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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP001046-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THEOPHILOUS RUFFIN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and from an Order Denying Postconviction Motion, Entered in Milwaukee County Circuit Court, the Honorable M. Joseph Donald Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Ruffin was denied his constitutional right to the effective assistance of counsel and his due process right to a fair trial when the court instructed the jury with the incorrect substantive jury instruction charging the wrong mode of sexual assault.

A. The court's instruction of the jury with the wrong sexual assault offense was not harmless.

Here, the court provided the jury with the wrong instruction on second-degree sexual assault when it read the jury an instruction on that offense that required "use of force" and did not require "causation." (1:4, 15:3-6). Because the court gave the jury the wrong instruction on second-degree sexual assault, the jury was not instructed to consider whether Mr. Ruffin "caused" V.P.'s injury for that offense.

The State asserts that the court's submission of the incorrect substantive instruction on second-degree sexual assault was harmless because it is clear beyond a reasonable doubt that the jury would still have convicted Mr. Ruffin had the correct instruction been provided because the evidence overwhelmingly showed that Mr. Ruffin "caused"

V.P.'s injury. (State's Response Br. at 20). The State's argument assumes too much.

Importantly, Mr. Ruffin did not actually concede at trial that he legally caused V.P.'s injury, despite the State's attempts at trial to get him to admit he did. Instead, he told the jury that during an argument with V.P., he told V.P. that he wanted her out of the house and was going to call her social worker and report that she was using drugs while pregnant. (73:8). This, he testified, set V.P. off and she attacked him, jumping on him and knocking them onto the bed. (73:8-9). Once on the bed, Mr. Ruffin testified that V.P. had wrapped her legs around him and was physically assaulting him. (73:9-10). In an effort to get V.P. off of him and not put pressure on her stomach, to protect the baby, Mr. Ruffin testified that he grabbed her by the shoulder and the vaginal area to lift her up and push her off of him. (73:9-10, 45-46). When he did this, he testified that V.P. yelled in pain and the altercation ceased. (73:11). V.P. went to the bathroom and discovered the injury to her labia. (73:11).

"Cause" means that the defendant's conduct was a "substantial factor" in producing the injury. WI JI-Criminal 901. It is wholly possible that the jury here accepted Mr. Ruffin's version of events and could have concluded, if presented with the proper instruction on second-degree sexual assault, that because the injury to V.P. was accidental and occurred while he was defending himself against V.P., his behavior was not a substantial factor in

causing the tear to her labia. Alternatively, and equally reasonably, the jury could have concluded that because V.P. was intoxicated and high on cocaine, started the fight with Mr. Ruffin, physically assaulted him, and wrapped her arms and legs around him, refusing to let go, that Mr. Ruffin's actions to defend himself were not a substantial factor in producing the injury, but rather that it was substantially V.P.'s actions that led to her injury.

As such, it is not clear beyond a reasonable doubt that the jury would have found Mr. Ruffin guilty of second-degree sexual assault, sexual intercourse causing injury, had the proper instruction been submitted. *See State v. Williams*, 2015 WI 75, ¶¶52-53, 364 Wis. 2d 126, 867 N.W.2d 736.

Moreover, Mr. Ruffin's acquittal on the charge of mayhem in this case aids his belief that the State has not shown beyond a reasonable doubt that the jury would have found him guilty of second-degree sexual assault, sexual intercourse causing injury, had the proper instruction been submitted to the jury. The instructions for mayhem required the State to prove beyond a reasonable doubt that Mr. Ruffin caused the injury to V.P. WI-Criminal JI 1246. Although mayhem has other elements—such as intent to disfigure a person—it is entirely possible that the jury acquitted Mr. Ruffin of that charge because, for the reasons discussed above, they did not believe he was a substantial factor in causing V.P.'s injuries. WI-Criminal JI 1246.

Although the harm to Mr. Ruffin that resulted from the court's delivery of the wrong jury instruction is mainly demonstrated by the fact that it is not clear beyond a reasonable doubt that the jury would have found him guilty of second-degree sexual assault had the court given the proper instruction, the harm here is amplified by the impact the change in charges would have had on trial strategy, had defense counsel anticipated the change. Counsel asserted during arguments prior to sentencing in this case that, had he been aware the "use of force" version of the sexual assault instruction was submitted to the jury, he would have proceeded with a different theory of defense which did not focus entirely on the causing of the injury. (76:11-12). Defense counsel may have followed through with his request for the self-defense instruction or counsel would have considered requesting a lesser-included offense. (76:12). This type of substantial change could also have altered counsel and Mr. Ruffin's pre-trial strategy and decision-making. Thus, the harm to Mr. Ruffin has been significant.

