STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022AP111–CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEFFREY L. BLABAUM,

Defendant–Appellant.

REPLY BRIEF OF DEFENDANT–APPELLANT

ON APPEAL FROM CONVICTIONS ENTERED ON MAY 4, 2021, IN THE CIRCUIT COURT
FOR IOWA COUNTY, BRANCH 1,
THE HON. MARGARET M. KOEHLER, PRESIDING

Respectfully submitted,

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Defendant-Appellant

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ARGUMENT

I. THE STATE FAILED TO ESTABLISH JURISDICTION OR PROVE THAT A THEFT WAS COMMITTED

Blabaum agrees that territorial jurisdiction may be proven by circumstantial evidence, but it must be proven beyond a reasonable doubt.[1] The State argues that it proved the property was in Wisconsin through Blabaum's alleged admissions and B.B.'s testimony that: (1) Blabaum allegedly sent a text message admitting that the disputed property was hers and was at a location within Wisconsin, (2) she bought the bench and that the bench was in Blabaum's trailer, (3) Blabaum arrived on scene with a trailer, (4) the photo in Blabaum's text message appeared to show the floor of the trailer, and (5) that she believed the bench was in the trailer.[2]

The first argument would be an alleged admission, which would require additional corroboration to prove the commission of a crime.[3] The second and fifth arguments reference subjective beliefs of B.B., which add nothing to the weight of the evidence.[4] The third argument asserts only that Blabaum arrived at a location where he

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[1] ***State v. Swinson***, 2003 WI App 45, ¶ 19, 261 Wis. 2d 633, 646, 660 N.W.2d 12, 17.
[2] State's Brief, at 11.
[3] *See* ***State v. Verhasselt***, 83 Wis. 2d 647, 661, 266 N.W.2d 342, 349 (1978).
[4] *See* ***State v. Mosher***, 221 Wis. 2d 203, 217, 584 N.W.2d 553, 560 (Ct. App. 1998) (officer's uncommunicated opinion is irrelevant to determining custody for *Miranda* purposes).

agreed to meet B.B. With regards to the fifth argument, B.B. at first asserted that the bench was in the trailer, but then clarified that she "assume[d]" and believed that the bench was in the trailer because the text message photo "looked like the trailer flooring."[5] B.B. did not testify that she had any familiarity with the trailer that Blabaum was towing. Therefore, the State failed to establish the first mode of territorial jurisdiction because it did not establish that the disputed property was in Wisconsin during the incident.[6]

The State also failed to prove that Blabaum committed an act, while outside of Wisconsin, with the specific intent that it caused a consequence of the crime of theft in Wisconsin. The State's reliance on *State v. Inglin* is misplaced as the defendant in *Inglin* used deception to obtain control of his child from the mother in Wisconsin before intentionally concealing the child in Canada in violation of a court order.[7] By contrast, no witness at Blabaum's trial testified that Blabaum was outside of Wisconsin at the time of the alleged theft.[8] Therefore, the State failed to establish either mode of territorial jurisdiction beyond a reasonable doubt, or prove the corpus delicti of

[5] R. 45:82–83.
[6] Wis. Stat. § 939.03(1); ***Hotzel v. Simmons***, 258 Wis. 234, 240, 45 N.W.2d 683 (1951).
[7] ***State v. Inglin***, 224 Wis. 2d 764, 768–69, 592 N.W.2d 666, 667–68 (Ct. App. 1999).
[8] R. 45:76–77, 80–81, 118–120.

misdemeanor theft because Blabaum's alleged admissions were not sufficiently corroborated.[9]

II. THE COURT ERRED IN DENYING BLABAUM'S MOTIONS FOR A MISTRIAL

The State attempts to minimize the impact of the other acts evidence it elicited from B.B., but the prejudice to Blabaum is clear and substantial. The first objectionable exchange is shown below:

Prosecutor:	***It sounds like you made a hasty departure, is that safe to say?***
B.B.:	Yes.
Prosecutor:	***And why is that?***
B.B.:	***Because he has laid hands on me before and I was—***
Trial Counsel:	I'll object.
The Court:	Go ahead.
Trial Counsel:	That's other acts evidence . . . […]
Prosecutor:	I think it goes to the context of the break-up and why she didn't take some of the property at issue with her at the time.
The Court:	Sustained. It's other acts evidence.
Prosecutor:	Okay.
Prosecutor:	[to B.B.] ***So, it is safe to say you felt you needed to leave hastily from Tennessee, correct?***
B.B.:	Correct.

