STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2022AP1826-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CARLOS AGUILAR,

Defendant-Respondent.

APPEAL FROM AN ORDER DISMISSING THE CRIMINAL COMPLAINT ENTERED IN GREEN COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. VALE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

DUXSTAD, BESTUL & McNAUGHTON, S.C.
Robert S. Duxstad
Attorney for Defendant-Respondent Carlos Aguilar
State Bar No. 01018491
P.O. Box 737
1112 17th Avenue
Monroe, WI 53566
(608) 325-4924
(877) 866-7560 (Fax)
duxstad@duxstadlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

On the evening of December 11, 2021, Carlos Aguilar and his wife, Sandy,[1] spent a night out in Brodhead with Carlos' brother and sister-in-law. Towards the end of the night, the group retreated to Aguilars' home; Carlos and Sandy were both intoxicated.

Earlier that day, Carlos and Sandy discussed their financial situation, with Carlos expressing his desire to save money so they could afford to purchase a home. This was cause for some tension because Sandy had been spending more money than Carlos was comfortable with on Christmas gifts for the couple's children.[2] This tension eventually boiled over after Carlos asked Sandy to come to bed with him later that evening and Sandy refused, opting instead to continue talking to her sister-in-law, Karly.[3] To get Sandy's attention, Carlos emptied her purse. An upset Sandy gathered the contents of the purse, grabbed the keys to Carlos' new car and stormed out of the home.

When Carlos heard Sandy grab his car keys, he was immediately concerned about what her plans were, considering her level of intoxication and the fact that it was well past midnight.[4] He followed her to the car and repeatedly told her not to enter it. Sandy did not listen to Carlos and instead entered the vehicle. Their arguing continued and at one point Carlos grabbed Sandy's hair while she was in the car. After his brother and sister-in-law

[1] Sandy is a pseudonym used to protect the alleged victim's identity. *See* Wis. Stat. § (Rule) 809.86(4).
[2] Neither child was present on the evening the events leading to this action took place. (R-App. at 4.)
[3] Karly is a pseudonym; while she is not a victim pursuant to Wis. Stat. § (Rule) 809.86(3), using a pseudonym further protects Sandy's identity.
[4] A preliminary breath test later revealed Sandy's blood alcohol level to be .114%, well over the legal limit for driving in Wisconsin. (R-App. at 8.)

intervened, Carlos then ceased arguing with Sandy and walked away from the car.

Karly called the police, and when they arrived, Carlos explained to Officer Bennett, the investigating officer, that he did not want Sandy, who was intoxicated, in the vehicle because it was his vehicle. He also expressed concern as to what Sandy's plans were with the vehicle. Carlos was arrested and charged with Battery, Disorderly Conduct, Criminal Damage to Property, and False Imprisonment, all with domestic abuse modifiers, in Green County Case No. 22-CF-2 (hereinafter referred to as 22-CF-2).

At the preliminary hearing in 22-CF-2,[5] the presiding Circuit Court Judge, Thomas J. Vale, dismissed the False Imprisonment charge, as the Court determined the State failed to meet its probable cause burden. The State then moved for reconsideration of the non-bindover, which the Trial Court also denied. Instead of appealing that decision in 22-CF-2, the State reissued an identical criminal complaint, without any additional evidence, charging Carlos with False Imprisonment in Green County Case No. 22-CF-79 (hereinafter referred to as 22-CF-79). Once again, the Court dismissed the charge after hearing the State's evidence at the preliminary examination in 22-CF-79,[6] reasoning that the State failed to present evidence supporting a reasonable inference that Carlos had committed a felony. This third ruling by the Trial Court denying a bindover for false imprisonment is the subject of this appeal.

Wisconsin law requires a Court to dismiss a felony charge following a preliminary hearing unless the State presents evidence supporting a reasonable inference that the Defendant committed a felony. False imprisonment is committed when one acts intending to confine another

[5] Hereinafter referred to as the "First Preliminary".
[6] Hereinafter referred to as the "Second Preliminary".

within boundaries fixed by the actor.[7] Wisconsin caselaw on false imprisonment clearly contemplates the charge applying in situations where a defendant confines or restrains a victim to a specific location.[8]

At the Second Preliminary, the State did not present any new or unused evidence compared to the evidence presented at the First Preliminary. The State primarily introduced video recordings from Officer Bennett's body camera to modify his prior testimony stating Carlos had been concerned about Sandy driving his car while intoxicated. The transcript from the First Preliminary was admitted in its entirety as well. As the evidence presented at the Second Preliminary did not materially add or change the substance of the State's case, the Trial Court again ruled the evidence was insufficient to support a reasonable inference that Carlos confined or restrained Sandy. While the State presented evidence that Carlos attempted to pull Sandy out of his vehicle during a dispute over access to that vehicle, the State did not establish that Carlos ever attempted or succeeded in confining or restraining Sandy in a particular location, nor did he confine or restrain her movement at all. Additionally, the evidence adduced at the Second Preliminary clearly established that Carlos thought he was legally authorized to pull Sandy out of the disputed vehicle, as he thought it was his vehicle; and there was no evidence to support a reasonable inference that Carlos knew he did not have legal authority to do so. The Trial Court correctly dismissed this charge following the Second Preliminary, and this Court should affirm and prevent the continued prosecutorial harassment of Carlos.

