

FILED

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No. 2024AP2013

CLERK OF COURT OF APPEALS
OF WISCONSIN

In the Wisconsin Court of Appeals

**STATE OF WISCONSIN,
PLAINTIFF-APPELLEE,
V.
STEPHEN LODWICK
DEFENDANT-APPELLANT.**

APPELLANT'S REPLY BRIEF

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Issues Presented for Review:

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Issue #5 **THE CIRCUIT COURT ERRED IN NOT STRIKING THE DOMESTIC ABUSE MODIFIER ON THE SIMPLE DISORDERLY CONDUCT ALLEGATION**

Issue #6 **THE CIRCUIT COURT ERRED IN FAILURE TO PERMIT EXPUNGEMENT FOR APPELLANT**

Appellee's Issues for Review

- I. This Court should affirm the Circuit Court's decision that Lodwick was not in custody for purposes of his Motions under Wis. Stat. § 974.06.
- II. The Circuit Court's Restitution Order was supported by the weight of the evidence and the Circuit Court was empowered to enter a civil judgment.
- III. The Circuit Court correctly ordered the Domestic Abuse Surcharge on Defendant-Appellant's Conviction.
- IV. The Circuit Court correctly denied the Defendant-Appellant's request for Expunction

STATEMENT OF THE CASE

Appellant restates and affirms his version of the *Statement of the Case* within his Initial Brief.

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STANDARD OF REVIEW

The Appellee contends that no appellate court can or should reverse a conviction, as follows:

“This Court may not reverse Lodwick’s conviction “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

It is an exacting standard. Under it, “a reviewing court may overturn a verdict on grounds of insufficiency of the evidence only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt.” *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.”

What the Appellee wishes this Court to overlook, is that the Appellant filed sworn testimony from a State witness, which contravenes the alleged victim’s testimony and the circuit court refused to hold even an evidentiary hearing.

Under WIS. STAT. § 752.35, we possess a broad power of discretionary reversal, see *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990), and we may exercise that power where it appears from the record that (1) “the real controversy has not been fully tried”; or (2) “it is probable that justice has for any reason miscarried,” § 752.35. “[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial.” *State v. Maloney*, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citing *State v. Hicks*, 202 Wis. 2d 150, 160-61, 549 N.W.2d 435 (1996)). (see *State v. Robinson*, 2023 WI App 11 - Wis: Court of Appeals, 3rd Dist. 2023)

Had the jury learned the truth about JBB and her false testimony, Appellant would have been cleared of the remaining charge and Domestic Abuse modifier.

**Issue #1 THE CIRCUIT COURT ERRED IN NARROWLY DEFINING THE TERM
IN CUSTODY FOR PURPOSES OF MENTZEL DENIAL OF MOTIONS
FILED BY APPELLANT**

As Lodwick states, the court in *Mentzel* did find that the statute's definition of "in custody under sentence of a court" was ambiguous. *State v. Mentzel*, 218 Wis. 2d 734, 741, 581 N.W.2d 581, 583 (Ct. App. 1998). The State concedes this point in its brief. (P.9)

"Custody" as an elusive definition and while the Appellant in this case contends that still being under the circuit court's authority for enforcement of restitution, which could include *contempt* proceedings if the circuit court so ruled under Wis. Stat. §973.20. The tether to the circuit court by virtue of the restitution Ordered in this case, is no gossamer thread, but a real and hardened link, which places Appellant in a *de minimis* custodial position.

The custodial status does not require iron bars or shackles, but remaining under judicial authority is sufficient for *Mentzel* purposes.

**Issue #2 THE CIRCUIT COURT ERRED IN NOT HOLDING A HEARING ON
DEFENDANT/APPELLANT'S MOTION FOR NEW TRIAL**

**Issue #3 THE CIRCUIT COURT ERRED IN FAILING TO GRANT RELIEF
SOUGHT BY DEFENDANT/APPELLANT**

Issue #4 THE CIRCUIT COURT ERRED IN ALLOWING THE JUDGMENT ENTERED AGAINST DEFENDANT/APPEALANT PREDICATED ON FRAUD, PERJURY AND/OR MATERIALLY FALSE EVIDENCE OR TESTIMONY OF ALLEGED VICTIM

The State contends that even if the testimony of a State's witness is reviewed here, the fraud detailed in those statements should be ignored.

If this Court is inclined to examine Lodwick's "newly- found evidence" on the merits, his motions should still be denied. None of this evidence, should it be deemed admissible, weighs against the sole count on which he was convicted. Lodwick was convicted by a jury of Disorderly Conduct- Domestic Abuse (Count 2), while he was acquitted of Battery- Domestic Abuse and Criminal Damage to Property. (June 12, 2023 R. 42:1, 44:1, 46:1, November 30, 2023 R. 92:139-144.)

Sworn testimony by Krystle Weber that JBB filed a fraudulent claim at the restitution proceeding, is totally lacking in worthiness for a full hearing where JBB could be placed under oath and confronted with the truth and the circuit court could correct the wrongs brought on the Appellant via perjury.

