STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2019AP001409-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHANLER LEE GUYTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Door County Circuit Court,
the Honorable David L. Weber, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

> Whether the state presented sufficient evidence for the court to convict Mr. Guyton of five counts of threat to a witness where he spoke angry words to child services workers in response to their decision to suspend contact with his child?

The circuit court answered yes by entering judgments of conviction after finding Mr. Guyton guilty.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Guyton does not request oral argument or publication, as this case can be decided on application of existing legal principles. However, Mr. Guyton welcomes oral argument if this court has questions.

STATEMENT OF THE CASE AND FACTS

On November 17, 2017, the state charged Chanler Lee Guyton with five counts of Battery or Threat to Witness, as a Repeater, contrary to Wis. Stat. §§ 940.201(2) and 939.62(1)(b). (2). The state alleged that, on or about Tuesday, July 18, 2017, Mr. Guyton intentionally threatened five employees of the Door County Department of Human Services with bodily harm without their consent.

(2:1-4). The charging document did not include any mention of a past, pending, or future hearing at which the five individuals were or would be witnesses.

Mr. Guyton waived his right to a jury trial and a court trial commenced on April 18, 2018. M.E. testified that she was a social worker for Door County Department of Health Services (hereinafter DHS), and was the case worker for Mr. Guyton's son following a Child in Need of Protection or Services (CHIPS) disposition. (65:32-34). M.E. testified that she only worked with the family post-disposition in the CHIPS matter and, had never been a witness in Mr. Guyton's cases, one of her primary purposes was to set up calls between Mr. Guyton and his son, as Mr. Guyton was incarcerated. (65:39, 86). M.E. indicated that she was aware that Mr. Guyton was unhappy with some of the decisions DHS has made regarding his son, and had filed complaints. (65:41).

M.E. told the court that, on the morning of July 18, 2017, she had a call with Mr. Guyton, at which time she informed him that DHS was going to be discontinuing the phone calls between Mr. Guyton and his son, pending an investigation. (65:47). She testified that, upon receiving this information, Mr. Guyton became hostile, saying things like "I'm coming to your office armed" and naming anyone who has touched this case, including other DHS workers, C.M., B.C., D.G., A.L. (65:48-49).

In her notes, presented as an exhibit to the court, M.E. detailed what she deemed to be verbatim from the conversation, where Mr. Guyton said "This will turn tragic," "I'll be out in 6 months and will take into his own hands." (65:52). These notes included A.L., D.G., and C.M., but not B.C. (65:53). Also in her notes was the fact that she told Mr. Guyton that she was going to have to report this conversation to authorities, to which he indicated he did not care. (65:55-56).

D.G. testified that M.E. told her about the call after it happened, and that, while she wasn't initially fearful, she later felt afraid that Mr. Guyton was going to seek revenge because he was unhappy with DHS' handling of his case. (65:130-131, 145). She testified that, while she could be called as a witness, she hadn't ever been a witness to a proceeding involving Mr. Guyton before, and was largely in charge of supervising the case managers. (65: 134, 148-149).

C.M., the deputy director of Door County DHS, testified that she knew Mr. Guyton through his correspondence with DHS, primarily his letters detailing that he would seek legal action for wrongs he felt were perpetrated on him. (65: 161, 167). The state introduced Exhibit 6, response letters to Mr. Guyton's complaints, which included that Mr. Guyton was present at the dispositional hearing on April 3, 2017, and was given and signed a Notice of Right to Seek Post-disposition Relief and would have had to file a Notice of Intent to Pursue a Post-

disposition Relief with the court within twenty days of the entry of the disposition order. (31:8).

When asked by the court whether or not she thought that the threats were made because she could be a witness, C.M. answered that she didn't know if he made the threats because she was a witness, but noted "I think they were made because he saw me as being a part of the system that was taking action in his case." (65:198). The court asked again:

> Q: I'm asking your understanding – is that why he was making the threats?
>
> A: My understanding was that he was trying to intimidate everybody associated with the case to get us to change our actions on the case.
>
> Q: Did it have anything to do, in your mind, with any of you being witnesses?
>
> A: I don't know.