[7] Restatement (Second) of Torts § 35 (Am. Law Inst. 1965).
[8] *See Herbst v. Wuennenberg*, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978) (citing Restatement (Second) of Torts § 35 (Am. Law Inst. 1965).

ISSUES PRESENTED

Should the Circuit Court have denied the bindover in Case No. 22-CF-79 and dismissed the Complaint charging the Defendant with False Imprisonment where the existence of probable cause had been fully litigated in Case No. 22-CF-2, culminating in a final order dismissing the False Imprisonment charge, and the State presented no new or unused evidence to support a different result at the second preliminary examination?

The Circuit Court did not directly address this issue, but its ruling did not indicate the State had presented any new or unused evidence to support a different outcome.

This Court should answer *yes.*

Must the false imprisonment charge be dismissed following a preliminary hearing if the evidence presented by the State does not support a reasonable inference that the Defendant probably committed a felony?

The Circuit Court answered *yes*.

This Court should answer *yes*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities involved. Oral argument would be of marginal value to the Court and is not justified given the additional expenditure of the Court's time and the cost to the Defendant-Respondent.

The Defendant-Respondent does not recommend the Court's decision be published. The issues involve no more than the application of well-settled rules of law. The issue asserted by the State is whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient. Both issues asserted by the Defendant-Respondent can be decided on the basis of controlling precedent, and no reason appears for questioning or qualifying the precedent.

STATEMENT OF THE CASE

The State charged Carlos Aguilar with Battery, Disorderly Conduct, Criminal Damage to Property, and False Imprisonment, all with domestic abuse modifiers, on January 4, 2022, in 22-CF-2.[9] While the entire record for 22-CF-2 may not be part of the record on appeal, the transcript from the First Preliminary is, as it was introduced as Exhibit 3 in the Second Preliminary, the case that led to this appeal. Additionally, the Honorable Thomas J. Vale, Green County Circuit Judge, was the presiding Judge in both cases and could take judicial note of the proceedings from 22-CF-2 while presiding over 22-CF-79.

In 22-CF-2, the Complaint incorporated the Officer's report, stating that Carlos had dumped Sandy's purse out and pulled her hair while she was in Carlos's vehicle, and this formed the factual basis for Criminal Damage to Property, Disorderly Conduct, Misdemeanor Battery, and False Imprisonment charges. The First Preliminary was held on March 18, 2022.

At the First Preliminary, the State offered the testimony of Officer Brian Bennett of the Brodhead Police Department, who was the responding officer on the night of the incident. (Rec. 15 at 2:14.) Specifically, Bennett testified to the statements made by Carlos, Sandy, and Karly in interviews he conducted with the three of them on the evening in question. (Rec. 4 at 2:15-8:9.) Bennett's testimony established that all three witnesses gave consistent statements that paint a clear picture of the events. *Id.* Bennett also testified that Carlos said that one reason he did not want Sandy in his vehicle was because he was concerned about her driving intoxicated. (Rec. 4 at 11:10-12.)

[9] The criminal complaint and all other pertinent documents from 22-CF-2, which are all public records, are provided in Respondent's Appendix.

At the close of the First Preliminary, the State argued it had met its burden of probable cause in one of the most clear-cut cases of false imprisonment possible; but the Court disagreed. (Rec. 4 at 25:18-28:23, 30:23-32:17.) Citing the fact that what transpired between Carlos and Sandy on the night in question was, at worst, a domestic dispute surrounding access to marital property that had turned physical, the Court denied bindover and dismissed the false imprisonment charge. (Rec. 4 at 32:8-17.) The Court did not rely on Bennett's testimony regarding Carlos's statements about preventing drunk driving in rendering its decision. *Id.*

The State indicated at the close of the First Preliminary that it would file a motion to reconsider, and an oral ruling on that motion was scheduled for May 23, 2022. In its Motion, the State highlighted the fact that Carlos was pulling Sandy's hair and did not want her in his vehicle in arguing that it had met the probable cause burden for bindover. (R-App. at 13-15.) The State also argued that Carlos was pulling Sandy out of his vehicle to get her back into their home, even though there was no evidence to that effect presented during the preliminary hearing. (R-App. at 13-15.) Ultimately, the crux of the State's argument was that Carlos restricted Sandy's movement by not allowing her to peacefully sit, whilst heavily intoxicated, in his vehicle, and that the restriction of movement constituted felony false imprisonment. (R-App. at 13-15.)

