notice" it also *does not require* such notice. *See* Wis. Stat. § 704.28. When the legislature drafted § 704.28, it used § ATCP 134.06 as a guide, as the language and format is almost identical. The provision relating to providing a statement of withholdings to a tenant was contained within § ATCP 134.06 but the legislature notably omitted this duty when it drafted § 704.28. Wisconsin Adm. Code § ATCP 134.06(4) (Register, Dec. 1998); Wis. Stat. § 704.28 (2011-12). The plain language of the statute permits a landlord to withhold a security deposit for the reasons authorized in Wis. Stat. § 704.28(1)-(2) without requiring the landlord to provide notice of the reasons. The contrary duties imposed on a landlord in § ATCP 134.06(4) are thus invalid. *See* Wis. Stat. § 704.95.

Since 2011, the legislature has created a slew of legislation to enact, clarify, and reclarify landlord tenant laws. *See* 2011 ACT 143; 2013 ACT 76; 2015 ACT 176; 2017 ACT 317. These changes have caused a great deal of uncertainty and confusion over the duties of landlords and the rights of tenants.[4] While the policy considerations in support of tenants' rights cited by the State are certainly worthy and additional legislation may be necessary to clarify these laws, the

[4] *See e.g.* Abigail Becker, *Wisconsin Bill would Change Tenant, Landlord Regulations, Limit Municipal Power*, THE CAP TIMES (Dec. 12, 2017), https://madison.com/ct/news/local/govt-and-politics/wisconsin-bill-would-change-tenant-landlord-regulations-limit-municipal-power/article_50c5eb1d-bfea-543f-9c36-a2407a6706e9.html.

State cannot criminally charge Lasecki for violating the "spirit" of a statute; the prohibited conduct must be clear. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

C. The State changed its theory of a crime in response to Lasecki's argument that the crime it prosecuted does not exist

The State charged Lasecki for failing "to deliver or mail to [the tenants] the full amount of any security deposit paid by the tenant[s], less any authorized withholdings, within 21 days . . . ." R 2. The State then changed the crime to allege 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 27. This proposed definition of the crime was given to the jury. R.77:168. As discussed in Lasecki's opening brief, the State criminalized the mere failure to return one's security deposit, without regard to whether he was obligated to do so. Lasecki's Brief at 14-16. In addition, the crime presented a perilous duplicity and unanimity problem by defining guilt as a failure to return the deposits *and/or* a statement of withholdings. *Id.* at 16-17.

In response, the State now argues that "it is clear" that the State prosecuted Lasecki for not sending a statement of withholdings. State's Brief at 38. But, Lasecki was never charged with such a crime; he was charged with failing to return the deposits, less authorized withholdings under § ATCP 134.06(2), with no reference to the statement of withholdings

provision contained in subsection (4). R. 2. The State never amended the complaint.

In addition, the crime presented to the jury was not limited to only a failure to provide a statement of withholdings. If that was the case, the State would have to establish that Lasecki withheld the deposits *and* that he did not provide a statement of withholdings. *See* § ATCP 134.06(4)(a). Instead, the State invited the jury to convict Lasecki for failing to provide a statement of withholdings, a mere failure to return the deposits (without consideration as to whether he was *obligated* to do so), or a combination of the two. R 77:168; Lasecki's Brief at 16-17.

The State then seems to argue that if the crime of failing to provide a statement of withholdings does not exist, it successfully prosecuted Lasecki for wrongfully withholding the deposits.[5] *See* State's Brief at 39-42. The crime defined for the jury belies this claim. The jury was never asked to determine whether Lasecki was *obligated* to return the deposits; instead, the State criminalized the mere failure to return. R 77:168. The "mitigation" instruction did nothing to clarify this definition. This instruction improperly required that Lasecki establish that he was entitled to retain the deposits, and the jury was never told how this instruction connects to the elements of the offense. *Id.* at 169. As previously developed, the "crime" of failing to return a security

[5] The State's oscillating theory of the crime shows that the crime for which Lasecki was convicted, whatever that may be, does not exist.

deposit requires the *State* to establish that the landlord had an obligation to do so. Lasecki's Brief at 14-16. The State has neither developed its argument that "mitigation" is an affirmative defense, nor has it adequately refuted Lasecki's argument to the contrary. *See id.*; State's Brief at 39. In any event, the State did not establish beyond a reasonable doubt that the tenants were entitled to the return of the security deposits. Lasecki's Brief at 16, n. 11.

On that note, the State is wrong that J.J. was required to give only a twenty-eight-day notice. State's Brief at 42. The lease agreement plainly required sixty days. R. 40, ¶ 27. Similarly, the State misrepresents the record when it claims that J.J. paid rent through July. State's Brief at 11. J.J. took tenancy on March 25, 2016 and provided a check for the first month's rent and the security deposit. R. 77:92, 94. J.J. paid rent for two months thereafter; in total, he "paid for three months" rent, or until June 25, 2016. *Id.* at 100.