Immediately after the trial court sustained Blabaum's objection, the prosecutor asked B.B. a question directing the jury's attention back to B.B.'s stated reason for hastily leaving Tennessee: alleged domestic violence by Blabaum. B.B. then testified that Blabaum followed her to Wisconsin, had been driving around her home since the end of September 2019,[10] and that she unsuccessfully

[9] *See* ***Verhasselt***, 83 Wis. 2d at 661; Wis. Stat. § 939.03(1).
[10] R. 45:67.

attempted to obtain one or more restraining orders.[11] Following this testimony, the following exchange occurred:[12]

Prosecutor:	***So, you were fearful of going to his place alone***?
B.B.:	Correct.
Prosecutor:	***Why is that?***
B.B.:	***Just because of the past physical contact that we have had.***

The State argues that it took curative steps after B.B. provided an "inappropriate" response to the prosecutor's question regarding why she feared meeting Blabaum alone.[13] Based on B.B.'s prior testimony it is unpersuasive to assert what "appropriate" testimony a reasonable prosecutor could have expected to elicit with such a question, other than repeating the other acts testimony. This testimony was far more prejudicial than the comment in *State v. DeLain*, where the prosecutor asked the jury to consider how a defense argument made the complainant feel while in the courtroom.[14]

The other acts testimony presented at Blabaum's trial is more analogous to *State v. Sullivan*, where the prosecutor elicited testimony about an unrelated domestic incident in a case where the defendant was charged with four crimes against a person.[15] *Sullivan* held that the

[11] R. 45:74–75.
[12] R. 45:77–78.
[13] State's Brief, 21–22.
[14] ***State v. DeLain***, 2004 WI App 79, ¶ 24, 272 Wis. 2d 356, 370–71, 679 N.W.2d 562, 569.
[15] ***State v. Sullivan***, 216 Wis. 2d 768, 775–76, 576 N.W.2d 30, 34 (1998).

trial court erred by admitting the other acts testimony, and rejected the State's arguments that the defendant's acquittal on two charges or the use of a curative instruction cured any prejudice.[16] As in *Sullivan*, the cautionary instruction was insufficient to cure prejudice to Blabaum because: (1) the court only instructed the jury to disregard any stricken testimony, (2) part of the basis for Blabaum's motions for mistrial included B.B.'s unstricken testimony that Blabaum allegedly laid hands on her, and (3) the curative instruction did not identify the testimony or evidence the jury was to disregard.[17]

The foregoing other acts evidence was not relevant to the theft charge, which did not involve any alleged acts of domestic violence. The other acts would not be admissible under a *Sullivan* analysis because any probative value would be substantially outweighed by a danger of unfair prejudice. Since the trial court did not strike all prejudicial testimony, and trial counsel did not move to strike the testimony, this allowed the jury to draw the forbidden inference that if Blabaum allegedly beat B.B., he would surely steal from her.

Given the prosecutorial overreaching, this Court should apply strict scrutiny review to the trial court's denial of Blabaum's motions for mistrial and find that the rulings constituted an erroneous exercise

[16] *Id.* at 791–92.
[17] *Id.*; R. 45:78–79, 163.

of discretion. The State does not argue that the denial of Blabaum's motions for mistrial should be considered harmless error and has therefore forfeited that argument.[18]

III. A NEW TRIAL SHOULD BE ORDERED OR ALTERNATIVELY A HEARING ON BLABAUM'S POSTCONVICTION MOTION SHOULD BE HELD

A. Exclusion of exculpatory testimony

The State asserts that there is no *mens rea* element for the crime of theft which requires proof that an accused believed that a victim was the owner of the property.[19] The State's interpretation should be rejected because it is contrary to binding legal authority and would lead to an absurd result, namely that someone could be convicted of theft for retaining possession of property they believed belonged to them.[20] The applicable jury instructions state:[21]

> Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally."