In response, Carlos argued that the State had not met its burden of presenting evidence sufficient to raise a reasonable inference that Carlos probably confined or restrained Sandy. (R-App. at 7-9.) The basis for this argument was that Sandy admitted she was never confined or restrained and had reasonable means of escape available. (Rec. 4 at 12:8-13.) Additionally, Carlos raised the point that, had he confined or restrained Sandy, any such

confinement or restraint would have been legally justified to prevent drunk driving. (R-App. at 9-10.)

At the oral ruling on the State's Motion to Reconsider, the Court heard arguments from counsel and ultimately stood by its original decision to deny bindover. (R-App. at 28:19-37:19.) Specifically, the Court found no evidence that Carlos intentionally confined or restrained Sandy, in part because he never did anything to keep her where she no longer wished to be. (R-App. at 35:16-36:9.) There was some discussion regarding whether Carlos was concerned with Sandy driving drunk, but the crux of the Court's decision rested on the idea that the State did not present evidence sufficient to support a reasonable inference that Carlos probably confined or restrained Sandy. (R-App. at 32:4-37:19.)

Following the dismissal of the false imprisonment charge in 22-CF-2, the State refused to participate in any discussions with Carlos to resolve the remaining charges of Criminal Damage to Property, Disorderly Conduct, and Misdemeanor Battery. The State further refused to turn over any discovery related to those charges. (Rec. 20 at 6:13-21.) Ultimately on September 23, 2022, Carlos pled "No Contest" to the remaining charges without any plea offer from the State and the Court withheld sentence and placed Carlos on probation for two years with specific conditions. (R-App. at 40-41.)

Rather than appeal the May 23, 2022, decision dismissing the felony count of False Imprisonment in 22-CF-2, the State elected the next day to recharge Carlos with a new count of False Imprisonment, contrary to Wis. Stat. § 940.30, in 22-CF-79. (Rec. 2 at 1.) This second Complaint had an identical factual basis as contained in the Complaint in 22-CF-2, with both Complaints alleging that Carlos was involved in a dispute with his wife, Sandy, that turned physical, regarding the use of a vehicle. (Rec. 2 at 1-8; R-App. at 3-9.) After Carlos repeatedly told Sandy not to enter his new

vehicle, she entered the vehicle, and Carlos pulled her hair. (Rec. 2 at 2-6.) Carlos's sister-in-law, Karly, witnessed this incident, and called the police. (Rec. 2 at 6.) Brian Bennett, of the Brodhead Police Department, was the responding officer, and he interviewed Carlos, Sandy, and Karly. (Rec. 2 at 2-8.)

At the Second Preliminary, the State presented no new or unused evidence compared to the evidence presented at the First Preliminary, instead opting to present only Officer Bennett's testimony and body camera footage of the same events to which he testified to previously. (Rec. 20 at 7:14-15, 13:18.) The State primarily focused on having Bennett testify that Carlos never said anything about trying to prevent Sandy from driving drunk in attempting to remove her from the vehicle. (Rec. 20 at 12:18-19.) However, the body camera footage reveals that Carlos did mention some concern over Sandy's level of intoxication, despite the State's assertion. (Rec. 30 at 0:20-1:27.)[10] In this portion of the video, Carlos states that he and Sandy were intoxicated, and later states that he was concerned she was going to take his vehicle. *Id.* Additionally, as the transcript from the First Preliminary reveals, the Court did not consider the possibility that Carlos was attempting to remove Sandy from the vehicle to prevent her from driving drunk when it denied bindover in 22-CF-2. (Rec. 15 at 30:23-32:17.) The Court's decision in both cases was clearly based on the premise that attempting to remove a person from a vehicle during a domestic dispute does not rise to the level of felony false imprisonment. (Rec. 15 at 32:6-17.)

The rest of Bennett's testimony and the accompanying body camera footage at the Second Preliminary hearing establishes that Carlos did not want Sandy in the disputed vehicle because it was his vehicle, and that he

[10] The video recording is the file ending in 758 from Exhibit 30.

was concerned about the possibility of her taking it somewhere. (Rec. 30 at 1:20-48.) During an interview at the police station, a remorseful Aguilar admitted that he was overly aggressive in protecting his vehicle, but continued to reiterate that the motivation behind his actions was protecting his car. (Rec. 30 at 6:25-30 (Video 4).)

The State also presented evidence consisting of Officer Bennett's interview with Sandy. This reveals that Sandy was aware of Carlos' desire for her not to enter his vehicle, but she did so anyway. (Rec. 33 at 2:40-3:00.) She also makes it clear that Carlos did not prevent her from leaving their home and that she did not know where Carlos wanted her to go were he to successfully remove her from his vehicle.[11] (Rec. 33 at 2:42-50.) Ultimately, all of Sandy's statements are consistent with the idea that this altercation was no more than a domestic dispute over access to a vehicle; Bennett's interview with Karly supports the same conclusion. (Rec. 33 (Video 2).)

