RECEIVED
01-31-2020
CLERK OF COURT OF APPEALS
OF WISCONSIN

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 for the Judgement of Conviction
Entered in the Circuit Court for Door County,
The Honorable David L. Weber, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
loshawk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

Contrary to the state's argument, there was not sufficient evidence, even if judged in the light most favorable to the state, to convict Mr. Guyton. The state asks this court to lower the state's burden of proof in an absurd attempt to avoid dealing with the lack of factual support for these charges.

Mr. Guyton does not suggest that the behavior of threatening individuals is acceptable, but, the state had recourse to hold him accountable. *See,* e.g., Wisconsin Statute § 947.01 (2017-2018). The state, however, failed to meet its burden with respect to the crime it selected.

I. The state did not prove that D.G. and C.M. met the legal definition of witness.

The parties agree that a witness is defined as "any natural person who has been or is expected to be summoned to testify" or "who by reason of having relevant information is subject to call or likely to be called as a witness." Wis. Stat. § 940.41(3)(2017-2018). The first definition is met when a person has been or is expected to be summoned, which assumes a proceeding has commenced. The second definition requires that the person have relevant information *and* is subject to call or likely to be called.

The state categorically, and without any legal argument, dismisses the cases cited by Mr. Guyton that discuss how other courts have interpreted who qualifies as a witness. (State's brief at 13). Mr. Guyton cites cases from other jurisdictions to

discuss how other courts have interpreted the same issue to provide this court guidance. Interestingly and incorrectly, the state suggests that Mr. Guyton does not provide a legal support for his argument. It is the state, however, that cites no case law to illustrate how these witnesses meet the statutory definition.

The state seems to argue that because both D.G. and C.M. had some relevant information that they qualify under the second definition. The statute, however, requires more than this and the state fails to provide any evidence that was presented regarding how either of these women were subject to call or likely to be called, as required by the statute. The state does not meet its burden by producing only speculation about the possibility of some hypothetical hearing.

The state also argues that Mr. Guyton conceded the issue at trial. However, closing arguments by counsel are not evidence, and a concession in argument does not alleviate the state from its burden to prove each of the elements of the crime beyond a reasonable doubt. In fact, a finder of fact could reject any concession by counsel during a trial. This court can do the same and must do so if the state has not met its burden.

II. The state did not prove Mr. Guyton knew or should have known that the victims were witnesses

At the outset, it should be acknowledged that the state quotes trial testimony as if Mr. Guyton said

it, when, in reality, the actual testimony from Mr. Guyton was in response to questions posed by the state. (State's brief at 14). Mr. Guyton responded 'correct' or 'yes' when posed with certain questions, but never himself made the statements that the state attributes to him.

As to the substance of the state's argument, Mr. Guyton agrees that the standard of proof on this element requires the court to consider an objective standard, whether "A reasonable person in that position objectively would know that they are or would be witnesses." (73:14; State's brief at 14).

What the state ignores, however, is the fact that the CHIPS case was in a post-dispositional posture. The state elicited testimony that Mr. Guyton had objected before and received a hearing *while the CHIPS case was pending*. There was no evidence elicited that Mr. Guyton or any other reasonable person would believe that objections to placement would result in a hearing *after* a dispositional order was entered. It makes common sense that this would be the reasonable belief: the dispositional hearing is just that, it enters the disposition. There are no 'regularly scheduled hearings' after that. The fact that some of the state's witnesses testified that they were aware of potential post-dispositional hearings offers no support to the state's argument—it would be excepted that someone who works within the system on a daily basis would know about all the processes and procedures. But the standard contemplates what a reasonable person in Mr. Guyton's case would or should know.

Additionally, the state's own witness testified that Door County DHS did not have the case, as venue was transferred to Brown County as of November 2017. (65:38, 75). With the exception of M.E., who appeared at the non-substantive transfer hearing, the state produced no evidence that any of the individuals were witnesses in any hearings from July 2017 through the time of testimony. *(See generally* 65).

It is not enough that there could have been any number of proceedings, what is required is that a reasonable person would or should objectively believe that these people would be witnesses. A reasonable person would not have known or should not have known that these individuals could be witnesses in some hypothetical proceeding, at some point in the future, in a different county, the state failed to prove as much.

