STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2010AP2003-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY C. BEAMON,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules, and Statutes

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ARGUMENT

SUFFICIENCY OF THE EVIDENCE MUST BE CONTROLLED BY THE JURY INSTRUCTIONS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief in support of Courtney C. Beamon regarding the appropriate standard for assessing sufficiency of the evidence in a criminal case when the elements of the offense set forth in the jury instructions do not strictly comport with the elements required by statute or authoritative judicial interpretation. The Court of Appeals' published decision in this matter conflicts with basic principles of due process reflected in several prior decisions of this Court.

WACDL takes no position on Beamon's underlying sufficiency argument.

A. The Court of Appeals' Decision

Beamon was charged with fleeing or eluding an officer in violation of Wis. Stat. §346.04(3), which provides as follows:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

The statute identifies three alternative means by which the defendant may commit this offense, one general - "willful or wanton disregard" so as to endanger others - and two specific - increase speed or extinguish lights. ***State v. Sterzinger***, 2002 WI App 171, ¶9, 256 Wis.2d 925, 649 N.W.2d 677. However, the state below proffered - and the trial court gave - an instruction that specified Beamon's increasing his speed as the means by which he willfully or wantonly interfered with or endangered the traffic officer:

> Section 346.04(3) of the Wisconsin Statutes is violated by a person who operates a motor vehicle on a highway after receiving a visual or audible signal from a marked police vehicle and *knowingly flees any traffic officer by willful disregard of such signal so as to interfere with or endanger the traffic officer by increasing the speed of the vehicle to flee.* Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.
>
> First, the defendant operated a motor vehicle on a highway after receiving a visual and audible signal from a marked police vehicle.
>
> Secondly, the defendant knowingly fled a marked squad car by willful disregard of the visual or audible signal so as to interfere with or endanger the traffic officer *by increasing the speed of the vehicle to flee.*

(Ct. App. Op., ¶5 (emphasis in original)).

Because the evidence failed to support a finding that Beamon increased his speed (Ct. App. Op. ¶¶5-6), he claimed the evidence was insufficient for conviction under the instructions given, citing ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126,

314 Wis.2d 560, 757 N.W.2d 803 ("A challenge to the sufficiency of the evidence is evaluated in light of the jury instructions").

However, the Court below held that, when assessing the sufficiency of the evidence in a criminal case, "the evidence is measured against the actual elements of the charged offense, and not the incorrect jury instruction which required an unnecessary factual finding" (Ct. App. Opinion, ¶12). The Court reached this conclusion by replacing the analysis traditionally applied to sufficiency claims with an analysis of the perceived accuracy of the substantive jury instructions and applying a form of harmless error review (*id.*, ¶¶7-9).

B. The Court of Appeals' Analysis Conflicts With Controlling Authority

In a criminal case, the state must prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, ***Jackson v. Virginia***, 443 U.S. 307 (1979). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Rushing***, 197 Wis.2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995), citing ***Jackson***, 443 U.S. at 319.

The Court of Appeals' novel "harmless error" approach to sufficiency claims conflicts, not only with the ***D.L. Anderson's*** decision, and this Court's more recent decision in ***Best Price Plumbing, Inc. v. Erie Insurance Exchange***, 2012 WI 44, ¶3, 340 Wis.2d 307, 814 N.W.2d 419 (sufficiency must be reviewed "in the context of the instructions that were given the jury"), but with a number of basic due process principles as well.

First, by definition, insufficient evidence for conviction cannot be harmless. If the evidence is insufficient for conviction, the conviction cannot rationally be harmless. *Cf.* ***Kyles v. Whitley*** 514 U.S. 419, 435-36 (1995) (violation of ***United States v. Bagley***, 473 U.S. 667 (1985), requiring "a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different," necessarily demonstrates error not harmless); ***United States v. Santos***, 449 F.3d 93, 102 (2nd Cir. 2006) (review of sufficiency of the evidence stricter than harmless error review). A conviction based on insufficient evidence cannot, consistent with due process, be upheld based on the court's perception that the defendant really is guilty anyway. *E.g.*, ***State ex rel. Kanieski v. Gagnon***, 54 Wis.2d 108, 117-18, 194 N.W.2d 808 (1972) (conviction of a criminal offense cannot be based upon speculation).

Second, the Court of Appeals' attempt to evade this fact by redefining the defendant's sufficiency claim as a challenge to the validity of the jury instruction defining the offense (Ct. App. Op. ¶¶7-9) also conflicts with this Court's precedents. Beamon did not challenge the instruction; he relied upon it. It was the *state* that challenged the validity of the instruction.