In briefing the issue of whether the State had shown probable cause at the Second Preliminary, the State once again argued it had presented evidence sufficient to support a reasonable inference that Carlos attempted to pull Sandy out of his vehicle and that this act constituted false imprisonment. (Rec. 16 at 7-8). In his reply brief, Carlos raised the issue that the State presented no new or unused evidence at the Second Preliminary and therefore improperly issued the second criminal complaint, and there should be no bindover based on the ruling of *Wittke v. State ex rel. Smith,* 80 Wis. 2d 332, 342, 259 N.W.2d 515, 519 (1977). (Rec. 17 at 7-8.)

[11] Sandy explains that she "*thinks* [Carlos] was trying to get me out of the car to come inside," (Rec. 33 at 4:10-15 (emphasis added).) This is all speculation, and Sandy eventually admits that she does not actually *know* why Carlos was attempting to pull her out of his vehicle.

Carlos further argued that the State did not present any evidence that he knew he lacked legal authority to remove Sandy from his vehicle, and that the act of attempting to remove her from his vehicle was not false imprisonment. (Rec. 17 at 3-7.)

In its oral ruling, the Court held the State did not present sufficient evidence to support a reasonable inference that Carlos had probably committed a felony. (Rec. 19 at 17:19-19:25.) Specifically, it found that Carlos and Sandy were involved in a domestic dispute that turned physical regarding access to marital property, in this case a vehicle. *Id.* Reasoning that Carlos never attempted to confine or restrain Sandy in a specific location, it concluded that Carlos' actions in attempting to pull Sandy from his vehicle did not rise to the level of felony false imprisonment and could only constitute a lesser charge, such as misdemeanor battery. *Id.*

ARGUMENT

I. THE STATE IMPROPERLY REISSUED A CRIMINAL COMPLAINT WITHOUT NEW OR UNUSED EVIDENCE FOLLOWING DISMISSAL OF THE FELONY CHARGE AT A PRELIMINARY HEARING IN CASE NO. 2022-CF-2, THEREFORE THE CIRCUIT COURT PROPERLY DISMISSED THE NEW COMPLAINT IN CASE NO. 2022-CF-79.

A. The State Cannot Refile A Charge Dismissed After A Preliminary Hearing Unless It Produces New Or Unused Evidence Supporting A Different Result.

22-CF-79's Criminal Complaint contains a word-for-word identical factual basis to the Criminal Complaint from 22-CF-2.[12] It follows that, if the State did not present any new or unused evidence during the Second Preliminary, the Criminal Complaint that is the basis for this action should be dismissed.

Preliminary examinations are governed by Wis. Stat. § 970.03. Wis. Stat. § 970.04 governs when the State can reissue a criminal complaint against a defendant following dismissal at a preliminary examination, allowing another complaint only when the State has or discovers additional evidence. A criminal complaint cannot be reissued when the State possesses no new or unused evidence supporting a different outcome. *Wittke v. State ex rel Smith*, 80 Wis. 2d 332, 259 N.W.2d 515 (1977). New and unused evidence, in this context, is not evidence that is merely cumulative or collaborative. *State v. Johnson*, 231 Wis. 2d 58, 604 N.W.2d 902 (Ct. App. 1999). Considerations of fairness and public policy afforded to a criminal defendant demand that the State shall not be permitted to forego an appeal

[12] The only substantive difference is that the State did not recharge the three misdemeanor counts charged in 22-CF-2, as those were not dismissed following the First Preliminary.

and instead subject a defendant to successive preliminary examinations where it can produce no new or unused evidence. *Wittke*, 80 Wis. 2d at 343.

B. Compared To The Evidence Presented At The 22-CF-2 Preliminary Hearing, The State Presented No New Or Unused Evidence Supporting A Different Result During The 22-CF-79 Preliminary Hearing.

The Honorable Thomas J. Vale, Green County Circuit Court Judge, presided over the First Preliminary on March 18, 2022. (Rec. 15 at 1.) During that hearing, in an attempt to present evidence sufficient to support a reasonable inference that Carlos committed a felony, the State offered the testimony of Officer Bennett. (Rec. 15 at 2:19-8:9.) This testimony established that Carlos and Sandy were involved in a domestic dispute that turned physical over access to a vehicle, and that Carlos ultimately attempted to pull her out of the vehicle. *Id.* Officer Bennett's account of the situation was based on his interviews at the scene with Carlos, Sandy, and Carlos' sister-in-law, Karly. *Id.* At the conclusion of the First Preliminary, the Court found the State had not offered sufficient evidence, based on Officer Bennett's testimony, to support a reasonable inference that Carlos had probably committed a felony. (Rec. 15 at 30:23-32:17.) The State filed a *Motion to Reconsider*, which the Court denied following a hearing on May 23, 2022. (R-App. at 11.)

