STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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Appeal No. 2023AP1775-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

DOMINIC RANDALL WHITE-ANDREWS,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON OCTOBER 22, 2021, THE HONORABLE J.D. WATTS, PRESIDING. MILWAUKEE COUNTY CASE NO. 20CF198

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted by:

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

Statement of the Issue

Whether the trial court committed plain error when, during a bench trial, it interjected during the State's case in chief to say the State could not meet its burden with respect to Count 1 and offered the State a chance to amend the charge accordingly.

Statement on Oral Argument and Publication

White-Andrews would welcome oral argument if of interest to the Court.

White-Andrews believes that the Court's opinion in the instant will meet the criteria for publication because it will clarify the meaning of an existing statute and will contribute to the legal literature. Thus, this case is likely appropriate for publication and White-Andrews makes such a request.

Statement of the Case

The Criminal Complaint

As relevant here, the State filed a criminal complaint charging White-Andrews with child enticement. (R.2.) Child enticement requires the State to prove that the defendant caused a child under 18 to go into any vehicle, room, building, or secluded place with the intent of committing a sex-related crime against the child. Wis. Stat. § 948.07; Wis. JI-Criminal 2134.

The charge related to an alleged encounter with Arianna[1] at a birthday party in September 2014. (R.2:1.) According to the complaint, Arianna entered a bathroom to refill a water gun when White-Andrews came in, shut the door, and asked if she would "tell." (*Id.*) White-Andrews then allegedly began to unbutton his pants and

[1] A pseudonym.

asked if Arianna wanted to see his "private part." (*Id.*) Arianna then began to scream and cry and ran out of the bathroom after White-Andrews opened the door. (*Id.*)

Witness Testimony at the Bench Trial

White-Andrews waived his right to a jury and proceeded to a bench trial. (R.27.) Neither the State nor the defense presented opening arguments, and the case proceeded right into the taking of testimony. Arianna was the first witness to testify at the trial.

By the time White-Andrews was charged for the alleged encounter in September 2014, nearly seven years had passed. (R.54:20.) Arianna testified that she was at her friend Jamay's birthday party playing with water guns because it was hot outside. (*Id.*:21–22.) She and Jamay went into the apartment to refill their water guns in the bathroom. (*Id.*:22, 29.) Arianna's friend left before her, leaving her in the bathroom alone. (*Id.*:22–23, 29.) According to Arianna, White-Andrews came into the bathroom, asked if she wanted "to see something," and closed the door. (*Id.*:23–24, 25.) Arianna said "no" and started crying "because he was unzipping his pants" and sitting on the toilet. (*Id.*:25–26.) Arianna testified this made her scared, and she started to scream and cry. (*Id.*:26.) White-Andrews then let her out of the bathroom. (*Id.*)

Arianna testified that White-Andrews said, "don't tell or something like that." (*Id.*:28.) She further testified that she ran out to her family and reported that "that man" was "trying to do stuff to [her]." (*Id.*:27.) She testified that the encounter was

very short. (*Id.*:31.) Eventually, she spoke with the police about what happened and participated in a photo array. (*Id.*:27–28.)

Arianna's mother, Diana,[2] also testified. She reported that Arianna was at a friend's birthday party in September 2014. (*Id.*:33–34.) She was not there with Arianna but eventually received a phone call about the alleged incident. (*Id.*:34.) According to Diana, she was told that Arianna was using the bathroom when a man came in, unzipped his pants, and tried to make Arianna "perform oral care on him." (*Id.*) Diana immediately went to the apartment. (*Id.*:35.)

When Diana arrived, the police were already at the apartment. (*Id.*) Arianna was crying and Diana "could tell she was scared." (*Id.*) Diana comforted Arianna, and once Arianna calmed down a few moments later, she shared her version of events. (*Id.*:35, 37.) Arianna told Diana that she was in the bathroom when a guy came in, unzipped his pants, and tried to get her to do inappropriate things to him or "go down on him." (*Id.*:35–36.)

