STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No.15-AP-1994-CR

JEFFREY S. DECKER,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE SCOTT C. WOLDT PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

JEFFREY DECKER

PO Box 1572
Oshkosh WI 54903
(715) 321-0905
reporterdeckerr@gmail.com

Defendant-Appellant, *pro se*

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ARGUMENT

The State's Reply Brief in this matter is significant in two ways: First, as discussed in Part I, it makes very limited and ineffective arguments, abandoning or failing to develop responses to most of what Plaintiff raised in his brief. Second, as discussed in Part II, it makes a critical concession that the court erred, and fails to demonstrate that that error was harmless.

I. The State's Arguments are Unavailing.

A. The State has abandoned sufficient issues to allow Defendant to prevail.

The State's entire argument consumes a mere 90 lines of text and less than a thousand words. It cites only a handful of authorities, sometimes for esoteric propositions, such as irrelevant evidence being inadmissible. (Response Brief at 6.) The brevity of the State's argument and its paucity of authority are representative here of an argument that is neither deep nor sustained. The State does not address any of Plaintiff's finer-grained arguments at all, and even his overarching arguments are merely negated, not substantially addressed.

Because of the perfunctory nature of the state's arguments, for the most part they need not – in fact *should* not – be considered.

An appellate court does not decide issues that are not adequately developed by the parties in their briefs. *Truttschel v. Martin*, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997). Arguments in briefs must go beyond "general statements": they must emerge as "developed themes" that "reflect[]...legal reasoning." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). All arguments must be supported by legal authority. *Id.* The Rules of Appellate Procedure, which assist this court by directing the form and organization of briefs, must be followed. *See id.*, citing Wis. Stats., § 809.19(1)(e). If the Defendant can adhere to these standards as a *pro se* litigant, the state certainly must bear the same burden.

The lack of substance to the State's argument before this court would require it to analyze the issues addressed, develop arguments for the State, and then decide them. *See State v. Marshall*, 2002 WI App 73, ¶24, 251 Wis. 2d 408, 642 N.W.2d 571. The State may not expect this court to play its "performing bear." *State v. Waste Management of Wis., Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147 (1978). As a high-volume, error-correcting court, the Court of Appeals cannot serve as both advocate and court. *Pettit*, 171 Wis. 2d at 647.

Nor is it generally appropriate for the court to assume the role of advocate, and particularly not on behalf of the state, with its considerable resources, against a *pro se* litigant. *See State v. Garner*, 54 Wis.2d 100, 104, 194 N.W.2d 649 (1972) ("[E]ven where there is no jury, the judge should not take an active role in trying the case for either the

state or the defense"). *See also* Wis. Sup. Ct. Rule SCR 60.04(1)(hm) (all judicial duties to be performed impartially; may make efforts to allow all litigants to be heard). Decker has the right on appeal to an impartial tribunal, and by asking this court to consider arguments it would be required to develop itself, the State is asking it to compromise that role.

Including those issues either not directly addressed, or barely mentioned by the State and left undeveloped, the State should be deemed to have effectively conceded the following:

a) The evidence adduced against Decker at trial was insufficient to convict him.

b) No valid exclusion order has ever, or could ever exist. No authority for such an order exists in State Statutes or UW policies.

c) No evidence was presented to show Defendant knew officers were acting with lawful authority.

d) The officers had no intention of respecting due process requirements.

e) The officers violated numerous departmental policies and guidelines regarding use of force and respect for civil rights, and the court erred in saying "Use of force is not an issue."

f) The arrest in question fits a pattern of politically-motivated harassment of Defendant, intended only to silence his criticism of flagrant financial misconduct.

g) The trial court erred by preventing relevant testimony by the Defendant, and the court violated his right to present a full defense by ending closing arguments prematurely. by preventing Defendant from offering complete closing arguments.

Defendant acknowledges that he bears a burden of persuasion, but based on the strength of his arguments, and seeing no negative or affirmative argument in response, the court would be well warranted in reversing the circuit court and granting the relief requested by the Defendant.

B. The State's Few Direct Arguments are Unpersuasive.

1. Availability of collateral challenge. The State spends a significant portion of what little argument it makes suggesting that Decker had other means of challenging an exclusion order he believed was unlawful. (Response Brief at 5.) That is irrelevant. One with a collateral means of attacking an order executed by police is in no different posture from a person without such means. The unstated implication is that Decker should have utilized collateral means to challenge the exclusion order, and that he was required to submit to police until the order was voided. That is not the law, and the State offers no authority for it.

The real question is still whether the elements of the offense were proven. Whether the exclusion order was legally effective or defective is not determinative here, but it is not irrelevant either. Decker's rationale for considering the order defective goes to his *mens rea*. Moreover, it goes to whether lawful authority was shown. It is not good enough for an officer just to testify, "we had an order." The order was not produced at trial. The officer acted on the mistaken belief that the person issuing the order had the power to do so, when that was not the law.