The State then reissued a factually identical Criminal Complaint in 22-CF-79 on May 24, 2022, again charging Carlos with a single count of false imprisonment. (Rec. 2.) During the Second Preliminary, on July 20, 2022, the State again offered Bennett's testimony, supplementing it with body camera footage of the events he was testifying to. (Rec. 20 at 7:14-35:14.) This evidence revealed that Carlos and Sandy were involved in a domestic dispute that turned physical over access to a vehicle that culminated

with Carlos pulling on Sandy's hair while attempting to remove Sandy from said vehicle. *Id.* At the oral ruling for the Second Preliminary, the Court again dismissed the complaint because the State had again failed to put forth evidence sufficient to support a reasonable inference that Carlos had probably committed a felony. (Rec. 19 at 19:19-22:4.)

The State presented no new or unused evidence at the Second Preliminary compared to that presented during the First Preliminary. The same officer testified to the same events, leading to the same conclusions by the same Court. The transcript from the First Preliminary was admitted as Exhibit 3 in the Second Preliminary. The only difference between the two hearings was the cumulative evidence presented in the form of the video footage of the events Officer Bennett had already testified to. Officer Bennett did not testify as to any additional investigation conducted after his initial report and prior testimony given at the First Preliminary. There were no new witnesses called to testify.

Cumulative evidence is not new evidence. *Johnson*, 231 Wis. 2d at 68. Cumulative evidence is not unused evidence. *Id*. Cumulative evidence cannot support the reissuance of a criminal complaint following dismissal at a preliminary examination. *Id*. Cumulative evidence does not vitiate the considerations of public policy and fairness that demand the State appeal the dismissal of a felony charge following a preliminary hearing rather than refiling an identical criminal complaint. *See Id.*; *Wittke*, 80 Wis. 2d at 343. The State could have appealed the dismissal of the false imprisonment charge following the First Preliminary and ensuing *Motion to Reconsider*, but instead chose to improperly re-issue an identical criminal complaint with no new or unused evidence to support it; this was improper according to the laws of this State. Therefore, the Trial Court correctly dismissed the Complaint

in 22-CF-79 at the conclusion of the Oral Ruling following the Second Preliminary.

II. IRRESPECTIVE OF THE PROPRIETY OF ISSUING A SECOND COMPLAINT FOR FALSE IMPRISONMENT, THE STATE STILL DID NOT PRESENT SUFFICIENT EVIDENCE AT THE SECOND PRELIMINARY EXAMINATION TO SUPPORT A REASONABLE INFERENCE THAT THE DEFENDANT PROBABLY COMMITTED A FELONY.

A. The Granting Of A Bindover At A Preliminary Examination Is Not An Automatic Exercise By The Trial Court.

The State's burden at a preliminary examination is probable cause, meaning presenting sufficient evidence to support a reasonable inference that the Defendant probably committed a felony. Wis. Stat. § 970.03; *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984).

The screening function of the preliminary hearing recognizes that "[i]f the inference that the accused committed a felony is so weak that drawing it still does not establish a plausible account of probable guilt, it is within the discretion of the magistrate to decline to find probable cause to bind him over for trial." *Id.* at 398. There are great costs to a defendant associated with criminal prosecution, including expense, delay, anxiety, and public embarrassment. *State v. Richer*, 174 Wis. 2d 231, 241, 496 N.W.2d 66 (1993). These costs are exacerbated when the State is pursuing a hasty, malicious, improvident, and oppressive prosecution. *Id.* In the instant case, the Trial Court correctly denied bindover to protect Carlos from a harassing and oppressive prosecution, especially in light of the extensive proceedings Carlos has already endured in 22-CF-2.

B. At The Preliminary Examination, The State Failed To Meet Its Burden Of Establishing All Five Elements Of False Imprisonment.

Probable cause, in the preliminary examination context, requires some evidence sufficient to support a reasonable inference that a defendant committed every element of a felony. *See State v. Cotton*, 2003 WI App 154, ¶ 23, 266 Wis. 2d 308, 668 N.W.2d 346. In the instant case, the State failed to present sufficient evidence that Carlos committed the first and fifth elements of false imprisonment, and therefore the lower Court's decision to deny bindover was proper.

At its core, false imprisonment requires intentional and nonconsensual confinement. *State v. Burroughs*, 2002 WI App 18, ¶ 19, 250 Wis. 2d 180, 640 N.W.2d 190. Along those lines, the Wisconsin Supreme Court has called the essence of false imprisonment "the intentional, unlawful, and unconsented restraint by one person of the physical liberty of another". *Herbst v. Wuennenberg*, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978). While Herbst is a civil case, its holding, as it relates to false imprisonment, has been applied in the criminal context. *See Burroughs*, 2002 WI App at ¶ 18.