Clarence Finley also testified. (R.45:4; A-Ap 8.) In September 2014, Finley was living on West Hampton Avenue and was dating Jamay's mother. (*Id.*:5; A-Ap 9.) On the day in question, he hosted a birthday party for Jamay at the apartment on West Hampton. (R.45:5–6; A-Ap 9–10.) He estimated there were about 16 people at the party: nine adults and seven kids. (R.45:6; A-Ap 10.) Arianna was one of the kids

[2] A pseudonym.

present. (*Id.*) And White-Andrews, a neighbor of Finley's, was one of the adults there. (R.45:6–7; A-Ap 10–11.) Finley testified that everyone was having a good time and the kids were running around. (R.45:7; A-Ap 11.)

At one point, Finley went into the apartment to tell White-Andrews, who he didn't know well, to come outside. (R.45:8; A-Ap 12.) Finley then went to mind the grill. (*Id.*) The next thing he knew, Arianna came outside crying. (*Id.*) The adults rushed inside the house, including Finley. (R.45:8–9; A-Ap 12–13.) He saw his cousin scuffling with White-Andrews and told them to go outside. (R.45:9–10; A-Ap 13–14.) Once they were outside, another of Finley's cousins got involved trying to keep White-Andrews from being seriously injured. (R.45:10; A-Ap 14.) Eventually, White-Andrews ran home. (R.45:12; A-Ap 16.)

Finley spoke with police, and he reported that he couldn't remember Arianna's exact words, but he overheard her say something about White-Andrews "trying to make [her] suck or feel his private parts." (R.45:13–14; A-Ap 17–18.) Then, Arianna repeated herself and Finley heard it directly from her. (R.45:14; A-Ap 18.) He also told the police that, upon entering the apartment with the other adults, he saw White-Andrews was sitting on the couch. (R.45:15; A-Ap 19.)

Clay Rich, who is Finley's stepfather, was also at the party and testified at the bench trial. (R.45:21, 22; A-Ap 25, 26.) He testified that there were 15 to 20 people there, sitting around drinking, listening to music, and talking. (R.45:22–23; A-Ap 26, 27.) People were going in and out of the apartment. (R.45:31; A-Ap 35.) When Rich

arrived, White-Andrews was already there. (R.45:23; A-Ap 27.) While he was standing outside, Arianna ran up to him, looking frightened and nervous, and "said that the man inside wants me to go in the bathroom where he can show me his private parts." (R.45:24; A-Ap 28.) Rich was the first adult she ran to. (R.45:31; A-Ap 35.) Later, Arianna started crying really hard. (R.45:25–26; A-Ap 29–30.) After the adults heard what happened, they went inside and started to beat up White-Andrews. (R.45:27; A-Ap 31.) After White-Andrews got dragged outside, Rich and one of his nephews went to stop the fight. (R.45:28; A-Ap 32.)

The Court Interjects

At this point in the testimony, the court called a sidebar. (R.45:32; A-Ap 36.) Afterwards, Rich was dismissed as a witness and the court memorialized the sidebar. (*Id.*) The court stated:

> The Court raised this issue, and I'm going to take a moment because I have a lot to say.
>
> I understand that this is in the middle of the case and perhaps should wait until the end. However, it's causing a concern that the Court has that we're not using our time well, and based on the fact that the Court is both the factfinder and the law it creates this dynamic tension, but as the Judge who is in charge of the law, I cannot avoid this issue, and the issue is one of law.
>
> So first of all let's start with the statute in Count 1. We're only talking about Count 1. I've only heard evidence of Count 1, and this came to the Court as I was reviewing the jury instructions.

(R.45:33; A-Ap 37.) The court went on to discuss the words of the charging statute: Wis. Stat. § 948.07. (*Id.*) Section 948.07 states that "Whoever with intent to commit any of the following acts causes or attempts to cause any child who has not attained

the age of eighteen years to go into any vehicle, building, room, or excluded place is guilty of a Class B felony." The court did not take issue with the latter listed acts or the age of the alleged victim. The court took issue with the requirement that "[t]he defendant attempted to cause the victim to go into a room or excluded place." (R.45:34–35; A-Ap 38–39.) The court then cited *State v. Provo*, 2004 WI App 97, ¶ 1, 272 Wis. 2d 837, 681 N.W.2d 272, which holds that § 948.07 requires the defendant to cause the child to go into a place—a vehicle, building, room, excluded place. (R.45:35–36; A-Ap 39–40.) The court then discussed *State v. Payette*, 2008 WI App 106, 313 Wis. 2d 39, 756 N.W.2d 423, which relied on *Provo* to emphasize that a defendant telling a victim to go into another room, even in a house they shared, satisfied that causation requirement in § 948.07. (R.45:36; A-Ap 40.)

The court announced that, in its view, "the State cannot prevail on this issue of attempting to cause or causing the victim to go into any room or excluded place because closing the door might make the room more excluded . . . but there is no causing to go anywhere." (R.45:37; A-Ap 41.) The court went on:

> So, State, I'm finding based on this record since you don't have any other witnesses, and the eye witness you have is quite credible that *you cannot satisfy element one in either causing or attempting to cause, and therefore, Count 1 is not child enticement by any definition*.

(R.45:37–38; A-Ap 41–42 (emphasis added).) The court expounded, stating that while the bathroom could constitute an excluded place, there is no evidence of an "attempt by [the defendant] to get the victim into this bathroom." (R.45:40; A-Ap 44.) The court gave the State time to do research and come back, inviting both the

State and the defense to consider Wis. Stat. § 971.29 (2) and (3).[3] (R.45:38, 40; A-Ap 42, 44.)

When the trial resumed, the State told the court that it agreed with its "analysis of the child enticement statute." (R.45:42; A-Ap 46.) The State then moved to amend Count 1 to a charge of attempted first degree sexual assault. (R.45:43; A-Ap 47.) Defense counsel did object to this attempted amendment, arguing that it was too prejudicial. (R.45: 44–48; A-Ap 48–52.) The court, citing the longer period of exposure and potential for lifetime sex offender registration, denied that amendment. (R.45:57–58; A-Ap 61–62.) The court then approved the State's other proffered charge: attempt to expose genitals to a child. (R.45:58–59; A-Ap 62–63.) Defense counsel did not object to this amendment (*id.*), and White-Andrews was ultimately convicted of the charge (R.56:50).

Argument

I. A summary of the argument.

White-Andrews begins this appeal by setting the stage with two important pillars of American jurisprudence.

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[3] Wis. Stat. § 971.29 (2) reads: "At the trial, the court may allow amendment of the compliant, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial."

Wis. Stat. § 971.29 (3) reads: "Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendment thereby rendered necessary and may proceed with or postpone the trial."

First, criminal defendants are entitled, by virtue of their due process rights, to a fair and neutral judge overseeing their case. *See State v. Rochelt*, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct.App.1991). Our system recognizes this and safeguards it. Take, for example, the law surrounding recusals. *See* Wis. Stat. § 757.19. Even the *appearance* of bias is enough for a judge to recuse themselves. Wis. Stat. § 757.19 (2)(g) (a judge shall recuse themselves when he or she "determines that, for any reason, he or she cannot, *or it appears he or she cannot*, act in an impartial manner" (emphasis added)).

Second, the State bears the burden of proving, beyond a reasonable doubt, that a defendant committed the crime with which the State charged them. *See, e.g.*, Wis. JI-Criminal 140. The factfinder must be satisfied that there is *no reasonable basis* to think the defendant may not have done what the State said they did. *Id.*

Against this backdrop, White-Andrews argues that the court's interference in his bench trial was outside the scope of the court's authority and violated his constitutional rights, constituting reversible plain error.

II. The trial court's interjection and subsequent invitation to the State to amend the charge to one the court believed it could prove, after the court had already found the State could not meet its burden of proof with respect to the charged offense, constituted plain error.

A. A brief summary of the law governing plain error.

"There is no bright-line rule for what constitutes plain error," but defined at the highest level of generality in the criminal context, "plain error means a clear or

obvious error, one that likely deprived the defendant of a basic constitutional right." *State v. Lammers*, 2009 WI App 136, ¶¶ 12-13, 321 Wis. 2d 376, 773 N.W.2d 463 (cleaned up). Or stated another way, "plain error is error so fundamental that a new trial or other relief must be granted even the action was not objected to at the time." *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (cleaned up).

Analysis of an alleged plain error in the criminal context involves a two-step process. *Jorgensen*, 2008 WI 60, ¶ 23. First, the defendant must show "that the unobjected to error is fundamental, obvious, and substantial. . . ." *Id.* If the defendant makes this showing, then the burden shifts to the State to demonstrate that the error was harmless beyond a reasonable doubt. *Id.*, ¶ 23 & n.5.

B. The error was fundamental, obvious, and substantial because the trial court lacked the authority to intervene in the State's case in chief during a bench trial and give it a second chance to charge White-Andrews with a crime it could prove based on the evidence it presented.

A court derives its authority from two places: inherent authority and authority given to it by statute. *W.W.W. v. M.C.S.*, 185 Wis. 2d 468, 483, 518 N.W.2d 285 (Ct. App. 1994). The court did not have the authority to *sua sponte* invite the State to amend Count 1—under its inherent authority or under statute.

i. The court, having found the State could not meet its burden with respect to Count 1, lacked the inherent authority to *sua*

***sponte* invite the State to amend the charge during the presentation of evidence.**

Generally speaking, courts have inherent authority over three areas. The first is the inherent authority to direct the internal operations of the court—things like hiring a judicial assistant and maintaining facilities. *Sun Prairie v. Davis*, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999). Second, courts have the inherent authority "to regulate members of the bench and bar." *Id.* Finally, courts have the inherent authority to ensure "that the court functions efficiently and effectively to provide the fair administration of justice." *Id.* at 749–50. This ensures that courts have the authority to control their dockets. *Id.* at 750.

Courts do not, however, have inherent authority over matters that do not concern either the existence of the court or its efficient functioning. *See id.* at 751. When the court told the State that it could not satisfy one of the elements of child enticement charged in Count 1, it was not acting within the scope of its inherent authority. It was not related to the court's operations; it was not related to regulating members of the bench or bar; and it was also not related to the fair administration of justice. While a court may have inherent authority to manage its own docket, it does not have the authority to invite the State to amend its charges against a defendant. Indeed, charging decisions are entirely the purview of the prosecutor's office. Wis. Stat. § 968.02.

The court's interjection and invitation to the State to amend the charge in Count 1 was therefore not an exercise of the court's inherent authority.

ii. The court also lacked statutory authority to invite the State, *sua sponte*, to amend the charge after finding that the State could not prove all the elements in Count 1.

If the court did not have the inherent authority to invite the State to amend its charge in Count 1, then it would need to derive the authority to do so from the statutes. Indeed, "if the authority to fashion a particular criminal disposition exists, it must derive from the statutes." *State v. Amato*, 126 Wis. 2d 212, 216, 376 N.W.2d 75 (Ct. App. 1985).

During the trial, the court cited to Wis. Stat. § 971.29. As relevant here, § 971.29 (2) reads:

> At the trial, the court may allow the amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

The Wisconsin Supreme Court has held that the second sentence in Subsection (2)—"the sentence regarding amendment after verdict," "was intended to deal with technical variances in the complaint such as names and dates." *State v. Duda*, 60 Wis. 2d 431, 440, 210 N.W.2d 763 (Wis. 1973). That sentence therefore does not confer the authority to, having already found the State could not prove Count 1, invite the State to amend its charge because of a lack of evidence. So, the remaining possibility is that the first sentence of § 971.29(2) authorizes the court to, on its own motion,

find the evidence lacking and invite the State to amend. White-Andrews' position is that the statute does not.

a. Statutory interpretation does not lead to the conclusion that a court, having already found the State could not meet its burden, has authority to *sua sponte* invite the amendment of a charge during the State's case in order to conform to what the court thinks the State can prove.

First, the principles of statutory interpretation do not support a finding that the statute grants a court authority to *sua sponte* invite or encourage the State to amend a charge during the State's case in chief. Any interpretation of a statute must give that statute "its full, proper, and intended effect." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Interpreting a statute begins with the language of the statute and, "[i]f the meaning of the words are plain and unambiguous, a court's inquiry ends." *Id.* at ¶¶ 45, 46. The words of a statute are given their "'common, ordinary, and accepted meaning.'" *Id.* at ¶ 45 (quoting *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656).

The sentence at issue reads: "At the trial, the court may allow the amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." Wis. Stat. § 971.29 (2). The word at issue is "allow"—does this verb give the court authority to intervene, after finding that the State could not prove the charge as a matter of law, and invite the State to

amend a charge? By its plain meaning, it does not. "Allow" means to permit.[4] Allow decidedly does not mean orchestrate, instigate, initiate, or any other overt action verb that would suggest a court can, on its own motion and after concluding the State cannot meet its burden, invite the State to amend its charge to one the court believes the State can prove. White-Andrews argues that the analysis can stop there; the plain language is clear.

But it's worth pointing out that the plain meaning of the first sentence in Subsection (2) is bolstered by the second sentence. The second sentence, as noted above, is "intended to deal with the technical variances in the complaint such as names and dates." *Duda*, 60 Wis. 2d at 440. So, if "conform to the proof" in the second sentence relates to "technical variances," then "conform to the proof" in the first sentence should mean the same. And this makes sense, to have this sort of "saving" statute. Perhaps evidence comes in that a victim's last name was Johnston, not Johnson—or that an address was 3125, not 3152. These "variances" don't affect the substance of the charge a defendant faces or deprive a defendant of notice. *See* Art. 1, Sec. 7, Wis. Const. ("In all criminal prosecutions the accused shall enjoy the right . . . to demand the nature and cause of the accusation against him . . . ."). If anything, starting a trial over based on such "technical variances" would not be in the interest of a criminal defendant.

[4] "Allow," https://www.merriam-webster.com/dictionary/allow (last visited Nov. 16, 2023).

The plain meaning of § 971.29 is also bolstered by the statute-mandated order in which a trial must proceed as outlined in Wis. Stat. § 972.10. Once the jurors have been selected, trials are to follow § 972.10. Of import here is Subsection (4), which affords criminal defendants the opportunity to move for a dismissal "at the conclusion of the entire case." Wis. Stat. § 972.10(4). Under Wisconsin law, a defendant is entitled to challenge the State's case against them and argue that there is no evidentiary basis for a conviction of the crime with which they are charged. Reading § 971.29 to allow a court, with reasonable doubt, to *sua sponte* invite the State to amend the charge against a defendant mid-trial based on the court's belief the State is losing its case deprives a defendant of the opportunity to move to dismiss a criminal charge the State cannot prove or has not proven. Not only is this statutorily derived procedural right—to move to dismiss—it dovetails with the State bearing the burden to prove a charge beyond a reasonable doubt. This subsection reinforces that burden and a defendant's right to be convicted only if the State can meet it.

In sum, analyzing the statue under principles of statutory construction does not support a finding that § 971.29(2) confers authority to a trial court to amend, or invite the State to amend, the charge against the defendant mid-trial in order to conform with evidence presented by the State.

b. There is no support in case law for reading § 971.29 as giving courts authority to invite the State to amend a charge mid-trial.