The first element of theft required the State to prove that Blabaum intentionally retained possession of moveable property of B.B., where the term "intentionally" means that the actor either had a purpose to do the thing or cause the result specified or was aware that

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[18] ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992).
[19] State's Brief, at 24–28.
[20] ***State ex rel. Kalal v. Cir. Ct. for Dane Cnty.***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124.
[21] WIS JI-Criminal 1441 Theft — § 943.20(1)(a) (2022), at 5 n. 6.

their conduct was practically certain to cause that result.[22] The third element of theft required the State to prove that Blabaum knew that B.B. did not consent.[23] The word "knew" would require proof that Blabaum believed that B.B. was the actual owner of the disputed property.[24] Both *mens rea* elements required proof that Blabaum knew that the disputed property belonged to B.B.[25]

The statements of Tennessee law enforcement to Harazin and Blabaum, if offered to prove their existence and their effect on Blabaum's state of mind, would not be hearsay.[26] It would be relevant and admissible as it would negative the aforementioned *mens rea* elements of theft. Therefore, the trial court erred by classifying any such evidence as hearsay.

Even if Blabaum offered such testimony to prove the truth of the matter asserted, the trial court's mechanistic application of the rule against hearsay violated Blabaum's constitutional right to present a complete defense.[27] Such hearsay testimony would be admissible on

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[22] Wis. Stat. § 939.23(3); Wis. Stat. § 943.20(1)(a).
[23] Wis. Stat. § 943.20(1)(a).
[24] Wis. Stat. § 939.23(2).
[25] ***State v. Kreuser***, 91 Wis. 2d 242, 248–249, 280 N.W.2d 270, 273 (1979) ("[T]here was sufficient evidence . . . that he knew that the Blazer was stolen.").
[26] ***State v. Wilson***, 160 Wis. 2d 774, 779–80, 467 N.W.2d 130, 132–33 (Ct. App. 1991).
[27] ***Chambers v. Mississippi***, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973); ***State v. Anderson***, 141 Wis. 2d 653, 660, 416 N.W.2d 276, 279 (1987).

constitutional grounds because it was sufficiently corroborated.[28] The State failed to respond to Blabaum's arguments that the proffered testimony was critical to Blabaum's defense, was sufficiently corroborated to be admissible even if offered as hearsay, and that the trial court's exclusion of the evidence violated Blabaum's constitutional right to present a complete defense. Therefore, the State has conceded these arguments.[29]

B. Prejudicial other acts evidence and improper closing remarks by the prosecution

The State's argument that Blabaum's acquittal on the disorderly conduct charge shows that there was no prejudice from the other acts testimony should be rejected, as a similar argument was in *Sullivan*.[30] B.B.'s testimony about her fear of Blabaum, based on alleged domestic violence, was directed towards the theft charge more than the disorderly conduct charge. The disorderly conduct testimony did not include any allegations of physical violence.[31] By contrast, the theft allegations included B.B.'s testimony that she feared meeting Blabaum alone because of alleged acts of physical violence.[32]

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[28] ***State v. Brown***, 96 Wis. 2d 238, 242–245, 291 N.W.2d 528, 531 (1980).
[29] ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109 (Ct. App. 1979).
[30] State's Brief, at 25; ***Sullivan***, 216 Wis. 2d at 791.
[31] R. 45:67–75.
[32] R. 45:77–78.