The Wisconsin Criminal Jury Instruction for false imprisonment lists its elements as:

(1) The defendant confined or restrained the victim.
(2) The defendant confined or restrained the victim intentionally.
(3) The victim was confined or restrained without their consent.
(4) The defendant had no lawful authority to confine or restrain the victim.
(5) The defendant knew that the victim did not consent and knew that they did not have lawful authority to confine or restrain the victim.

Wis. JI–Criminal 1275 (2015).

The jury instruction explains that the confinement or restraint of the victim must be genuine, but not necessarily in a jail or prison. *Id.* Still, the instruction contemplates some act by the Defendant of restricting the victim to a specific location, explaining that false imprisonment occurs where the Defendant deprives the victim of freedom of movement or compels the victim to remain where they do not wish. *Id.* This idea of restraining or confining a victim to a particular location was further endorsed by the Wisconsin Supreme Court in *State v. Long*, where it found sufficient evidence to support a false imprisonment conviction where the Defendant hugged the victim tightly, preventing her from moving for a duration of time.

The State addressed each element of false imprisonment in its brief; Carlos will address only the first and fifth elements of the crime, as those elements form the basis for the lower Court's decision to deny bindover. To that end, it is Carlos' position that the State presented insufficient evidence to support a reasonable inference that he probably committed the first and fifth elements of false imprisonment.

1. The State did not present sufficient evidence to support a reasonable inference that Carlos confined or restrained Sandy as those terms are used in Wis. Stat. § 940.30.

Any confinement or restraint of movement must be genuine for a Defendant to be guilty of false imprisonment. Wis. JI–Criminal 1275 (2015). While the State presented evidence that Carlos pulled Sandy's hair in an apparent attempt to pull her out of his vehicle, that act does not constitute false imprisonment pursuant to Wis. Stat. § 940.30 because Carlos never attempted to or succeeded in confining Sandy to a specific location or restricted her movement from a location.

The seminal Wisconsin case on false imprisonment is *Herbst v. Wuennenberg*, where the court held that "the essence of false imprisonment is the intentional, unlawful, and unconsented restraint by one person of the physical liberty of another." *Herbst*, 83 Wis. 2d at 774. The context of this holding makes it clear that the Court did not construe every literal restraint of another person's liberty to be false imprisonment. Immediately following the verbiage discussing the essence of false imprisonment, the *Herbst* Court held that there can be no cause of action for false imprisonment unless there is confinement that is contrary to the will of the "prisoner". *Id*. Additionally, the entire decision relies on the Restatement (Second) of Torts, which includes as a necessary element that an actor acts intending to confine another, or a third person, within boundaries fixed by the actor. *Id.*; Restatement (Second) of Torts § 35 (Am. Law. Inst. 1965). *Herbst* also relies on *Dupler v. Seubert*, 69 Wis. 2d 373, 230 N.W.2d 626 (1975) and *Maniaci v. Marquette University*, 50 Wis. 2d 287, 184 N.W.2d 168 (1971) in determining the essence of false imprisonment, both of which rely on the Restatement to define the tort. This context makes it obvious that restraining the physical liberty of another is only false imprisonment when coupled with some element of confining or restraining the victim to a specific location. Based on this analysis, under the *Herbst* standard, Carlos' actions involved in attempting to pull Sandy out of his vehicle clearly do not constitute false imprisonment because he was not attempting to confine or restrain Sandy to a specific location.

Additionally, although *Herbst* has been relied on in the criminal context, it is ultimately a civil case. *Burroughs*, on the other hand, is a criminal case with explicit language that false imprisonment requires confinement; it is also the case which the State cites to support its assertion that *Herbst* has been applied in the criminal context. While *Burroughs* does

cite to *Herbst* regarding false imprisonment, it ultimately concludes that, whatever the essence of the crime may be, at its core, it requires confinement. *Burroughs*, 2002 WI App at ¶ 19. "Fidelity to precedent, the doctrine of *Stare Decisis*, is fundamental to 'a society governed by the rule of law.'" *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 484, 513, 534 N.W.2d 608 (1995) (*citing Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). "The published decision of any one of the panels of the court of appeals has binding effect on all panels." *Skrupky v. Elbert*, 189 Wis. 2d 31, 56, 526 N.W.2d 264 (Ct. App. 1994). The language from the *Burroughs* decision, stating that criminal false imprisonment cannot occur without confinement, is binding on this Court; therefore, the lower Court's decision must be affirmed.

The State relies on *State v. Long* to support its assertion that a Defendant need only to confine or restrain a victim to be guilty of false imprisonment, but that decision is hardly analogous to the instant case. The Defendant in *Long* restricted the victim's movement by hugging her tightly, restraining her movement and confining her to a specific location while committing an act of sexual assault. *Long*, 2009 WI at ¶ 10. The facts in the instant case are very dissimilar to those in *Long*. Carlos never restricted Sandy to a specific location, nor did he sexually assault her. Additionally, the *Long* court only held that false imprisonment is not limited to circumstances where the Defendant confines the victim inside a structure, it did not hold that false imprisonment can occur even if the Defendant does nothing to confine or restrain a victim in a specific location. *See id.* at ¶ 28. Most important, the *Long* decision contains no language abrogating the *Burroughs* language requiring confinement for criminal false imprisonment in Wisconsin.