However, the state offered that instruction at trial as accurately stating the law (R20:1) and accordingly has waived any challenge to it on appeal. Wis. Stat. §805.13(3) ("Failure to object at the [instructions] conference constitutes a waiver of any error in the proposed instructions"). That waiver is binding on both the state and the Court of Appeals. *See* ***State v. Schumacher***, 144 Wis.2d 388, 424 N.W.2d 672 (1988) (power to review unobjected to jury instructions extends only to Supreme Court).[1] *See also* ***Upchurch v. State***, 64 Wis.2d 553, 561-62, 219 N.W.2d 363 (1974) ("a deliberate choice of strategy, even if it backfires, amounts to a waiver binding upon the defendant and this court," citing ***State v. Ruud***, 41 Wis.2d 720, 726, 165 N.W.2d 153 (1969)).

Third, the Court of Appeals' "harmless error" theory conflicts with established due process principles that the Court "cannot affirm

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[1] The Court of Appeals may *reverse* a conviction in the interests of justice despite such a waiver. ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990); Wis. Stat. §752.35. However, §752.35 provides no authority to *affirm* under those circumstances.

a criminal conviction on the basis of a theory not presented to the jury." ***Chiarella v. United States***, 445 U.S. 222, 236 (1980). An appellate court thus can uphold a conviction only if the evidence at trial was sufficient to convict on the theory actually presented to the jury. ***State v. Wulff***, 207 Wis.2d 144, 152, 557 N.W.2d 813 (1997).

The instruction requested by the state expressly provided that Beamon may be convicted *only* if the jury found that Beamon acted in "willful disregard of the visual or audible signal so as to interfere with or endanger the traffic officer" and that he did so "by increasing the speed of the vehicle to flee." Whether or not that particular means is required by §346.04(3), that was the theory presented to the jury at the state's request. Regardless of what evidence the state presented at trial, the jury was not given the option of finding that Beamon interfered with or endangered the traffic officer by other means, such as by failing to "stop, yield or slow when [the officer] was pursuing him" or by "'blasting right through' a four-way stop sign." (Ct. App. Op. ¶9 n.2). Under established authority in ***Chiarella*** and ***Wulff***, therefore, the Court of Appeals erred in holding that an appellate court is not only permitted, but required to uphold a conviction on a theory not presented to the jury.

Fourth, the Court of Appeals conceded that there was insufficient evidence to support the offense as defined by the jury instructions requested by the state, but effectively deemed the evidence sufficient for an included offense composed, according to that court, of some but not all of the elements on which the jury was instructed (Ct. App. Op., ¶8).[2] That action, in the absence of an instruction expressly allowing for conviction on that included offense, thus likewise conflicts with this Court's holding in ***State v. Myers***, 158 Wis.2d 356, 461 N.W.2d 777 (1990). The Court there unanimously held that, following reversal for insufficiency of the evidence, an appellate court may remand for conviction of a lesser included offense *only* if the jury received instruction on it. ***Id.*** at 371-74. With particular relevance here, the Court noted that to do

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[2] The state makes the same analogy. State's Brief at 9-10.

otherwise "ignores the crucial distinction between an appellate court finding evidence in the record sufficient to support a jury verdict and a jury finding the evidence sufficient to prove guilt beyond a reasonable doubt," and improperly acts to "rescue [the state] from a trial strategy that went awry." ***Id.*** at 366-67.

Fifth, the Court of Appeals' "harmless error" analysis of sufficiency issues conflicts with federal authority recognizing that, although potentially erroneous, the jury instructions are the law of the case for assessing sufficiency of the evidence. *E.g.*, ***United States v. Williams***, 376 F.3d 1048, 1051 (10th Cir. 2004); ***United States v. Romero***, 136 F.3d 1268, 1272–73 (10th Cir.1998). "The doctrine of law of the case is an equitable remedy whose purpose is to prevent the government from arguing on appeal a position which it abandoned below." ***Williams***, 376 F.3d at 1051. Accordingly, that doctrine does not apply where, unlike here, the state preserved objection to the erroneous instruction. ***Williams***, 376 F.3d at 1051.

The Court of Appeals is correct that a few other federal circuits apply a more restrictive "law of the case" doctrine (Ct. App. Op. ¶9).[3] However, that Court overlooks the fact that those cases generally addressed circumstances in which the prosecution merely failed to object to the erroneous instructions, unlike the situation here where the *state* itself was responsible for the instruction in question (R20:1).[4] That Court also overlooks the fact that, unlike under federal law, the state's failure to object at trial to the supposedly erroneous instruction constitutes a waiver under Wisconsin law, binding upon both the state and the lower courts. Wis. Stat. §805.13(3); ***Schumacher***, *supra*.

The lower court's reliance on those cases also overlooks the

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[3] *See* ***United States v. Inman***, 558 F.3d 742 (8th Cir. 2009); ***United States v. Guevara***, 408 F.3d 252 (5th Cir. 2005); ***United States v. Zanghi***, 189 F.3d 71 (1st Cir. 1999).