(65:199).

B.C., the DHS worker assigned to look into the allegation of abuse from Mr. Guyton's son, testified that she believed Mr. Guyton may carry out the threat. (65:203, 215).

She also testified that she did not believe that Mr. Guyton's threats were made because she could be a witness. (65:229). The court followed up:

> Q: You understood that he felt mistreated in one or more ways?
>
> A: My understanding—no, I'm sure you know I wasn't part of that conversation – is that he was being told while the allegations of child abuse to his son were being investigated his phone calls with his son from [M.E.'s] office were going to be temporarily suspended. And that, yes, that was what prompted his upset.
>
> Q: So it is your understanding that, at least, he made those threats on July 18 of '17 because his phone calls were going to be discontinued?
>
> A: Suspended, yes.

(65:229-230).

A.L., social worker for DHS, testified that she was aware of Mr. Guyton's complaint letters. (65:244). She testified that she knew Mr. Guyton was unhappy with the placement of his son, which is why he wrote the letters, and that his concerns were founded, and resulted in a change of placement for his son from his maternal grandmother's house to a foster home (and ultimately to Mr. Guyton's brother). (65:255). As to her feelings of why Mr. Guyton made these threats, she said she thought it was "[b]ecause I was working directly with the case, for the duration of—from the intake period through the disposition, and had direct contact with Mr. Guyton as well as the child." (65:264).

After the state rested, the defense moved for a directed verdict, based on the fact that the threat was made only to M.E., and that all of the witnesses, excepting A.L., were only hypothetical witnesses. (65:280). The court engaged in a discussion with the parties regarding multiple issues. As to the issue of the status of the five individuals as witnesses, the court cited *McLeod vs. State,* 85 Wis. 2d 787, 271 N.W.2d 157 (Ct. App. 1978), indicating that witnesses need not have already testified.

The court did, however, have an issue with the fourth element of the offense, whether the threats had to be made because of the witness status. (65:288).

The court correctly indicated "any threats that were made had to be because the victims were witnesses or potential witnesses." (65:287). The court expressed its concern, indicating that:

> "there's a [conception] difference between making a threat because Mr. Guyton feels he's being wronged by the Department generally; he feels placement is not been adequately investigated, he feels that people are incompetent, he feels people aren't listening to him, he feels a number of different things as outlined in his letter, and therefore he makes a threat, or a number of threats. That's one thing. It's another thing to make a threat because these people are going—either have been or are going to be witnesses."

(65:289-290; App. 104-105).

The state argued that note 5 of the annotations in the jury instructions modified this requirement, but the court continued to note a potential causation issue. (65:290; App. 105). Ultimately, the court denied the motion as to the count involving A.L., but indicated that the court needed to do some research before deciding the motion. (65:303). The court continued the proceedings until another day.

On August 30, 2018, the court recalled the case and denied the defense motion for a directed verdict. (66:3). The state officially rested, and the defense called Mr. Guyton to the stand.

Mr. Guyton testified that he had custody of his son post-disposition in the Brown County CHIPS matter. (66:11). He was very frustrated with the placement of his son after his arrest, which ultimately resulted in filing of a new CHIPS case in Door County. (66:14). Mr. Guyton said he tried to express this to DHS, but DHS would not acknowledge his concerns. (66:14).

He testified that he had written letters regarding his frustration to DHS, through their complaint process. (66:38). The state introduced Exhibit 13, a response letter from DHS to Mr. Guyton's letters, which indicated that Mr. Guyton would be able to object to placement at a hearing. (66: 43; 26). The state suggested that this was consistent with what Mr. Guyton saw happen during the CHIPS case: he would object, there would be a hearing with testimony, and a judicial

determination, to which Mr. Guyton responded, "Yeah, I guess." (66:44).

Mr. Guyton also testified that he believed there would be no more hearings after the CHIPS dispositional order was entered. (66:28). He also testified that M.E. never gave him any notice of appellate rights after telling him that DHS was suspending his phone calls. (66:54).