The State does not allege that Carlos ever confined Sandy. Instead, it alleges that Carlos asked Sandy to leave his vehicle, and then attempted to remove her after she refused to leave; if anything, he tried to compel movement, not restrain or confine Sandy. Carlos never prevented Sandy from remaining on the premises or leaving. He simply was preventing her from using personal property that he had a lawful right to use himself. This scenario was clearly established by the testimony at both preliminary examinations. Officer Bennett testified that when he interviewed Sandy on the night of the incident, she said that she had not been restrained or confined by Carlos. (Rec. 15 at 12:8-13.) While Sandy stated to the officer that Carlos was intending to hurt her when he pulled on her hair, he was only doing this to get her out of his vehicle. (Rec. 15 at 12:8-13.) When asked a second time if she felt Carlos was trying to prevent her from leaving anywhere, she stated she honestly did not know. (Rec. 15 at 20:18-21:12.)

The State is asking this Court to endorse a bindover for false imprisonment in any situation where the facts presented at a preliminary hearing support a reasonable inference that a defendant restricted the physical liberty of the victim in their use of property despite there being no confinement of the victim to a specific area. Adopting this position would be a dangerous extension of prior court rulings. There can be nonconsensual and unlawful physical contact without false imprisonment, and the State has conceded as much. (Rec. 19 at 19:16-18.) The line between battery and false imprisonment, in cases that do not involve confinement, is that false imprisonment can only occur where an actor restrains a victim within bounds set by the actor. *See Burroughs*, 2002 WI App at ¶ 19; Restatement (Second) of Torts § 35 (Am. Law. Inst. 1965). The Trial Court wrestled with this issue in the instant case, and ultimately denied bindover because Carlos never restrained Sandy within bounds he fixed himself. (Rec. 19 at 19:5-22:4.)

The Trial Court rejected the State's assertion that remotely locking a vehicle is false imprisonment because, in that situation, there is neither confinement nor restraint;[13] this Court should do the same. In its appeal, the State is advocating for an interpretation of the false imprisonment statute that would allow for prosecution of false imprisonment every time a spouse attempts to deny use of marital property or jointly owned property by the other spouse in any of the following circumstances:

- A spouse locks the other spouse out of a portion of or all of their residence.
- A spouse pulls the other spouse out of their favorite recliner so the spouse can watch television from that chair.
- A spouse pushes or pulls the other spouse out of their marital home.
- A spouse pulls the other spouse out of the bathroom in the marital home.
- A spouse grabs the other spouse's arm and takes away a phone or other item of personal property away from them.

All of the above circumstances involve some restraint of movement or confinement of another person as it relates to the use of jointly owned property; but they do not entail a true restraint or confinement of the person's freedom of movement because the victim is not being confined or restrained within bounds set by the imprisoner. As such, the above circumstances, as well as the circumstances of this case, do not constitute acts of false imprisonment under Wis. Stat. § 940.30.

Domestic disputes over use of property occur, and sometimes they escalate into criminal situations involving physical contact – this is what

[13] Rec. 19 at 8:8-25.

occurred in the instant case; but it did not cross the line into false imprisonment. The State argues that Carlos crossed a line in his conduct on December 12, 2021, but if this Court decides that he must be bound over for trial to defend himself against false imprisonment charges, it would be opening a dangerous door that would be impossible to close.

2. The State did not present evidence sufficient to support a reasonable inference that Carlos knew he did not have the legal authority to attempt to remove Sandy from his vehicle.

At a preliminary examination, the State must present some evidence sufficient to support a reasonable inference a defendant knew they lacked the legal authority to confine or restrain their victim to satisfy the fifth element of false imprisonment. *State v. Teynor*, 141 Wis. 2d 187, 207, 414 N.W.2d 76, (Ct. App. 1987); Wis. JI–Criminal 1275 (2015). Carlos cannot be bound over for trial on a false imprisonment charge, because, at the Second Preliminary, the State did not present sufficient evidence to support a reasonable inference that Carlos knew he did not have the legal authority to attempt to remove Sandy from his vehicle, these being the actions which the State allege constitute false imprisonment.