As a result, Mr. Ruffin asks this court to conclude that the error was not harmless, and to vacate and dismiss his conviction for second-degree sexual assault, contrary to Wis. Stat. §940.225(2)(b), in accordance with *Williams*, 364 Wis. 2d 126 at ¶52.

B. Trial counsel was ineffective for failing to contemporaneously object to the submission of the wrong substantive jury instruction.

Alternatively, trial counsel was ineffective for not objecting to the court's submission of the incorrect jury instruction on second-degree sexual assault in this case. Again, the State argues that because the evidence overwhelmingly showed that the jury would have found Mr. Ruffin guilty of second-degree sexual assault, sexual intercourse causing injury, if they had been properly instructed on that offense, Mr. Ruffin was not prejudiced by trial counsel's failure to object to the wrong instruction. (State's Response at 26). Once again, the State assumes too much.

Put simply, there is a reasonable probability that if the jury heard the correct instruction in this case that they would have determined that Mr. Ruffin was not a substantial factor in causing V.P.'s injuries. *See State v. Smith*, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."); *State v. Delgado*, 194 Wis. 2d 737, 751, 535 N.W.2d 450 (Ct. App. 1995) ("A reasonable probability is one sufficient to undermine the confidence in the outcome of the trial."). As stated above, it is entirely possible, based

on Mr. Ruffin's testimony, that the jury could have concluded that V.P.'s actions, and not Mr. Ruffin's conduct in defending himself, led to V.P.'s injury and Mr. Ruffin was not a substantial factor in causing the injury.

Yet again, the State dismisses Mr. Ruffin's assertions that he suffered additional prejudice from the court's instruction error because his counsel would have argued his case differently had he known the court would submit the incorrect "use of force" instruction to the jury as conclusory. (State's Response at 26). Mr. Ruffin's allegations are not conclusory. As stated previously, trial counsel specifically said had he known the court would submit the "use of force" version of the sexual assault instruction to the jury, he would have proceeded with a different theory of defense that did not focus entirely on the causing of the injury. (76:11-12).

For these reasons and those discussed in Mr. Ruffin's brief-in-chief, it is clear that trial counsel's failure to object to the improper instruction on sexual assault constituted ineffective assistance of counsel, that the failure to object was not a strategic decision, and that this error prejudiced Mr. Ruffin. Thus, Mr. Ruffin alternatively asks this Court to order a new trial. *Id*. at 756.

C. Due to the error in the substantive jury instructions and the detrimental impact it had on Mr. Ruffin's defense, a new trial is warranted in the interest of justice.

On this point, the State claims that there is "nothing exceptional" about Mr. Ruffin's case. (State's Response at 22). That is a bold statement considering that the jury, the decider of Mr. Ruffin's guilt or innocence, was instructed improperly. What flows from that improper instruction is indeed significant.

There are two reasons why the real controversy was not fully tried here. *See State v. Armstrong*, 2005 WI 119, 263 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996). First, because the jury was given the wrong instruction on second-degree sexual assault, we do not know if the jury believed that Mr. Ruffin was a substantial factor in causing V.P.'s injury.

Second, Mr. Ruffin was unable to properly defend himself against the wrong jury instruction on second-degree sexual assault. As trial counsel stated, he would have presented the case very differently had the matter been charged as second-degree sexual assault, use or threat of force, contrary to Wis. Stat. §940.225(2)(a). (76:9-14). As a result, counsel's strategic decisions, questioning of witnesses, and the whole of its presentation to the jury was affected by the error in the jury instructions.

Accordingly, not only has the real controversy not been fully tried, but the error in this case makes

it more than probable that there has been a miscarriage of justice. Therefore, Mr. Ruffin alternatively asks this court to order a new trial in the interests of justice. *See State v. Henley*, 2010 WI 97, ¶63, 328 Wis. 2d 544, 787 N.W.2d 350.

II. If the court declines to grant Mr. Ruffin relief due to the error of submitting the incorrect substantive jury instruction on count one, he seeks a new trial on the grounds that (1) the court erred in refusing to permit the affirmative defense instruction of "accident" on count one, or alternatively, (2) that trial counsel erred by failing to adequately argue the legal precedent supporting his request for the instruction.