Mr. Guyton testified that he remembered that A.L. had testified in the CHIPS proceeding. (66:19-20, 35). Mr. Guyton testified that, besides A.L. and M.E., he had never personally talked with any of the other DHS individuals involved in the case. (66:17-18).

Mr. Guyton told the court that he was planning on filing a civil suit against DHS, but through his research at the institution learned he could not pursue the claim. (66:24-25). He also told the court that he was not involved in early release programming, and that he would not have told M.E. that he was going to be released in six months during their phone call, and instead most likely told her a year and six months. (66:24-25).

Mr. Guyton testified that his comments to M.E. were a product of anger, not an actual threat to harm anyone or because anyone was going to testify against him. (66:26). Mr. Guyton said that his intent in saying "they would be held accountable" was because he wanted them to lose their jobs or have a civil action against them. (66:26).

He did not deny making the comments to M.E., but told the court that he made the comments to stop M.E. from doing what she was doing—harassing him. (66:39, 49).

The defense rested. (66:57).

On rebuttal Officer Chad Hougaard testified about diary entries from Mr. Guyton's personal journals, written after the phone call with M.E., which indicated that he had threatened the workers and felt like killing someone. (66:60).

At the end of testimony, the court again reiterated its concerns regarding the lack of evidence regarding causation between Mr. Guyton's threats and the DHS workers' status as witnesses. (66:70). The court asked for briefing in lieu of oral closing arguments. (66:77).

After consideration of written closing arguments from counsel, the court, on January 3, 2019, found Mr. Guyton guilty on all counts and entered judgments of conviction. (73:23, 53; App. 101-103). Mr. Guyton was sentenced, on each count, to 3 years initial confinement, 3 years of extended supervision, consecutive to any other sentence. (53; App. 101-103).

The undersigned counsel was appointed. This appeal follows.

Additional relevant facts will be discussed in the argument.

ARGUMENT

The State Presented Insufficient Evidence For The Court To Find That Mr. Guyton Was Guilty Of Threat To A Witness As To Each Of The Five Counts. Therefore, His Conviction Must Be Reversed.

A. Introduction.

Protection of witnesses and victims involved in the justice system is paramount. Wisconsin and other jurisdictions have passed laws to target efforts to thwart legal processes. These laws serve to punish people who attempt (or succeed) in threatening or harming witnesses or victims where the threat is made specifically because of their status as a witness. The comments to 1969 Assembly Bill 859, which created Wisconsin Statute § 940.201, noted in *McLeod v. State,* 85 Wis. 2d 787, 793, 271 N.W.2d 157, 160 (Ct. App. 1978), that the purpose of the statute is "aimed at the organized criminal practice of preventing witnesses from testifying in grand juries or trials."

Other, similar Wisconsin statutes exist to deter threats made because of or in response to an individual acting within their official capacity in the legal system. For example, Wisconsin Statute § 940.203(2) (2017-2018), threat to an officer of the court, requires a defendant to intentionally and without consent threaten to cause bodily harm to someone known to be a current or former prosecutor

or judge, in response to an action taken in the prosecutor or judge.

The purpose of these statutory provisions is clearly aimed at "preventing the impeding of the administration of justice by the threatening or harming of witnesses." *McLeod,* 85 Wis. 2d at 790.

What happened in this case is different. Mr. Guyton was upset because DHS decided to suspend his phone calls with his child. Those calls were the only means he had to communicate with his child, as he was incarcerated. His words had nothing to do with thwarting legal processes. Instead, they were a product of a father's frustration and sadness in response to a decision that impacted his relationship with his child.

Of course, threatening behavior is never acceptable, and the state had recourse to hold Mr. Guyton accountable for his actions. *See*, e.g., Wisconsin Statute § 947.01 (2017-2018). But, the state could not have him convicted of threat to a witness.

B. Standard of review.

"The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review." *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410.

However, review of a sufficiency of the evidence challenge is very narrow, and the reviewing court must give great deference to the trier of fact. *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. "[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger,* 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

As the burden of proof is the same whether the trial is to the court or to a jury, the test to be applied to determine the sufficiency of the evidence is the same. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965), citing *State v. Waters*, 28 Wis. 2d 148, 153, 135 N.W.2d 768 (1965).