The State presented evidence consisting of Officer Bennett's testimony regarding the content of his interviews with Carlos, Sandy, and Karly, and video footage of those same interviews. Karly never discussed Carlos' motivations for attempting to remove Sandy from the vehicle.[14] Sandy ultimately admits that she did not know why Carlos wanted to remove her from the vehicle.[15] However, Carlos repeatedly mentions how he did not

[14] Officer Bennett's interview with Karly is captured on the MP4 file ending in 2509 on Exhibit 2 from the Second Preliminary (Record 33).
[15] Officer Bennett's interview with Sandy discussing Carlos's motivations for attempting to pull her from his vehicle, and whether he was preventing her from leaving, is captured on the MP4 file ending in 2831 on Exhibit 2 from the Second Preliminary (Record 33).

want Sandy in the vehicle because it was his vehicle.[16] (Rec. 30 at 1:23-50, 2:20-57.) He makes it clear that removing her from the vehicle had nothing to do with where he wanted her to be and was instead only related to where he did not want her to be, specifically, inside his vehicle.[17] This testimony and the supporting footage make it clear that the only reasonable inference that can be drawn regarding the fifth element of false imprisonment is that Carlos thought he had legal authority to remove Sandy from his vehicle.

What is more problematic for the State is the complete lack of evidence that Carlos knew he lacked the legal authority to remove Sandy from his vehicle. In *State v. Cotton*, the Court held that if the State fails to present some evidence regarding one element of an alleged crime at a preliminary hearing, the Defendant cannot be bound over for trial. *Cotton*, 2003 WI App at ¶ 23. In the instant case, the record is absent of any evidence that Carlos knew he lacked the legal authority to pull Sandy's hair in an apparent attempt to remove her from his vehicle. The State points to Carlos' statement at the police station that he should not have attempted to pull Sandy from his vehicle, but this had nothing to do with whether he thought he had the legal authority to do so and offers no insight as to Carlos' state of mind during the incident. The State was required to present evidence during the preliminary hearing that Carlos knew he lacked the legal authority to attempt to remove Sandy from his vehicle, and it failed to do so.

If there are competing inferences in a preliminary examination, the Court must accept the one most favorable to the State, but an inference must

---

[16] Officer Bennett's interview with Carlos is captured on the MP$ file ending in 758 on Exhibit 1 from the Second Preliminary (Record 30).

[17] Carlos explained to Officer Bennett that his primary motivation in attempting to remove Sandy from his vehicle was the fact that the vehicle belonged to him, and he did not want her taking it, saying "I thought she was taking my car… I'm like, do not take my car… It's not yours, it doesn't belong to you, you can't just take it wherever you want." (Rec. 30 at 1:30-48.)

be drawn from some evidence. In the instant case, the State has presented no evidence that Carlos knew he lacked the legal authority to remove Sandy from his vehicle, and a reasonable inference can be drawn from Officer Bennett's interviews with Carlos that Carlos thought he had the legal authority to do so. As the evidence on record offers no reasonable inference that Carlos knew he lacked the legal authority to remove Sandy from his vehicle, the State has not met its burden to bind Carlos over for trial on this false imprisonment charge.

CONCLUSION

The Circuit Court's refusal to bindover the Defendant in 22-CF-79 on a charge of false imprisonment was due to the State's failure to present new or additional evidence from what the Court heard in 22-CF-2, which had resulted in two prior findings that the State had failed to establish the Defendant had committed a felony.

Further, the Circuit Court's dismissal of Carlos' false imprisonment charge should be affirmed, because the State did not present sufficient evidence to support a reasonable inference that Carlos probably committed a felony during the Second Preliminary. The Defendant's pulling his spouse's hair to remove her from his vehicle did not constitute an act of confinement or restraint within bounds set by the Defendant. Additionally, the State did not establish that the Defendant did not know he did not have the legal authority to attempt to keep his wife from using his vehicle.

Criminal prosecutions inflict profoundly negative consequences on defendants in any circumstance, and these are incalculably amplified when a defendant is twice prosecuted for the same alleged crime. The issue of probable cause was fully litigated in the instant case during the State's prosecution in 22-CF-2. The criminal complaint in 22-CF-79, and the

resulting appeal following dismissal after the preliminary examination, can be classified as nothing more than prosecutorial harassment. This Court should affirm the Circuit Court's decision and protect Carlos from further embarrassment, expense, and anxiety that accompanies an unwarranted prosecution.

Dated: March 16, 2023.

Duxstad, Bestul, & McNaughton S.C.

Electronically signed by Robert S. Duxstad
Robert S. Duxstad
Counsel for Defendant-Respondent
State Bar No. 1018491

Duxstad, Bestul, & McNaughton S.C.

Electronically signed by Alexander B. Zahn
Alexander B. Zahn
Counsel for Defendant-Respondent
State Bar No. 1129534

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,909 words.

Dated this 16th day of March 2023.

Electronically signed by:

Alexander B. Zahn
ALEXANDER B. ZAHN
Counsel for Defendant-Respondent
State Bar No. 1129534

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of March 2023.

Electronically signed by:

Alexander B. Zahn
ALEXANDER B. ZAHN
Counsel for Defendant-Respondent
State Bar No. 1129534