The officer stated his conclusion that reliance on the order was reasonable, but why? Nothing was presented at trial that would support that conclusion. He could not say that such orders were routine: they are not. He could not say he was trained to treat such orders as valid. He could not say that such orders were accepted and never successfully challenged: he knew Decker had successfully challenged a previous order excluding him. Can anyone with an official title assert non-existent authority and get an officer of the UW-Oshkosh police to do his or her bidding? Is that reasonable? Does that give the officers lawful authority?[1]

[1] For an extreme comparison, consider the events in Mount Washington, Kentucky on April 9, 2004, which were fictionalized in the motion picture *Compliance* (2012). A prank caller impersonating a police officer induced staff at a McDonalds restaurant to detain for three hours, strip-search, assault and demean an alleged "suspect." The incident led to civil and criminal charges. *See McDonald's Corp. v. Ogborn*, 309 SW 3d 274 (Ky. 2009).

Under the State's theory, not only would police be able to justify misconduct by saying they were following orders, not only would they be permitted to proceed upon unlawful orders, but any peaceful resistance would be criminalized. That would effectively nullify the legislative intent of criminalizing only acts that *knowingly* interfere with *lawful* conduct.

2. Analogy to action on DOT reports. The State likens the officers' reliance on the defective order as justified, by an analogy to officers' utilizing information from the Division of Motor Vehicles that a driver's license has been revoked. (Response Brief at 6.)

The analogy is specious.

Police may certainly act on information they receive from sources official or unofficial, and may rely on those sources to show reasonable suspicion, probable cause, exigent circumstances, or other legal conditions relevant to their authority. But there are several problems in this case that do not correspond to the driver's license analogy.

First, the Department of Transportation actually has the legislated power to revoke licenses. The UW System Administration has no equivalent power to issue exclusion orders. A better analogy would be if an officer had received a notice from the Department of Natural Resources that a driver's license was revoked, and, believing the DNR had that power, did not bother to check with the DOT.

Second, the DOT's power over licenses is accompanied by a database which is used so routinely, with such a relatively low incidence of error, that its reliability is common knowledge. No one suggests the source of information must be perfect to be reliable. Contrariwise, the information provided by the UW System in this case has no especial indicia of reliability. The obscure process is tailor-made for this one Defendant, and in the rare instances it is tested for accuracy, the Defendant has prevailed.

That means that the DOT records' reliability need not be proven at trial. Jurors are allowed to rely on common knowledge. WIS JI—CRIMINAL 195. Bench trial judges may likewise make take judicial notice of such matters. *State v. Sarnowski*, 2005 WI App 48, ¶¶13, 280 Wis. 2d 243, 251, 694 N.W.2d 498, citing *State v. Peterson*, 222 Wis. 2d 449,

457–458, 588 N.W.2d 84, 87–88 (Ct. App. 1998). In contrast, a court may not decide a critical issue based on facts that go beyond the admitted evidence and common knowledge. *Id.* at ¶¶12, 15. The reliability of student exclusion orders, then, must be shown with evidence.

Third, related to the above, the reliability of DOT revocation information may escape judicial review because it goes unchallenged. In most circumstances in which such evidence would be used, the party against whom the evidence is used would likely not raise an issue about it, because in most cases the information is correct, and thus the question or reliability is moot. Here, Decker made quite clear his position that the exclusion order was invalid.

II. The State Has Made a Critical Concession by Acknowledging Error and Has Not Shown that Error to be Harmless.

The State, in its Response Brief at 7, concedes that the trial in this matter was blemished with error warranting this court's review. Specifically, the State acknowledges that the Circuit Court applied an improper process to quash a subpoena issued by the Defendant, based on the court's being told off-the-record, *ex parte*, that the witness had, in the witness's view, nothing relevant to contribute.

The State asserts without virtue of argument, legal authority, or citation to the record, that such error was harmless. Because it has conceded error but not met the standard for showing harmlessness, the error should be deemed reversible and the matter (if not dismissed outright on other grounds) should be remanded for a new trial.

A. Standards for Harmless Error

Trial errors, including those of constitutional dimension, are divisible into two categories: those "subject to harmless-error analysis" and those "subject to automatic reversal." *State v. Harvey*, 2002 WI 93, ¶ 37, 254 Wis.2d 442, 647 N.W.2d 189 (internal quotes omitted). "[T]here is a strong presumption" that errors fall into the first category

where "the defendant had counsel and was tried by an impartial adjudicator." *Id., quoting Rose v. Clark*, 478 U.S. 570, 579, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986).

Though the State makes no effort even to show that the error it acknowledges is subject to harmless error analysis, Plaintiff agrees that it is. *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. ("The erroneous exclusion of testimony is subject to the harmless error rule.")

As the Wisconsin Supreme Court in *Hunt* further explained at ¶ 26:

> Harmless error analysis requires us to look to the effect of the error on the jury's verdict. State v. Weed, 2003 WI 85, ¶ 29, 263 Wis.2d 434, 666 N.W.2d 485. For the error to be deemed harmless, the party that benefited from the error—here, the State—must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [State v.] Harris, [2008 WI 15,] 307 Wis.2d 555, ¶ 42, 745 N.W.2d 397 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Stated differently, the error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Harvey, 254 Wis.2d 442, ¶ 49, 647 N.W.2d 189 (quoting Neder [v. United States], 527 U.S. [1] at 18, 119 S.Ct. 1827 [1999]).