Further, the State contends that the circuit court did not consider the acquitted counts during the restitution hearing. However, the *Damage to Property* charge stemmed from the claim this Appellant intentionally broke a mirror and the circuit court directly considered the alleged cost of that mirror during the hearing.¹

¹ This Court denied Appellant's *Motion to Expand the Record* where he would have obtained the circuit court decision for this Court's review.

Inexorably related to this appeal, is the civil matter where the Appellant has sued JBB and through that protracted litigation, Appellant has discovered materially false testimony from JBB, during trial and the restitution hearing.²

During a recent deposition of JBB, she disclosed that her inability to work as claimed in the restitution hearing, where she gained a \$5,000 + award, was not true.³

Q. And you worked 11 out of those 15 days through the first half of September, correct?

A. I mean it appears -- I'm not good at math. So sorry.

Q. Okay. And just to be clear, you -- you did work on these days in September, the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 12th, 13th, 14th, and 15th, correct?

A. Yes, I believe it was night shift so those shifts are less physical demands. I think -- I'd have to double check, but I think most of them are night shifts.

Q. So you were able to work?

A. With -- Not without assistance. Like if the other staff wasn't there to help me or family there to help me, no, I wouldn't have been able to.

Q. But you still got paid, correct?

A. I did get paid. Yes.

To the timing detriment for this Appellant, the exposure of JBB's perjury and fraudulent filings with the trial/ restitution proceedings. In fairness to the State, now that more sworn testimony exposes JBB, the Appellant does not object to the State filing a supplemental brief, which can address JBB's testimony from the Deposition.

Had the circuit court held a hearing on Appellant's motions, JBB would have been exposed and the circuit court would have been in a better position to make a record, which is barren today

² Washington County Case Number 2022CV000543

³ Appellant requests that this Court take judicial notice of the Annexed transcript or permit the expansion of the record to include the Deposition Transcript annexed hereto.

for this Court to address and parse. The Victim must show that there is a “causal nexus” between the crime and the victim’s losses, and that the crime of which the defendant was convicted was a “substantial factor” in causing those losses. *Id.* at 85-86, *State v. Wiskerchen*, 2019 WI 1, ¶ 25, 385 Wis. 2d 120, 134, 921 N.W.2d 730, 738. Wis. Stat. § 973.20(1r). In this case, the circuit court erred in not holding a hearing, either on the *Motion for New Trial*, or the *Motion for Relief from Judgment*, predicated upon fraud, perjury and/or deception.

Issue #5 THE CIRCUIT COURT ERRED IN NOT STRIKING THE DOMESTIC ABUSE MODIFIER ON THE SIMPLE DISORDERLY CONDUCT ALLEGATION

The Jury watched surveillance video that contained audio of Lodwick yelling at the victim. *Id.* at 143. Appellant later admitted that his voice was in the audio, he had been using profanities. Likewise, the jury saw JBB cursing at Appellant, in a mutual exchange of language only. The jury swiftly acquitted the Appellant of any battery or otherwise offensive conduct, except the overbreadth Disorderly Conduct catch-all.

973.017(10m) states: Statement of reasons for sentencing decision.

(a) The court shall state the reasons for its sentencing decision and, except as provided in par. (b), shall do so in open court and on the record.

There is no *Statement of Reasons* penned by the circuit court or any record as to why the circuit court imposed this surcharge in the official record held by the Clerk.

Issue #6 THE CIRCUIT COURT ERRED IN FAILURE TO PERMIT EXPUNGEMENT FOR APPELLANT

The State concedes that upon successful completion of the sentence, he is entitled to the expungement of the Disorderly Conduct. (Appellee Br. At P. 14)

Wis. Stat. 973.015 (1m)

(b) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and **which shall have the effect of expunging the record.** If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

The Appellant in this case successfully completed the probationary term, without any violations whatsoever and is entitled to the strict language of the statute above, as contemplated at the time of sentencing. This statutory provision, when read in the light most favorable to the Appellant, as it must when interpreting statutory language, this provision misleads defendants into believing that successful completion of probation on a misdemeanor such as this, automatically works as an expungement. Defense counsel was misled by the language, if Appellee's stricter basis for expungement prevails.

Due to the ambiguity in the statutes, the Appellant is entitled to the expungement of the Disorderly Conduct misdemeanor.

CONCLUSION

I For the reasons stated above, this Court should vacate the denial of the *Motion for New Trial* and direct the circuit court to hold an evidentiary hearing; and

II. For the reasons stated above, this Court should vacate the denial of the *Motion for Relief from Judgment* and direct the circuit court to hold an evidentiary hearing; and

III. For this Court to vacate the denial of expungement and direct the circuit court to enter the appropriate Order directing expunction, instantler;

IV. That this Court grant such further relief to which Appellant may be entitled/

Dated this 19th day of June, 2025.

By:  _____
Stephen Lodwick, Defendant/Appellant