[4] *See* ***Guevara***, 408 F.3d at 258; ***Zanghi***, *supra*. The one exception is ***Inman***, *supra*, which fails to explain why the government should not be bound by its voluntary choices at trial. *Cf.* ***Myers***, 158 Wis.2d at 366-67 (refusing to "rescue [the state] from a trial strategy that went awry").

fact that each relied on the finding that the instruction in question was "patently incorrect." *E.g.*, ***United States v. Zanghi***, 189 F.3d 71, 79-80 (1st Cir. 1999). Absent such a finding, those cases likewise require sufficiency to be assessed in light of the instructions:

> "[W]hen a cause is submitted to the jury under an instruction, not patently incorrect or internally inconsistent, to which no timely objection has been lodged, the instruction becomes the law of the case." ***United States v. Gomes***, 969 F.2d 1290, 1294 (1st Cir. 1992). In such situations, we review for whether there was "evidence sufficient to support [the] convictions under the law of the case," ***id.***, that is, evidence sufficient to establish the elements required by the actual instructions given.

Zanghi, 189 F.3d at 79.

On the facts of this case, the instruction was not "patently incorrect." Specifically, as noted in Beamon's Brief at 17-19 and his Reply Brief at 8-9, an instruction that specifies the means by which the defendant is alleged to have "willful[ly] disregard[ed] the visual signal so as to interfere with or endanger the traffic officer" is not "patently incorrect," or even incorrect at all. The state is free to specify the exact means by which it claims the defendant violated the law, as it did here, even if such specification is not strictly required and even if the evidence might support a finding of violation by other means. The fact that the state subsequently is unable to support its specific allegations does not render the instruction "patently incorrect."

Finally, the Court of Appeals' new theory of "harmless" insufficiency conflicts with the Sixth Amendment requirement that "the jury, rather than the judge, reach the requisite finding of 'guilty.'" ***Sullivan v. Louisiana***, 508 U.S. 275, 277 (1993). While the Supreme Court has noted that some instructional errors may be excused as "harmless," harmless error analysis does not permit the court to interpose itself, as the Court of Appeals does here, as some sort of "super-jury." ***Neder v. United States***, 527 U.S. 1, 19 (1999). It is not enough that the evidence may be "overwhelming" in the Court's mind. Rather, where the defendant contested the issue

affected by the error, and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. ***Id***. ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless"). A jury finding that the defendant "interfere[d] with or endanger[ed] the traffic officer by increasing the speed of the vehicle to flee" does not constitute a jury finding that he interfered with or endangered the officer in some *other* manner, especially where the original finding is concededly unsupported by the evidence and the defendant contested the remaining allegations.

While stating that sufficiency challenges based on erroneous jury instructions are "subject to harmless error review" (Ct. App. Op. ¶1), the Court of Appeals does not require the showing of harmlessness required by ***Neder***. Indeed, although finding that the evidence of Beamon's guilt was "overwhelming" (Ct. App. Op. ¶¶11-12) the Court does not require even that constitutionally inadequate finding. Rather, it merely holds that courts assessing sufficiency claims must do so in light of the statutory elements without regard to the instructions actually given. (Ct. App. Op. ¶9 ("[W]e conclude that the evidence is to be measured by the applicable law, not as set forth in the erroneous jury instructions which required an additional finding of fact not essential to the offense" (footnote omitted)), *id.* ¶12 ("We conclude that the evidence is measured against the actual elements of the charged offense, and not the incorrect jury instruction which required an unnecessary factual finding").

Because the jury was never asked to make such findings in the face of disputed evidence or inferences, the Court of Appeals' analysis violates the requirement that "the jury, rather than the judge, reach the requisite finding of 'guilty.'" ***Sullivan***, 508 U.S. at 277; *see* ***United States v. Johnson***, 652 F.3d 918, 923-24 (8th Cir. 2011) (rejecting suggestion that, if the instruction is "patently erroneous," the court merely ignores the instruction and affirms if any rational trier of fact could have found the essential elements of the offense, as

defined by applicable law, beyond a reasonable doubt); ***Inman***, 558 F.3d at 747 (same).[5]

CONCLUSION

For these reasons, therefore, WACDL joins Beamon in asking that the Court reject the Court of Appeals' novel harmless insufficiency analysis.

Dated at Milwaukee, Wisconsin, July 17, 2012.

Respectfully submitted,

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[5] Even ***Inman***, on which the Court of Appeals relied, provides that, when confronted with a sufficiency challenge based on a patently erroneous jury instruction, the court may affirm *only* if it finds that the elements impacted by the erroneous instruction were "uncontested and supported by overwhelming evidence" such that "no rational juror, if properly instructed, could find that the element was not satisfied." 558 F.3d at 749, citing ***Neder***, 527 U.S. at 17; ***Pope v. Illinois***, 481 U.S. 497, 503 (1987).

RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,766 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 17th day of July, 2012, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Robert R. Henak

Beamon Amicus Brief.wpd