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COURT OF APPEALS**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP000952

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS LOUIS GIEGLER,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
and Order Denying Postconviction Motion, Entered
in the Milwaukee County Circuit Court, the
Honorable Jean Marie Kies and the Honorable
Rebecca A. Kiefer, Presiding

**BRIEF OF
DEFENDANT-APPELLANT**

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ISSUE PRESENTED

1. Did the State present sufficient evidence to prove beyond a reasonable doubt that Mr. Giegler knew that a temporary restraining order had been issued against him?

The circuit court answered “yes.”

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Publication is not likely warranted because this appeal applies well-established law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Giegler with knowingly violating a domestic abuse temporary restraining order, contrary to Wis. Stat. §813.12(3) and (8)(a), and disorderly conduct, contrary to Wis. Stat. §947.01. (1:1-2). Both counts included a habitual criminality and dangerous weapon enhancer. (1:1-2).

As probable cause for the underlying offenses, the complaint alleged that on July 29, 2017, Mr. Giegler had contact with H.F. in violation of a temporary restraining order at the home where she was living. (1:2-3). H.F. asked Mr. Giegler to leave the residence, he refused, threatened to kill her and

himself, and armed himself with a knife. (1:2). Police were called and, when they arrived to arrest Mr. Giegler, he yelled at them and disobeyed their commands. (1:2).

Before trial, the State dismissed the dangerous weapon enhancers on both counts and felony charges Mr. Giegler faced in another case because H.F., the victim, died while this case was pending. (137:15-17).

Mr. Giegler represented himself at trial, which began on October 17, 2018. (137:2). The State called three witnesses: A.K., Officer Kevin Mussatti, and Officer Jesse Maxwell.

A.K. testified that he was the neighbor of Mr. Giegler and H.F., knew about the restraining order H.F. had against Mr. Giegler, and called the police to inform them that Mr. Giegler was at H.F.'s residence violating the restraining order on July 29, 2017. (138:15-18).

Officer Mussatti testified that he went to H.F.'s residence to investigate the restraining order violation based on information he received from police dispatch:

The State: And did you prior to arriving confirm that there was, in fact, a restraining order in place?

Officer Maxwell: I did, yes.

The State: And did you also confirm that that's a restraining order that had been served?

Officer Mussatti: Yes.

(138:40-41, 63). Through Officer Mussatti, the State admitted a copy of the temporary restraining order H.F. had against Mr. Giegler into evidence. (22:1-2; 138:43). Officer Mussatti also testified that when he arrived at H.F.'s residence he encountered Mr. Giegler on a bed, yelling at officers, and Mr. Giegler was uncooperative with police efforts to arrest him. (138:41-42).

Officer Maxwell also testified that he investigated the restraining order violation at H.F.'s residence. Like Officer Mussatti, he stated that police dispatch told him that the restraining order had been served on Mr. Giegler before the officer arrived at the residence. (183:85, 89). Additionally, Officer Maxwell testified that he was not the one who served the restraining order on Mr. Giegler. (138:79). However, he told the jury that when an officer serves someone with a restraining order, they complete an affidavit of service. (138:80). While investigating the restraining order violation, Officer Maxwell never asked Mr. Giegler any questions about the restraining order. (138:83-84).

The jury convicted Mr. Giegler of both charges. (34:1; 139:32-33). The court, the Honorable Jean Kies presiding, sentenced him to 1 year initial confinement and 1 year extended supervision on each count concurrent to each other. (34:1; 140:29).

Subsequently, Mr. Giegler filed a motion for postconviction relief. The motion requested that the court: (1) vacate the habitual criminality enhancers,

(2) enter an order of acquittal on the violating a restraining order charge, (3) order a new trial because Mr. Giegler did not knowingly waive his right to counsel, and (4) dismiss the domestic abuse surcharge on the disorderly conduct charge. (76:6-17).

After an evidentiary hearing, the court, the Honorable Rebecca A. Kiefer presiding, found that Mr. Giegler did not knowingly waive his right to counsel and, therefore, it granted him a new trial on both counts and vacated his convictions. (117:5, 11; App 7, 13). However, the court denied Mr. Giegler's request to dismiss the knowingly violating a restraining order count due to insufficient evidence.¹ (117:10-11; App. 12-13).

This appeal challenges whether the State presented sufficient evidence at trial to convict Mr. Giegler of knowingly violating a temporary restraining order.

¹ Since the court granted Mr. Giegler a new trial, it did not decide whether he was properly convicted as a habitual criminal or if the domestic abuse surcharge on the disorderly conduct count was proper. (117:11).

ARGUMENT

I. The State did not meet its burden to show Mr. Giegler knowingly violated a temporary restraining order because it did not prove he knew about the order.

In order to prove Mr. Giegler guilty of violating a temporary restraining order, the State was required to prove three elements beyond a reasonable doubt: (1) a temporary restraining order was issued against Mr. Giegler, the respondent, in favor of H.F., the petitioner, under §813.12 of the Wisconsin Statutes; (2) Mr. Giegler committed an act that violated the terms of the temporary restraining order; and (3) Mr. Giegler *knew* that the temporary restraining order had been issued and knew that his acts violated its terms. *See* WIS-JI-Criminal 2040.

This case centers on the third element. The issue is whether the State proved beyond a reasonable doubt that Mr. Giegler knew that the temporary restraining order had been issued.

The Due Process Clause of the United States Constitution guarantees that a person accused of a crime is presumed innocent and that the burden of proof is upon the State to establish guilt of every essential fact beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970).

A finding of guilt may rest on circumstantial evidence if the evidence is sufficiently strong and convincing to exclude every reasonable hypothesis

consistent with the defendant's innocence. *State v. Poellinger*, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990). Circumstantial evidence is not sufficient to support a conviction if it merely raises a suspicion of guilt, even if the suspicion is strong. *Miller v. State*, 191 Wis. 477, 482, 211 N.W. 278 (1926). The law requires that a criminal verdict rest upon more than a guess, even if it is a good guess. *Volk v. State*, 184 Wis. 286, 288, 199 N.W. 151 (1924).

Though facts may be established by reasonable inferences as well as direct evidence, an inference is reasonable only if it can fairly be drawn from the facts in evidence. *In re Paternity of A.M.C.*, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). A proper inference is one drawn from logic and proper deduction. *Id.* And while "a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001); *Yelk v. Seefeldt*, 35 Wis. 2d 271, 280-81, 151 N.W.2d 4 (1967).

On appeal, the relevant question is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential facts beyond a reasonable doubt. *Poellinger*, 153 Wis. 2d 493 at 501, 506-07. When a reviewing court has found the evidence legally insufficient, the only remedy is to direct a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 18 (1978).

Here, the State did not produce sufficient evidence to demonstrate beyond a reasonable doubt that Mr. Giegler knew about the temporary restraining order on July 29, 2017.

At trial, Officer Maxwell testified that when an officer serves a restraining order on someone they complete an affidavit to show the restraining order was indeed served. (138:80). Yet, the State did not admit an affidavit of service of the restraining order on Mr. Giegler into evidence during trial. The State also did not produce testimony from an officer who actually served the restraining order on Mr. Giegler or the individual from police dispatch who gave Officer Mussatti and Officer Maxwell the information about the restraining order. Moreover, the State did not present any testimony from a witness that stated that Mr. Giegler told them he knew about the existence of the temporary restraining order.

In reality, the only evidence that the State submitted at trial relevant to Mr. Giegler's knowledge of the restraining order was that police dispatch told Officer Mussatti and Officer Maxwell that the temporary restraining order was served on Mr. Giegler before they arrived at H.F.'s residence. (138:40-41, 63, 85, 89). The officers provided no further detail regarding the service of the temporary restraining order on Mr. Giegler, such as when, where, and how it was served on him.

In *State v. Oppermann*, the circuit court convicted the defendant of knowingly fleeing a marked

police car. 156 Wis. 2d 241, 242, 456 N.W.2d 625 (Ct. App. 1990). On appeal, this Court determined that the State did not present sufficient evidence at trial because there was no evidence that the defendant *knew* he received a signal from a traffic officer. *Id.* at 247. Specifically, this Court noted that the State failed to present testimony that the officer who attempted to stop the defendant was in uniform, that he displayed a badge, or that he activated the red and blue lights which are distinctive to police cars. *Id.*

Like *Oppermann*, the officers' minimal, uncorroborated, and second-hand testimony about service of the restraining order on Mr. Giegler was insufficient to show Mr. Giegler *knew* about the temporary restraining order when he violated it.

At best, the evidence presented at trial allowed the jury to speculate that Mr. Giegler knew about the restraining order. To sustain a verdict, there must be sufficient credible evidence to support guilt beyond a reasonable doubt. *Poellinger*, 153 Wis. 2d 493 at 501. That evidence is lacking here.

As such, the State failed to prove that Mr. Giegler knew about the temporary restraining order, an essential element necessary to convict him of violating that restraining order. Therefore, Mr. Giegler asks this Court to remand this case with instructions that the circuit court enter an order of acquittal on the charge of violating a temporary restraining order.

CONCLUSION

For the reasons stated in this brief, Mr. Giegler respectfully requests that this Court remand this case with instructions that the circuit court enter an order of acquittal on the charge of violating a temporary restraining order.

Dated this 13th day of August, 2021.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 1,666 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of August, 2021.

Signed:

Electronically signed by

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