A. The trial court erroneously exercised its discretion by declining to incorporate the language found in WI-Criminal JI 772, Accident, into the substantive jury instruction for second-degree sexual assault.

The State is correct in concluding that intent is not specifically an element of second-degree sexual assault, sexual intercourse causing injury. *See State v. Neumann*, 179 Wis. 2d 687, 508 N.W.2d 687 (Ct. App. 1993) (State's Response at 10-11, 14). However, "sexual intercourse," which is one of the elements of second-degree sexual assault, sexual intercourse causing injury, requires a person to act *affirmatively*.

WI JI-Criminal 1209 (2017); *see State v. Lackershire*, 2007 WI 74, ¶¶29-30, 107-108, 301 Wis. 2d 418, 734 N.W.2d; *State v. Olson*, 2000 WI App 158, ¶¶9-11, 238 Wis. 2d 74, 616 N.W.2d 144.

The State rejects Mr. Ruffin's reliance on *Lackershire* and *Olson* and contends that those cases only stand for the proposition that "rape" is a defense to a sexual assault charge without an intent element. (State's Response at 12-14). The State's argument misses the mark. The reason "rape" is a defense to a sexual assault charge without an intent element is because when an individual is "raped," they have not taken part in an *affirmative* act to pursue sexual intercourse with the other person. Similarly, when a person *accidentally* takes part in conduct that would otherwise be sufficient for sexual intercourse, they have not done an *affirmative* act to pursue that sexual intercourse. Accordingly, under the reasoning in *Lackershire* and *Olson*, "accident" is a viable defense in a second-degree sexual assault, sexual intercourse causing injury case.

Simply put, if a person intrudes another person's body in a way that would typically fit the definition of "sexual intercourse" but does so *accidentally*, they have not acted *affirmatively* towards taking part in sexual intercourse and a sexual assault. The accident defense can negative lesser mental elements and its use is not restricted only to cases involving intent. *See State v. Watkins*, 2002 WI 101, ¶41, 255 Wis. 2d 265, 647 N.W.2d 244. Therefore, the "accident" jury instruction should have

been provided as an affirmative defense to the charge, and inserted into the language defining "sexual intercourse" as requested by trial counsel in this case.

Notably, WI JI-Criminal 772 contemplates that the "accident" instruction may be relevant and applicable to elements aside from those involving a clear mental state, such as intent. The committee stated:

> …[The instruction] should be inserted at the point where the element to which evidence of accident relates is defined. Usually, this will be the mental state required for the crime, *but other elements could be involved*. The test should simply be one of relevance: does the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." See, §904.01.

WI JI-Criminal 772, fn.1. (emphasis added).

Failure to provide the affirmative defense instruction on "accident" as requested by defense counsel was erroneous, as "[a] court errs when it refuses to give an instruction on an issue raised by the evidence." *State v. Peters*, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300, citing *State v. Mayhall*, 195 Wis.2d 53, 57, 535 N.W.2d 473 (Ct.App.1995). Here, it is clear by the evidence presented that Mr. Ruffin established the legal grounds required for the affirmative defense of accident. He testified that while V.P. was intoxicated

and high, she physically attacked him, wrapped her legs and arms around him, and refused to release him. He admittedly attempted to push her off of his body by placing his hands in the area of her upper thighs and the injury to and touching of V.P.'s vagina occurred accidentally as he attempted to push her away. (73:7-11; 45-46). Accordingly, Mr. Ruffin alternatively requests a new trial. *Peters*, 258 Wis. 2d 148 at ¶29.

B. Defense counsel was deficient when he failed to cite any case law in support of his request for the "accident" instruction, and as a result, Mr. Ruffin was prejudiced.

While trial counsel did request that the trial court permit the affirmative defense of "accident" on count one, second-degree sexual assault, he did not pinpoint any legal authority, resulting in the trial court erroneously concluding that Wis. Stat. 940.225(2)(b) was a strict liability offense and the "accident" instruction did not apply. (73:66-77). As outlined above, there is legal authority and current precedent in support of an "accident" defense in a case like here—specifically the requirement of an affirmative act as discussed in *Lackershire* and *Olson*—but counsel erred in not identifying it to the court. As such, the "accident" jury instruction should have been provided as an affirmative defense to the sexual assault charge. And Mr. Ruffin was prejudiced by counsel's error, as a reasonable jury could have concluded that Mr. Ruffin's touching of V.P.'s vaginal

area while she was attacking him was accidental, and not returned a guilty verdict. Therefore, alternatively, Mr. Ruffin is entitled to a new trial due to counsel's deficient performance. *Delgado*, 194 Wis. 2d 737, 756.