Note two things: First, that the burden rests on the State, so that the Defendant has no obligation to demonstrate affirmatively that he was prejudiced by the error. Second, that the State must prove beyond a reasonable doubt that the outcome *would* have been the same without the violation – not merely that it *could* have been. *State v. Martin*, 2012 WI 96, 45, 343 Wis.2d 278, 816 N.W.2d 270. It bears the burden of proving that the effect of the error was "de minimis." *State v. Grant*, 139 Wis.2d 45, 53, 406 N.W.2d 744 (1987).

Harmless error is not a sufficiency of the evidence test. *State v. Anderson*, 2006 WI 77, ¶ 125, 291 Wis. 2d 673, 717 N.W.2d 74. It cannot be determined simply by positing what the record would have looked like minus the error and asking whether the state still had a strong enough case to convict. The test for harm relies on an open-ended consideration of factors that includes the overall strength of the state's case, but also looks at the importance of erroneously admitted or excluded evidence; the presence or absence of

evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; and the nature of the State's case; and the overall strength of the State's case. *Hunt*, ¶ 27, citing *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis.2d 506, 664 N.W.2d 97.

B. Application

The error acknowledged by the State might not seem crucial, but it potentially was. Decker contended that his excluded witness was present at the scene when LeMire first approached him. The court heard conflicting accounts of that encounter and chose to credit LeMire's testimony and discredit Decker's. In this instance, that Decker had refused to speak with officers and walked away from them before pulling away and falling to the floor. As the transcript of the audio recording proves, Decker verbally offered to let himself be carried out of the building. (R35:51) Chief LeMire replied, "We're not going to play this game," and promptly tackled Decker to the ground. The court ultimately relied on LeMire's version of events in explaining its verdict.

Had Decker's witness been required to testify, he would have confirmed Decker's version of events. The court likely would have been persuaded that Decker was telling the truth. In fact, the Court's assessment of Decker's truthfulness may have traveled to all of his testimony, and to the extent LeMire and Tarmann were contradicted by the neutral witness, their whole testimony may have been less credited.

But Decker has no obligation to show this. The State has taken upon itself the burden to prove otherwise. Having taken on that obligation, it then abandons it. Here is the State's whole argument (Response Brief at 7):

> I do not see any harm from this error. Because Mr. Decker is pro se I ask the Court consider an independent review of this error. The State believes that a fair review of the record does not show that this error caused any harm...

Respectfully, it is not logical to ask for an "independent review" because *Decker* is unrepresented. It is the *State* that benefits from independent review because the Court would be lifting up the *State's* heavy burden of finding proof beyond a reasonable doubt that the error was harmless.

The State has not met its burden. It needed to provide a substantial argument, meeting the requirements of Pettit and similar rulings, proving that the verdict would have been the same minus the error. Instead, it simply asserts, "I do not see any harm." That is not the standard.

Having conceded error and established no basis to find it harmless, reversal should ensue.

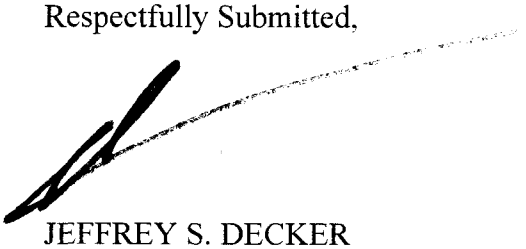
Further, the trial court's bias against the defendant was again revealed when it informally excused a properly-subpoenaed witness. The trial court strongly implies in its ruling that Defendant is not a concerned citizen advocating reform, but is instead nothing but a troublemaker who does not deserve the right to a fair trial.

CONCLUSION

For the reasons stated above, this Court should reverse the Circuit Court or grant a new trial.

Dated at Wausau, Wisconsin, March 22, 2016.

Respectfully Submitted,



JEFFREY S. DECKER

PO Box 1572
Oshkosh WI 54903
(715) 321-0905
reporterdecker@gmail.com

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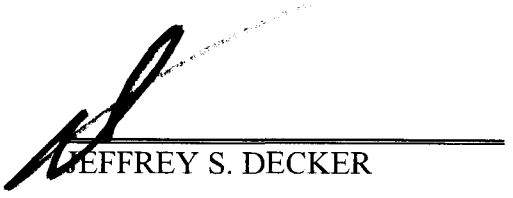
CERTIFICATION OF FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 12 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is **2,659** words.

Respectfully Submitted,



JEFFREY S. DECKER

PO Box 1572
Oshkosh WI 54903
(715) 321-0905
reporterdecker@gmail.com

CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 22nd day of March, 2016, I caused five copies of the Reply Brief of Defendant-Appellant to be mailed by first class mail, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O.Box 1688, Madison, Wisconsin 53701-1688.

JEFFREY S. DECKER