While this court's review of a sufficiency of the evidence claim is narrow, it must be meaningful. A fact finder cannot base its findings on conjecture and speculation. Reasonable inferences must be supported by facts in the record. *State ex rel. Kanieski v. Gagnon,* 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

C. Relevant statutes and definitions.

Wisconsin Statute § 940.201 of the Criminal Code is violated by one who intentionally causes or threatens to cause bodily harm to a person who he or she knows or has reason to know is or was a witness

by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened.

The Wisconsin Criminal Jury Instructions (Rel. No. 42—4/2004) enumerate the following six elements:

1. The defendant threatened to cause bodily harm of an individual;

2. The individual was a witness;

3. The defendant knew or had reason to know that the individual was a witness;

4. The defendant threatened to cause bodily harm to the individual because the person attended or testified as a witness;

5. The defendant threatened bodily harm without the consent of the individual;

6. The defendant acted intentionally.

The state was required to prove each of these elements beyond a reasonable doubt. As will be demonstrated, it failed to do so.

D. The state presented insufficient evidence to prove beyond a reasonable doubt two of the five individuals were, in fact, witnesses.

Wisconsin Statute § 940.41(3) (2017-2018), which applies to violations of Wisconsin Statute § 940.201, defines witness:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who has provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

The state is required to prove both that each of the five individuals had relevant information and has been or is expected to be summoned to testify. The state failed to do so with respect to D.G. and C.M.

A witness is more than an individual who has some relevant information. A witness is defined as "including both one who has been and one who is

expected to be summoned to testify." *McLeod*, 85 Wis. 2d at 790.

While Wisconsin law does not provide much guidance for analyzing when a person is a witness under the statute, other federal circuits have discussed the issue. In *Walker v. US*, 93 F.2d 792, 795 (8th Cir. 1938), the eighth circuit failed to find the statute applied to an individual when the government had not shown intent to request her testimony. In *U.S. v. Grunewald*, 233 F. 2d 556, 571 (2d Cir. 1956), *rev'd,* 77 S.Ct. 963 (1957), the second circuit also ruled that there needs to be an expectation of testimony in order for a person to qualify as a witness under the statutory definition. And, in the D.C. circuit, the court determined that a person is not a witness when, despite testimonial potential, there is no present prospect of ever exploiting it. *U.S. v. Jackson,* 168 U.S. App. D.C. 198, 201, 513 F. 2d 456 (1975).

The state failed to produce any evidence regarding an actual proceeding where D.G. or C.M. were "*expected"* to be witnesses. Wisconsin Statute § 940.201(2). The state produced no evidence that there was or would be any postdispositional hearings in the CHIPS case. The state provided no evidence that Mr. Guyton was subject or would be subject to a TPR proceeding. The state failed to produce any evidence that Mr. Guyton would or even could file some sort of civil lawsuit against DHS or any of the individuals involved. And the state failed to produce any evidence that these witnesses would be expected

to testify at any of these hearings. A purely hypothetical hearing does not qualify under the statutory definition that requires an expectation of an actual proceeding.

Additionally, the state's own witnesses admitted the unlikeliness of being called as a witness. C.M. and D.G. testified that they had more involvement with the case because Mr. Guyton had filed multiple complaints and threats of civil litigation with the department, but the state never presented information to show how the information they had would be relevant, or even to what actual proceeding they believed they could be a witness.

D.G. testified that she could see the potential for a postdispositional, new CHIPS case, or termination of parental rights (TPR) hearing. (65:133, 135). She testified that she "always anticipates to get asked to testify." (65:159). But, once again, the state presented no evidence that any of these types of hearings were actually foreseeable events, instead of speculation. DHS employees may commonly testify as part of their job as a general matter, but what is required here is proof that they were witnesses vis-à-vis Mr. Guyton. No such evidence was presented.

C.M. said it would be "really rare" that she would be a witness. (65:185, 198). This is not proof beyond a reasonable doubt that she is a witness in this case.