This case presents a much grander problem than simply that of imprecise jury instructions. The State cannot invent its own crime, and, absent objection from the defendant, the conviction will stand even where the crime does not exist. *See Christensen,* 110 Wis. 2d at 542 (for the court to have subject matter jurisdiction, the crime must first exist); *State v. Bush*, 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80 (subject matter jurisdiction cannot be waived). More importantly, contrary to the State's unsupported

assertion otherwise, Lasecki *did object* to the jury instructions. State's Brief at 36; R. 77:23. Granted, Lasecki did not offer an alternative wording, but this would have been impossible, as it was unclear what the State was even asserting he did wrong.[6] Drafting the elements of this illusory crime would be an arduous undertaking for someone trained in the law and an insurmountable task for a pro se litigant who was denied the right to counsel. *See* Lasecki's Brief at 2.

In summary, the criminal penalties of § 100.26(3) do not attach to a violation of the regulations § ATCP 134.06 via the language in § 100.20(2) permitting the department to issue orders, but not rules or regulations. In addition, § ATCP 134.06 is invalid because it changes a landlord's duties, enumerated in § 704.28, with respect to withholding and returning security deposits. To the extent a crime exists for violating § ATCP 134.06, the illusory crime for which Lasecki was convicted is not it.

The State references, though it does not develop, the issue of harmless error. State's Brief at 41-42. It is unclear what the State means. That the jury would have nonetheless convicted Lasecki of "some" crime? The State does not define what that crime is, let alone provide record support for its argument. The State, at its own peril, chose to prosecute Lasecki in a haphazard manner, and the convictions for this

[6] That is, whether he withheld the deposits for reasons unauthorized by the statute or whether he failed to provide notice of the reasons he rightfully withheld the deposits.

indeterminate "crime" cannot stand. Lasecki was sentenced to eighteen months in jail, immediately remanded into custody, and ordered to pay in excess of $8,000 for an illusory crime. R. 77:217-20.

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

The State's creation of this crime begins with chapter 100, the chapter from which the criminal penalties are derived. Wis. Stat. § 100.26(3). The State argues that landlords look to chapter 100, among others, for guidance on the legal requirements in rental property. State's Brief at 24. The State, for good reason, does not provided any authority for this proposition; chapter 100 does not even make reference to landlord-tenant laws. The State also does not explain how a landlord would understand that when the legislature gave the department authority to issue "orders" it really meant the "regulations" of § ATCP 134.06.

With respect to the discrepancy between the duties contained in § 704.28 and § ATCP 134.06, the State argues that § 704.28 does not say a landlord need not give notice of the reasons for withholding a deposit. State's Brief at 19, 31. However, § 704.28 does not *impose* this duty; it simply permits the landlord to withhold the deposit for the authorized reasons. § 704.28(1)-(2). Again, the legislature could have imposed the notice requirement, but it did not. If the

State is going to criminally charge a landlord for his passive failure to comply with a duty, that duty must be clear. *See State v. Williquette*, 129 Wis. 2d 239, 251-53, 385 N.W.2d 145 (1986); *Lambert v. California*, 355 U.S. 225, 228 (1957).

The State's attempt to liken this crime to other "complex" crimes is unavailing, as those crimes do not require one to understand that when the legislature said "orders" it really meant "regulations," and those statutes do not involve the inconsistent language between the code regulations and the statutory provisions as here. *See* State's Brief at 21-23.

The State seems to concede that this is the first time this "crime" has ever been charged. State's Brief at 25-26. At a minimum, it does not offer any support that it has ever been charged before. This background is relevant in determining whether a reasonable prosecutor would interpret the statutes to provide for this crime, and, it follows, whether a reasonable person had sufficient notice that such conduct constitutes a crime.

The State created this crime through a haphazard and illogical mishmash of various statutes and code provisions. A reasonable person would not have notice that his passive actions constituted this crime, still undefined by the State.

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

The State does not dispute that the court lacked authority to impose these additional amounts as restitution. State's Brief at 43-45. Rather, the State curiously disclaims that the additional amounts were restitution, despite the court's imposition of these amounts "in the form of restitution or amounts that you are required to do . . . [,]" and despite the written order confirming that these amounts are restitution. R. 77:218; R. 53; R. 55; R. 59. Instead, the State argues that this amount was a "penalty." State's Brief at 43. However, this "penalty" is not included in the maximum penalties authorized by the criminal statute and was never outlined in the complaint. Wis. Stat. § 100.26(3); R. 2; Wis. Stat. § 970.02(1)(a)(the criminal complaint shall contain the possible penalties for the offense).

The State submits that Wis. Stat. § 100.20(5) authorized penalties in addition to those contained in § 100.26(3). State's Brief at 43. However, the application of this provision is limited to a civil lawsuit: a person "*may sue* for damages . . . and shall recover twice the amount . . . ." Wis. Stat. § 100.20(5)(emphasis added). The State offers no authority under which a court can impose a penalty in a *criminal* case above those penalties authorized for the offense. The court lacked authority to impose

these additional amounts as part of Lasecki's criminal sentence, whether as restitution or an additional "penalty," and these amounts must be vacated.

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 3rd day of May, 2019

Signed:

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Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant

BABCOCK LAW, LLC
130 E. Walnut Street, St. 602
P.O. Box 22441
Green Bay, WI 54305
(920) 884-6565
ababcock@babcocklaw.org

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 2,925 words.

Dated this 3rd day of May, 2019

Signed:

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Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE
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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 3rd day of May, 2019

Signed:

_____

Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant