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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP001252-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY ARTHUR WRIGHT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Douglas County Circuit Court,
the Honorable George L. Glonek, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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CASES CITED

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STATUTES CITED

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907.02(1) 4, 6, 7

ARGUMENT

It's cliché, but fitting here: the state wants to have its cake and eat it, too. The state argues that Detective Jaszczak's expert testimony assisted the jury in this case but also that it made no difference in the outcome. Likewise, the state argues that Detective Jaszczak was a qualified expert and that his expert testimony was reliable but also that there was no harm done because any witness could have relied upon the ZAP Stick's instruction manual to opine that the device Wright used was a dangerous weapon. In the same vein, the state argues that Detective Jaszczak's testimony was only expositional but also that he was qualified to opine that the device in question was designed to "immobilize" L.M.

This Court should reject the state's arguments that (1) the admission of Detective Jaszczak's expert testimony was harmless and (2) that Detective Jaszczak's testimony satisfied the *Daubert* standard set forth in Wis. Stat. § 907.02(1).

I. The erroneous admission of Detective Jaszczak's expert testimony was not harmless.

An erroneous evidentiary ruling is harmless only if the beneficiary of the error proves, beyond a reasonable doubt, that there is no reasonable possibility that the error contributed to the conviction. *State v. Harvey*, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)). In other words, the

test is “whether there a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result.” *Id.*

Here, the state’s primary argument is that Detective Jaszczak’s “exposition” testimony “assisted the jury in deciding whether the stun gun used by Wright on the victim was a dangerous weapon.” (State’s br. at 16). More specifically, the state argues why Detective Jaszczak was qualified as an expert by his 25-years’ worth of law enforcement experience and that his testimony was both relevant and reliable on that very issue, which was the primary issue in dispute at trial.

In the next breath however, the state asserts that Detective “Jaszczak’s testimony had no impact on the first-degree sexual assault conviction.” (State’s br. at 22-23). Then why go through the trouble of a proffering the expert testimony and having a *Daubert* hearing at all? Why go through the motions to have the circuit court permit him to testify as an expert witness? Why take the time at trial to have him testify about tasers, stun guns, and the specific device at issue? The answer is obvious: *qualified* expert testimony was necessary to prove the “dangerous weapon” element of its charge.

Further, the state misses the point when it criticizes Wright for arguing that the state “needed” an expert to testify about the device used by Wright. (State’s br. at 16). The state needed an expert *in this case* because the alleged victim testified clearly and

consistently that the device Wright used caused her pain, but she did not testify that the device immobilized or incapacitated her in anyway. This would be a different case if the alleged victim testified that the device Wright used did anything that could meet the definition of a dangerous weapon. While the facts here are difficult, pain alone is not enough. The state had the burden to prove beyond a reasonable doubt that the ZAP Stick Wright used was “designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate [L.M.] by the use of an electric current.” Based on the video, L.M.’s statements, and her eventual testimony, the state used Detective Jaszczak because it needed expert testimony to fill in the gaps that the remaining evidence couldn’t.

The erroneous admission of Detective Jaszczak’s expert testimony was not harmless as evidenced by the state’s own argument that the opinion, admissible or not, “assisted the jury” on the primary issue of dispute at Wright’s trial.

II. Detective Jaszczak’s expert testimony failed to comply with *Daubert* and Wis. Stat. § 907.02(1).

In essence, the state’s argument as to how and why Detective Jaszczak’s expert testimony was admissible is that the detective’s 25-years of police experience is sufficient to allow him to testify about the stun gun at issue in this case. (State’s br. at 16). To get there, the state, like the prosecutor below,

argues that because the expert did not directly testify that the ZAP Stick met the legal definition of a dangerous electric weapon, the detective's testimony was reliable and qualified under Wis. Stat. § 907.02(1). This is a red herring, as it was below. The issue is not whether the detective testified about the legal definition. The issue is whether the detective was qualified to offer "scientific, technical, or other specialized knowledge" to the jury. Simply put, Detective Jaszczak was not qualified to offer "scientific, technical, or other specialized knowledge" to the jury.

As argued in Wright's brief-in-chief, Detective Jaszczak had been "talked" to about how Tasers differ from stun guns. (Brief at 16-17). From this training and experience, Detective Jaszczak proceeded to explain that stun guns work on the "sensory motor system" and "oftentimes tightens up the muscles right at the point of contact." (96:206-08; App. 24-26). Further, he testified that "[i]f a stun gun is used on a nerve bundle in the body, it oftentimes locks them up briefly depending on the length and duration of the stun, if you will." (96:208; App. 26). Notably, L.M. never testified about her muscles tightening up or Wright zapping her on a "nerve bundle" or any other sort of effect that would conceivably meet the "immobilize or incapacitate" legal definition of an electric weapon.

Furthermore, the state argues that Detective Jaszczak's opinion about the stun gun used by Wright were valid because they "were not arrived at out of

thin air,” and that he relied upon “the manufacturer’s instruction manual to *confirm*” that the ZAP Stick operates like other stun guns. (State’s br. at 18). But, the state’s argument simply begs the question: would a qualified and reliable expert be forced to rely on a consumer instruction manual as his source of authority. (*See* 94:33; App. 11).

Finally, the state resorts to citations to cases from other jurisdictions that are not controlling, persuasive, or even helpful. (State’s br. at 19-20). The issue presented in this case is obviously limited to Wisconsin’s statutes and the specific facts of Wright’s case. In contrast, in *In re Branden O.*, 94 Cal. Rptr. 3d 520, 525 (Cal. App. 2009), the “prosecutor never offered [the police officer] as an expert.” Thus, the question on appeal did not concern the court’s “gatekeeper” function as it does here. The state’s reliance on *In re Branden O.* is mistaken.

Likewise, the state goes even further in a misguided attempt to rely on *State v. Howse*, 875 N.W.2d 684 (Iowa).¹ *Howse*, like *In re Branden O.*, concerned a different state’s “dangerous weapon” statute. The Iowa Supreme Court’s holding that a stun gun is “per se” a dangerous weapon is irrelevant to Wright’s appeal.

¹ The state cites *State v. Howes*, but presumably meant to cite *State v. Howse*, 875 N.W.2d 684 (Iowa 2016).

CONCLUSION

For the reasons argued above, and as previously argued in his brief-in-chief, Wright respectfully asks this Court to reverse his judgment of conviction and to remand this case to the circuit court for a new and fair trial.

Dated this 8th day of December, 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 1,224 words.

Dated this 8th day of December, 2021.

Signed:

Electronically signed by Jeremy A. Newman

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