B.C. similarly testified that she could be called as a witness at a hearing (65:221), but again, the state failed to point to any actual, scheduled or anticipated, foreseeable hearing that would have made her a witness under the statute. And, in fact, she testified that the allegations that *could* have resulted in some new CHIPS case were unsubstantiated, that there would be no hearing. (65:226). B.C. also said she had no know knowledge of Mr. Guyton's other complaints and wasn't privy to the letters he sent the department regarding civil action. (65:230).

The state failed to prove that D.G. and C.M. were witnesses and therefore the convictions for both of these individuals must be vacated.

E. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Guyton knew or had reason to know that these victims were witnesses.

The third element requires that the state prove that the defendant "knew or had reason to know" that the individual was, in fact, a witness. WIS-JI CRIM 1238.

Instructive on this is *State v. Cotton,* 2003 WI App 154, 266 Wis. 2d 308, 668 N.W.2d 346, where this court ruled that evidence of anger towards a witness, without more, does not suffice to prove a violations of Wisconsin Statute § 943.201.

In *Cotton,* the district attorney filed a complaint against Mr. Cotton alleging intimidation of a witness. Following bind over after a preliminary hearing on those charges, the state filed an information alleging wholly new charges, including threat or battery to a witness, contrary to Wisconsin Statute § 943.201(2). *Id.,* ¶18-19. Mr. Cotton was arrested for underage drinking. While in the booking room, Officer Paikowski recognized Mr. Cotton as a potential witness in Mr. Cotton's cousin's homicide case. *Id.,* ¶3-4. Mr. Cotton complained about the subpoenas served on him and his family, by Officer Paikowski, while he was in Oklahoma. *Id.* ¶4. Mr. Cotton became angry, told Officer Paikowski he didn't like him, said he had ruined his family and slandered him in Oklahoma. Mr. Cotton called Officer Paikowski a liar and threatened him. *Id.* ¶4. At a preliminary hearing, Officer Paikowski testified that he believed, based on his experience, that he would be called to testify at the John Doe hearing for which he was attempting to serve Mr. Cotton a subpoena. *Id.* ¶20. The state argued that it could be inferred, because of his anger and his questioning of Officer Paikowski as the person who served the subpoena, Mr. Cotton knew Officer Paikowski could be a witness at a John Doe hearing or at his cousin's trial. *Id.,* ¶¶20-21. The circuit court dismissed the charges and this court affirmed. The court assumed without deciding that Officer Paikowski was likely to be called as a witness, but held that the evidence was insufficient to show that Mr. Cotton probably knew that

Officer Paikowski was likely to be called as a witness. *Id.*, ¶¶20, 22.

This court ruled that evidence limited to facts that a defendant is angry and threatens someone who could be a witness in some proceeding, without more, does not establish that the defendant threatened the alleged victim because he knew that they were likely to be a witness. *Id.* ¶22.

> There is nothing in the evidence identified by the State or in the record of the preliminary hearing that establishes Cotton's knowledge that Paikowski was likely to be a witness in an action or proceeding. Paikowski testified that Cotton expressed his anger with the service of the subpoenas on his family, claiming that the service had been invalid and that it had ruined his family. However, there is no indication that Cotton believed Paikowski might be a potential witness either in any case against him or in the homicide case pending against his cousin. Nowhere in the exchange between Paikowski and Cotton did Cotton make any reference that could be construed as evidence that he knew Paikowski was likely to be a witness. Evidence limited to the mere fact that Cotton was angry with Paikowski, without more, does not establish that he threatened Paikowski and Paikowski's family because he knew that Paikowski was likely to be a witness for the State.

Id. ¶22.

Like in Cotton, here, there is nothing in the record that establishes Mr. Guyton knew these individuals were likely to be a witness in an actual or anticipated action or proceeding or that he threatened them because he knew they were likely to be witnesses.

The state spent a great deal of time asking each of the witnesses if they believed they could be witnesses, but elicited no evidence that Mr. Guyton knew these individuals were expected to testify, or threatened them because he knew they were likely to testify.