III. Trial counsel was ineffective when he failed to pursue self-defense to the sexual assault charge, declining to move forward with his initial request that the court incorporate WI-Criminal JI 800 in the instructions.

Contrary to the State's argument on appeal, there was evidence at trial that supported a self-defense argument in this case. (State's Response at 30-31). During his testimony at trial, Mr. Ruffin asserted that he placed his hand in between V.P.'s legs in an effort to get her off of him. V.P. was at the time engaged in an assault on Mr. Ruffin, as she had jumped on him, wrapped her legs around him, and refused to let go. (73:7-11; 45-46). This was an unlawful interference on Mr. Ruffin and he had the legal privilege of self-defense to terminate that interference by pushing her off. *See* WI-Criminal JI 800.

Mr. Ruffin's testimony at trial alone would have required the court to give the jury a self-defense instruction had trial counsel followed through and requested it regardless of any other evidence presented at trial, as the "accused need produce only 'some evidence' in support of the privilege of self-

defense." *State v. Stietz*, 2017 WI 58, ¶16, 375 Wis. 2d 572, 895 N.W.2d 796 (citations omitted). "Crucial to applying the 'some evidence' standard is that a court is not to weigh the evidence. A court does not look to the totality of the evidence, as that would require the court to weigh the evidence—accepting one version of facts, rejecting another—and thus invade the province of the jury. Rather, the question of reasonableness of a person's actions and beliefs, when a claim of self-defense is asserted, is a question peculiarly within the province of the jury." *Id*. at ¶18.

Although the State points out some of the weaknesses in Mr. Ruffin's potential self-defense argument in this case—such as the severity of V.P.'s injury—"[e]vidence satisfies the 'some evidence' quantum of evidence even if it is 'weak', insufficient, inconsistent, or of doubtful credibility or 'slight.'" *Id*. at ¶17. (internal quotations omitted). (State's Response at 30-31).

Finally, it is reasonable to believe that a jury would have believed Mr. Ruffin's testimony and acquitted him on the second-degree sexual assault charge because the jury thought he acted in self-defense. *See Smith*, 207 Wis. 2d 258 at 276. None of the testimony cited by the State in its response—including the testimony of a gynecologist and a police officer—concluded that Mr. Ruffin's version of the events, that he was acting in self-defense, could not have led to V.P.'s injuries. (State's Response at 31). Overall, it was for the jury to decide whether V.P.'s injuries could have occurred while Mr. Ruffin was

defending himself. Thus, for the reasons discussed here and in Mr. Ruffin's brief-in-chief, it was ineffective for trial counsel not to request the self-defense jury instruction, as it was a viable defense in this case. As a result, Mr. Ruffin alternatively request a new trial. *Peters*, 258 Wis. 2d 148 at ¶29; *Delgado*, 194 Wis. 2d 737, 756.

CONCLUSION

For the reasons stated in this brief and Mr. Ruffin's brief-in-chief, Mr. Ruffin asks this court first for an order vacating the judgment of conviction in this matter and issuance of a judgment of acquittal on the grounds that the incorrect substantive jury instruction was presented to the jury. Alternatively, Mr. Ruffin requests that this court vacate the judgment of conviction either on the grounds that trial counsel was ineffective by failing to object to the erroneous jury instruction or, alternatively, that the interest of justice require a new proceedings.

Finally, Mr. Ruffin requests that the judgment of conviction be vacated and a new trial ordered on the grounds that the court erred in not submitting the "accident" instruction to the jury, or that trial counsel erred by failing to adequately present its argument in support of its request that the court instruct the jury on either accident or self-defense.

If this court concludes that a *Machner* hearing is necessary to address any of the claims of ineffective assistance of counsel, Mr. Ruffin requests that the

matter be remanded for the trial court for such a hearing.

Dated this 5th day of March, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,249 words.

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 5th day of March, 2020.

Signed:

CHRISTOPHER D. SOBIC
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