Case law equally does not support the conclusion that § 971.29 authorizes trial courts to *sua sponte* invite the State to amend a charge against a defendant when the court has already found, as a matter of law, that the evidence does not support a conviction on the charged crime. There are not many cases on the subject, but none truly stand for this proposition. The closest Wisconsin caselaw gets to greenlighting such an interpretation of § 971.29 is *LaFond v. State*, 37 Wis. 2d 137 (Wis. 1967), which interpreted § 971.29's predecessor statute. The case remains relevant because today's Wis. Stat. § 971.29 was intended to be a "restatement of" the preceding statute. *Duda*, 60 Wis. 2d at 440 (citing Bill 603-A, 1970 Wisconsin Annotations, p. 2141).

In that case, LaFond was charged with sexual intercourse with a child. *Id.* at 140. At the conclusion of evidence, the court pronounced from the bench that the State had not met its burden. *Id.* The court went on, however, to find LaFond guilty of contributing to the delinquency of a minor, though he had not been charged with it, stating that the evidence supported a *prima facie* case and was "'within the charge of sexual intercourse with a child.'" *Id.* Importantly, LaFond did not object to the amendment at the trial or raise the issue at all with the trial court, for that matter. *Id.* at 140–42. On appeal, the Wisconsin Supreme Court said that LaFond had waived any argument about the propriety of the court's actions and then went on to

examine if the amendment violated double jeopardy as LaFond argued. LaFond did not raise a plain error argument. *Id.* 142–43. The court found that the amendment at trial did not violate the prohibition against double jeopardy and that LaFond had waived any other arguments, and let LaFond's conviction stand, citing to Wis. Stat. § 967.16, *id.* at 143–44, the aforementioned predecessor to today's § 971.29.

The dissent also focused on § 971.29's predecessor statute, stating that the "variances" referenced in § 967.16 were those "not material to the merits of the action," and amending a charge does not fit that definition. *LaFond*, 37 Wis. 2d at 145. Following the court's decision, LaFond filed a motion for a rehearing. In its *per curiam* denial of rehearing motion, the court wrote:

> It has also been called to our attention that the court's opinion might appear to sanction the practice of finding an accused guilty of an offense he was not charged with. Such was not our intention.

Id. at 145a.

With that addendum in mind, *LaFond* stands only for the proposition that, by not raising his objection to the amendment at trial and not raising a justiciable argument (specifically, plain error with respect to the propriety of the court amending the charge) on appeal, LaFond waived any such argument. That is, without preserving the issue or raising plain error on appeal, there was nothing for the Wisconsin Supreme Court to do. Indeed, the court wrote that it "remain[ed] persuaded that our conclusion that any error was waived by the failure to make [a] timely objection is correct." *Id.* Therefore, *LaFond* cannot be, and should not be,

extrapolated to stand for the proposition that a court, under § 971.29 (the modern equivalent to the section on the books at the time the case was decided), can amend or invite an amendment to a charge mid- or post-trial. Further, the case does not address due process or burden of proof, the rights White-Andrews argues were violated during his trial.

None of the other cases White-Andrews has found address his particular argument: that § 971.29 does not allow a court, during a bench trial no less, to interject during the State's case and invite it to take another kick at the can when the court has already found that the State's evidence failed to meet the burden of proof. And that makes sense given that doing so violates fundamental principles of fairness and justice. Even those cases that uphold some sort of amendment by the court (not the State) were not argued or decided using the lens(es) White-Andrews is using here.

If case law supports anything, it supports an interpretation of § 971.29 as contemplating situations in which the State itself moves to amend a charge at trial, at which time the court must apply two tests when deciding whether to allow an amendment. *State v. Malcolm*, 2001 WI App 291, ¶ 26, 249 Wis. 2d 403, 638 N.W.2d 918. First, the court must be satisfied that the new charge is not "wholly unrelated to the transactions or facts" and, second, the court must be satisfied that the defendant had constitutionally sufficient notice. *Id.* (internal citation omitted). The existence of these standards to be examined when the State moves to amend reveals that

neither the courts nor the legislature contemplated a situation in which a court, with overtly stated reasonable doubt, *sua sponte* invites the State to amend.