While the state provided no evidence regarding Mr. Guyton's knowledge of these individuals as witnesses, there was an abundance of evidence presented that provided a reasonable hypothesis consistent with his innocence—that Mr. Guyton had no reason to believe these individuals were witnesses.

Mr. Guyton's CHIPS case was postdisposition, and Mr. Guyton testified that, while he anticipated working with CPS to regain custody of his child upon release, he believed all of the court proceedings were done after disposition. (66:28-29).

Additionally, the state tried to suggest that Mr. Guyton knew if he objected, he could receive a hearing, because he had objected to placement during the dispositional hearing and testimony was taken. (66:38). However, all of the letters Mr. Guyton sent objecting to DHS decisions had been dealt with

administratively, not through the courts. (66:38). Additionally, the state produced evidence, a letter from C.M., dated August 25, 2017, that showed Mr. Guyton had received his appellate rights after the contested hearing on April 3, 2017, and informed him that, had he intended on appealing dispositional orders entered by the court, then he would have had to file his Notice of Intent to Appeal the Post-dispositional Order within 20 days of April 3, 2017. (31:8).

Based on the state's own evidence, there is more than reasonable doubt as to whether or not Mr. Guyton knew or should have known these individuals were witnesses. He thought that the hearings were over, his only recourse to contest the decisions post-disposition were through an appeal that he did not file, and his only recourse was administrative. No other inference is reasonably supported by the evidence.

Additionally, and contrary to the attempt by the state to conjure a purely hypothetical scenario where Mr. Guyton was in a position to file a civil action lawsuit against the county, there was no such action filed, nor was Mr. Guyton pursuing any civil action, due to his understanding that he had no legal standing to do so. (66:23-24). The state elicited testimony from Mr. Guyton regarding his lack of legal or social work training to understand how to file suit against DHS, making this imaginary lawsuit even less likely. (66:40). There was also no evidence presented that a termination of parental rights

proceedings had commenced or would be filed, let alone that Mr. Guyton knew or should have known that, at some future unforeseen potential hearing, these individuals would be witnesses. (66:29).

The state failed to produce any evidence that could result in a reasonable inference of guilt as to his knowledge of these individuals as witnesses. Mr. Guyton was upset with these individuals for suspending his phone calls with his child. His anger was directed at their exercise of power over his relationship with his child, not directed at their role in some hypothetical court hearing, which is insufficient under this court's ruling in *Cotton* to prove guilt beyond a reasonable doubt. Thus, the conviction should be vacated.

F. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Guyton threatened bodily harm to a witness because of their status as a witness.

Even if the court finds that the alleged victims were witnesses *and* that Mr. Guyton knew that they were witnesses, there was still insufficient evidence presented to sustain a finding of guilt, beyond a reasonable doubt, that Mr. Guyton made these threats because of the witnesses' status as witnesses.

The fourth element of the offense requires that the state prove the offender made this threat "by reason of…" the person's status as a witness: that the "defendant caused or threatened to cause bodily harm

to the victim or victim's family because the person was likely to testify as a witness." WIS-JI CRIM 1292.

While *State v. Cotton* ultimately ruled that the state had not met its burden as to Mr. Cotton's knowledge of Officer Paikowski as a witness, the case also discussed causation, ruling that evidence linking the threat to an individual's status as a witness based solely on the defendant's anger is not sufficient proof of causation. *Cotton,* 2003 WI App 154, ¶22. Thus, in order to find guilt beyond a reasonable doubt, the defendant must have threatened someone *because* they are likely to be a witness.

Also helpful in identifying what is necessary to establish causation between threats and witness status is *McLeod v. State*. There, the defendant was convicted of battery to a witness, as a party to a crime, after soliciting someone to batter an individual *for fear that* the individual would testify against them. 85 Wis. 2d at 788. This case demonstrates the process for protecting a witness in a case that presented the prototypical situation for battery to a witness: an individual not only makes a threat, but makes that threat in order to thwart the witness from participating in the legal system.

The factual basis and rulings from each of the above-mentioned cases are consistent with the purpose and meaning behind Wisconsin Statute § 943.201: thwarting attempts of illegal interference with legal processes.