State v. Klinkenberg did not address whether it was proper for an officer to testify to identifying an accused through prior professional contacts because the defendant did not raise the issue on appeal.[33] Weir's testimony that he was familiar with Blabaum from prior professional contacts, under the circumstances, created a clear danger that the jury would infer that the prior professional contacts involved Blabaum being accused of a crime or other misconduct.[34]

The State concedes that the prosecutor argued to the jury that Blabaum offered no proof to rebut the State's evidence.[35] *State v. Patino* held that the rule from *Griffin v. California* is violated when a prosecutor implies that a criminal defendant's failure to testify in opposition to the government's witnesses supports an inference of guilt.[36] In closing arguments, trial counsel for Blabaum argued that the State failed to prove the theft charge beyond a reasonable doubt because: (1) Blabaum did not intentionally retain possession of B.B.'s property because she abandoned it, (2) B.B.'s abandonment of the property constituted consent to Blabaum retaining possession of it, (3) Blabaum believed that B.B.'s abandonment constituted consent to his

[33] ***State v. Klinkenberg***, No. 2015AP331-CR, unpublished slip op., ¶22 (WI App Nov. 5, 2015).
[34] *See* ***State v. Alexander***, 214 Wis. 2d 628, 651, 571 N.W.2d 662, 672 (1997).
[35] State's Brief, 32–33
[36] ***State v. Patino***, 177 Wis. 2d 348, 381–82, 502 N.W.2d 601, 614–15 (Ct. App. 1993).

retention of the property, and (4) the State presented no evidence beyond Blabaum's alleged admissions that the property was in Wisconsin.[37] In rebuttal, the prosecutor argued that the property must have been in Blabaum's trailer, and that there was no evidence presented to the contrary or any reason that Blabaum would have said otherwise.[38] The prosecutor next argued that Blabaum knew the disputed property belonged to B.B., admitted that it belonged to her, and that there was no testimony or evidence offered to contradict this.[39] As in *State v. Hoyle*,[40] the prosecutor's comments violated Blabaum's Fifth Amendment privilege and unconstitutionally shifted the burden of proof to Blabaum by implying to the jury that Blabaum's failure to testify supported the State's theory of guilt:[41] that the disputed property was allegedly in Blabaum's trailer and that Blabaum allegedly knew the disputed property belonged to B.B.

Therefore, these remarks by the prosecutor constituted plain error because Blabaum was the only witness present at trial who could

[37] R. 45: 173–176.
[38] State's Brief, at 32–34.
[39] R. 45:178–179.
[40] ***State v. Hoyle***, No. 2020AP1876-CR, unpublished slip op., ¶¶ 16-20 (WI App Apr. 26, 2022).
[41] ***Patino***, 177 Wis. 2d at 381–82.

testify regarding his belief as to whether B.B. was the legal owner of the property and what, if anything, was in the back of the trailer.[42]

C. New trial based on plain error and in the interests of justice or granting a hearing on Blabaum's postconviction motion

Blabaum rests on the arguments set forth in his brief and appendix regarding a new trial based on plain error and in the interests of justice. The foregoing errors, individually and cumulatively, constituted plain error because there is a reasonable possibility that the erroneously excluded or admitted evidence might have contributed to Blabaum's theft conviction.[43] The foregoing errors additionally warrant a new trial in the interests of justice as the real controversy was not fully tried. Based on the arguments in Blabaum's motion for postconviction relief, supporting briefs, and Blabaum's brief and appendix in this matter, the trial court erroneously denied Blabaum's postconviction motion without a hearing.

CONCLUSION

The judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court enter a directed not guilty verdict based on the sufficiency of the evidence and lack of territorial jurisdiction. Alternatively, Blabaum respectfully

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[42] ***Berger v. United States***, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935) ("It is [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction . . .").

[43] *See* ***State v. Billings***, 110 Wis. 2d 661, 667, 329 N.W.2d 192, 195 (1983).

requests a new trial based on the erroneous denial of Blabaum's motions for mistrial, plain error and the interests of justice or, if the Court deems this relief inappropriate, that the matter be remanded for an evidentiary hearing on Blabaum's ineffective assistance of counsel claims.

Dated at Middleton, Wisconsin, October 12, 2022.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

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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; and
(3) 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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