The state attempted to distinguish *State v. Cotton*, 2003 WI App 154, 266 Wis. 2d 308, 668 N.W.2d 346, but the argument is unpersuasive. The state argues that they offered proof of this element by showing Mr. Guyton had knowledge that the individuals played a part in the CHIPS proceeding and that made him angry. (State's brief at 15). While this is correct, that Mr. Guyton knew the people at DHS and their decisions made him angry, this does not somehow transform into knowledge that these individuals were, in fact, witnesses. Mr. Guyton's case is similar to *Cotton* in that Mr. Guyton's reaction tends only to suggest he was angry with workers, not

that his anger somehow demonstrates his knowledge that they were witnesses.

What is more, the state makes an unpersuasive argument that Mr. Guyton's testimony that he wanted to file a civil suit is evidence that he knew these individuals were or would be witnesses. (State's brief at 15-16). The state ignores Mr. Guyton's complete inability to file a suit. It was simply not possible—he had no mechanism or standing to do so. It does not matter, as the state suggests, that Mr. Guyton did not testify about when he became aware that he did not have a claim—what matters is that he did not have the ability to file any civil suit.

It is also telling that no hearing ever took place after these threats happened. There was no post-dispositional hearing regarding placement, Mr. Guyton's son was placed into the care of his brother without a hearing. The county never filed a termination of parental rights case. And there was no criminal trial, as the claims of abuse were unsubstantiated. It begs the question: how was it reasonable to think that they were, in fact, witnesses, or that a reasonable person would have known they would or could be witnesses?

III. The state had to prove, and did not prove, that Mr. Guyton threatened these individuals because they were witnesses.

The state failed to provide sufficient evidence that the threats happened because of the witness status. However, what is more problematic is that the

state seems to misstate the state's burden of proof in an attempt to avoid the fact that there was not sufficient evidence, as it did not exist, for this element. This court should not be fooled by an attempt from the state to avoid addressing the actual lack of evidence by creating a frivolous legal claim regarding the burden of proof.

A. The state misstates the elements of the crime the state must prove beyond a reasonable doubt.

The state erroneously suggests that it need not prove that Mr. Guyton threatened the individuals because they would be witnesses. The state suggests that the required element—that the defendant threatened to cause bodily harm to the victims because they were witnesses—only applies if the victim has testified, but not when a person is expected to be summoned to testify. (State's brief at 16).

The trial court properly decided that the state's reading of the jury instructions regarding the 'because' element was unfounded. The court found that the state had to prove the 'because' element as required under the jury instructions: "[footnote] 4 applies regardless of whether they've testified or not. It just has to be reworded to be stated that they would—the treat would be because they are expected to testify, if they haven't yet testified." (65:288).

The court's ruling is also consistent with the jury instructions and inconsistent with the state's legally incorrect and absurd position. Wis. JI-Criminal 1238 requires the state to prove, beyond a reasonable doubt, six elements. (*See* Wis. JI-Criminal 1238).

Contrary to the state's argument, footnotes 4 and 6 do not remove the requirement for the state to prove the causation element when a witness has not testified, but, rather, requires that the court include the proper definition of a witness *if* the witness has not yet testified.

Footnote 6, which discusses the causation element, reads that the "element is drafted for a case where the person has attended or testified. If that statement does not fit the status of the victim, the statement must be modified. *See* note 4, supra." (Wis. JI-Criminal 1238).

Footnote 4 says the "definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.201. If that statement does not fit the status of the victim, the definition in the second set of brackets should be sued, selecting the proper alternative from the full definition." (Wis. JI-Criminal 1238).

Despite the state's attempt to twist the words of the instruction to suggest that the state need not prove the fourth element, the notes to the instruction clearly state that it is the definition of witness, not the substantive elements, that must be changed, if

the charge includes a witness that has not yet testified.

What's more, footnote 6 goes on to state that the instruction uses because in place of the statutory language "by reason of" because it would be easier for a jury to understand. (Wis. JI-Criminal 1238). The state's argument that the statute itself does not contain a requirement that the state prove the defendant threatened the victim because the victim was a witness is wrong and completely ignores the second half of footnote 6, and ignores the clear case law from this court. It is the definition of witness that may need clarification depending on the facts of the case, not the substantive element regarding causation. *See McLeod v. State*, 85 Wis. 2d 787, 271 N.W.2d 157 (Ct. App. 1978).