Mr. Guyton's case does not fit into the prototypical scenario contemplated by the statue or seen in *McLeod,* because the facts in Mr. Guyton's case are inconsistent with how the statute is to be prosecuted or what proof is required under *Cotton*. The state produced no evidence that Mr. Guyton's was threatening the alleged victims because they were witnesses or because he had knowledge that they were likely witnesses. That is because Mr. Guyton's threats were angry comments, similar to those in *Cotton*, not an attempt to illegally meddle in a legal proceeding.

As to both C.M. and D.G., the state not only failed to prove causation, but both of these individuals testified consistent with Mr. Guyton's innocence. They both told the court that they did not believe these threats were made because they were witnesses. (65:131, 229). D.G. indicated that she felt Mr. Guyton was unhappy with the handling of his cases and wanted "revenge." (65:131). C.M. was asked twice by the court if she thought the threats were made because she and the others were witnesses, and both times answered, "I don't know." (65:199).

Based on this testimony, there is no reasonable inference that is consistent with guilt, and without any additional evidence, both convictions should be vacated.

With respect to the remaining three alleged victims, the state failed to provide the court with any evidence to prove the causal link between their status as witnesses and Mr. Guyton's threats.

M.E. testified that, when she told Mr. Guyton that she was going to have to report his threat to police, he responded "I don't F-ing care." (66:56). M.E.'s own testimony regarding Mr. Guyton's reaction demonstrates that the threat was not an effort to illegally thwart some legal process, but, rather, a man that was sad and angry that he was losing the ability to contact his child.

Mr. Guyton testified that he knew, by objecting in court to a departmental decision, there could be a hearing. (66:51). However, there is no evidence to suggest that Mr. Guyton made the threats as a legal objection in an effort to obtain a contested court hearing. As discussed above, Mr. Guyton had been dealing with his objections via administrative review, and had never received a hearing based on these letters, and was told, in writing, that the way to challenge the dispositional orders was by filing a Notice of Intent to Appeal within 20 days, something that was not done. (31:8).

There were no pending cases. The CHIPS case was post-disposition, there was no civil lawsuit filed, no TPR proceedings were in progress (or even contemplated), no notice of appellate rights was given regarding the termination of phone calls and, given that Mr. Guyton did not file a timely Notice of Appeal

in the CHIPS proceeding, there was no legal basis to bring a post-dispositional challenge based on his objections. This raises the question: how could Mr. Guyton threaten these individuals because of their status as witnesses if they would never be witnesses?

The state submitted no evidence that the threat was an attempt to get any of the individuals involved to testify to a court consistent with Mr. Guyton's objections. There is no evidence that Mr. Guyton threatened any of these individuals to stop them from or for fear that they would be testifying against him—there was no imminent or anticipated proceeding at which they were to testify. There was no evidence that Mr. Guyton was threatening anyone to somehow circumvent some legal process involving these individuals as witnesses.

The only reasonable inference from the evidence presented by the state was, therefore, that Mr. Guyton made these threats because he was angry with what DHS was doing regarding his son. Under this court's previous rulings and consistent with the purpose of the statute, this is insufficient proof of guilt.

CONCLUSION

This court must ask whether the evidence, viewed in the light most favorable to the state, is so lacking in probative value and force that no trier of fact, *acting reasonably,* could have found guilty

beyond a reasonable doubt. *Hayes,* 2004 WI 80, ¶56 (emphasis added). The circuit court made unreasonable inferences, based on the evidence presented by the state, to find guilt beyond a reasonable doubt in this case.

Mr. Guyton levied a threat because he was mad. Because he was angry at DHS decisions. Because he was frustrated that he was incarcerated and was going to be unable to speak with his son. Not because these women were witnesses. Mr. Guyton made these threats because of perceived harassment by DHS. This, however, this is insufficient under the law for findings of guilt of threat to a witness. The convictions must be vacated.

Dated this 30th day of October, 2019.

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 5,788 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.

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Dated this 30th day of October, 2019.

Signed:

KELSEY LOSHAW
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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APPENDIX

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