There is no support in the case law for a court interjecting in the State's presentation of a case, telling the State it cannot meet its burden, and then offering the State a chance to amend the charge to one that it can prove.

C. In summary, the court's error was fundamental, obvious, and substantial because inviting the State to amend a charge after having found the State could not meet its burden is patently and fundamentally unfair, and the State will not be able to show that the error was harmless.

White-Andrews began this brief with two pillars of American jurisprudence: the right to a fair and neutral judge and the right to only be found guilty when the State can prove all the elements of a given crime beyond a reasonable doubt. Both of those rights were violated when the court, acting as both the finder of fact and law, interjected during the State' case to tell the State it could not meet its burden of proof and give it a chance to try again with a different criminal charge.

What is more, the court lacked the authority to do this, as outlined above. Neither inherent nor statutory authority authorized the trial court to step in on the State's behalf and invite the State to amend the charge to one the State could prove.

Indeed, in inviting that the State amend, the court explicitly found, as a matter of law, that the State could not "satisfy element one in either causing or attempting to cause [the alleged victim to go to a secluded place], and therefore, Count 1 is not child enticement by any definition." (R.45:37–38.) That is, the court

made clear that it found White-Andrews was not guilty of Count 1 based on the evidence the State introduced. But rather than waiting for the State to rest, a motion to dismiss from the defense at the close of evidence, or the conclusion of closing arguments, the court decided it would let the State know it couldn't meet its burden and give it a chance to amend Count 1 to a charge that it could prove. Given that the court was the finder of fact in this trial only adds to the egregiousness of the error. It was the arbiter of whether the State met its burden. And rather than functioning as a factfinder, the court shifted into advocacy from the bench and gave the State another chance to convict White-Andrews of *something*. The entire situation violates due process and the burden of proof and flies in the face of principles of fairness. It defeats the purpose of an independent factfinder and having one side carry the burden of proof.

And given the nature of the error, and the constitutional rights violated, the State will not be able to show that the error was harmless. Indeed, the harm here is obvious: White-Andrews was convicted of an amended Count 1 when he should have been acquitted of the crime as charged.

The State decided what that charge would be, maintaining it all the way to trial. Then, when the trial came, the State failed to introduce evidence to meet all the elements of the crime with which it chose to charge White-Andrews.

None of this was White-Andrews' doing. He is now convicted of a different crime than the one the State initially charged him with (when he should have been

acquitted) because the trial court, acting as a factfinder, decided to advocate on the State's behalf.

Conclusion

Allowing a court to *sua sponte* invite the State to amend a charge the court has already found, as a matter of law, the State cannot prove, flies in the face of the foundation of the justice system. As mentioned at the outset, two pillars of American jurisprudence are implicated here: due process and the burden of proof. Allowing a court, during a bench trial, to tell the State "Hey, I have found as a matter of law that you cannot prove this charge because you can't meet an element. Why don't you try again?" is fundamentally inappropriate and unjust. It is the State's burden to carry. The State decides how to charge a case, and the State must meet its high burden of proof to convict a defendant. If it cannot do so, it should lose. It should not find an advocate in the judge presiding over a bench trial. White-Andrews therefore asks this Court to vacate his conviction.

Dated this 18th day of December, 2023.

PINIX LAW, LLC
Attorneys for Defendant-Appellant

Electronically signed by Taylor E. Barnes-Gilbert
By: Taylor E. Barnes-Gilbert, SBN 1088091

Rule 809.19(8g)(a) Certifications

I certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,602 words, as counted by the commercially available word processor Microsoft Word.

I hereby certify that filed with this brief is an appendix that complies with Section 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 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.

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 18th day of December, 2023.

PINIX LAW, LLC
Attorneys for Defendant-Appellant

Electronically signed by Taylor E. Barnes-Gilbert
By: Taylor E. Barnes-Gilbert, SBN 1088091

Rule 809.19(8g)(b) Certification of Appendix Content

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 Section 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.

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 first names and last initials 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.

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