The reason for the footnotes is not that the elements of the crime somehow changes for witnesses who have testified or are likely to testify, but, rather, deals with a change in the statutory numbering and definition of witnesses. Support for this is found in Wis. JI-Criminal 1239, which was withdrawn in 2003, because the Jury Instruction Committee found that an offense where a witness hadn't yet testified could be addressed by making minor adjustment in Wis. JI-Criminal 1238 instead of having two separate jury instructions:

> Wis JI-Criminal 1239 was originally published 1998, replacing Wis JI-Criminal 1233 for offenses against persons who have not yet testified as a witness but are likely to do so. It was withdrawn in 2003 because the Committee concluded that

> an offense of that type could be addressed by making relatively minor adjustments in Wis JI-Criminal 1238.
>
> The separate instruction formerly provided by Wis JI-Criminal 1239 addressed the type of violation recognized by the Wisconsin Court of Appeals in McLeod v. State, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978). McLeod held that the predecessor to§ 940.201 applied to a battery against a person who had not yet attended or testified as a witness, but who was expected to do so. McLeod dealt with § 940.206, 197S Wis. Stats., which was renumbered§ 940.20(3) without substantive change by Chapter 173, Laws of 1977. Current§ 940.201 replaced § 940.20(3) in 1998.

Despite the withdrawal of Wis. JI-Criminal 1239, it remained clear that, "[i]n cases like *McLeod*, even though the witness has not testified, there must be a connection between the battery and the victim's status as a witness, and the instruction so requires." Wis. JI-Criminal 1239 (Withdrawn).

The state's reading of the statute, the elements, and the jury instruction is a disingenuous attempt to skirt the requirements of law to prove their case beyond a reasonable doubt. The state was required to prove that the threats were made because the person testified as a witness *or* because the person was expected to be called as a witness.

B. The state failed to prove that Mr. Guyton's threats were because of the status of these individuals as witnesses.

The state ignores the testimony from two individuals, C.M. and D.G., both of whom testified that they did not believe the threats were made because they were (or could be) witnesses. (65:131, 229). The state seems to ignore this as an attempt to have this court ignore evidence constituting clear reasonable doubt.

Additionally, the state cites only part of Mr. Guyton's testimony in an attempt to persuade this court that Mr. Guyton threatened these individuals because they were (or could be) witnesses. (State's brief at 14). However, Mr. Guyton testified that, while these women were acting as a unit and he felt they were violating his rights, it was in the context of his complaints that he felt this was happening. Mr. Guyton consistently testified that he was attempting to go through the proper administrative channels to get his questions answered, but no one would respond satisfactorily. (*See generally* 66).

His threat was a man trying to be heard, not an attempt to change testimony at a hypothetical future hearing, or to stop them from coming to court hearings that weren't scheduled or could be expected to be scheduled. He didn't use words to that end, saying that he would kill them all if they testified against him or he would kill them if they didn't go to court and testify differently. There is no reasonable

view of the actual evidence that would suggest as much.

Mr. Guyton also, contrary to the state's recitation of the facts, testified that he planned on working with CPS to get his child back after his release. (66:28). He never testified that he planned on reopening his CHIPS case. Mr. Guyton also testified that he was dealing with his objections in a non-legal way, through administrative review. (31:8).

The state's attempt to manipulate the testimony does not transform what the testimony actually was. The state's argument about some sort of fantasy situation should be ignored, as it does not address the actual evidence presented and only reasonable inferences that this court should draw from them. Mr. Guyton again asks: how could Mr. Guyton threaten these individuals because of their status as witnesses if they would never be witnesses?

The state also failed to address the evidence as it relates to the witnesses who actually did testify previously. Regardless of whether the state was required to prove, beyond a reasonable doubt, that Mr. Guyton threatened these individuals because they would be witnesses, the state failed to address the fact that two of the five charges involved individuals who had already testified.

M.E.'s own testimony was that Mr. Guyton did not seem to care that she was going to report his threat, as he was not attempting to threaten her as a way to thwart some legal procedure, but, rather, as a

man sad and frustrated about losing the ability to talk with his son. (66:54). She appeared at one hearing, which was not contested by Mr. Guyton, and it is not apparent whether she even gave testimony at that hearing. (65:86-87). While A.L. had previously been a witness, she was self-admittedly not involved with the case after April 2017, which tends to undercut the state's position that she was threatened because she was a witness. (65:257).

The state failed to prove this element beyond a reasonable doubt for all five of the individuals named in the charges.

CONCLUSION

Mr. Guyton was a man frustrated and angry with DHS decisions. He did not threaten these individuals because they were witnesses. There is no reasonable view of the evidence that would allow this court to sustain the finding of guilt.

Dated this 31st day of January, 2020.

Respectfully submitted,

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
loshawk@opd.wi.gov

Attorney for Defendant-Appellant

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 2,781 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 31st day of January, 2020.

Signed:

KELSEY LOSHAW
Assistant State Public Defender