STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

---

Appeal No. 2005AP001285
(Brown County Case No. 01-CF-138)

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID R. KASTER,

Defendant-Appellant.

---

**Appeal From The Final Order**
**Entered In The Circuit Court For Brown County,**
**The Honorable Mark A. Warpinski,**
**Circuit Judge, Presiding**

---

# REPLY BRIEF OF DEFENDANT-APPELLANT

---

ROBERT R. HENAK
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutions, Rules and Statutes**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

---

Appeal No. 2005AP001285
(Brown County Case No. 01-CF-138)

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID R. KASTER,

Defendant-Appellant.

---

# REPLY BRIEF OF DEFENDANT-APPELLANT

---

## ARGUMENT

## I.

## GIVEN THIS COURT'S INTERPRETATION OF WIS. STAT. §948.095, KASTER WAS DENIED THE RIGHTS TO PRESENT A DEFENSE AND TO A JURY VERDICT ON ALL NECESSARY ELEMENTS OF THE OFFENSE CHARGED IN COUNT 1

The state's opposition to Kaster's arguments regarding Count 1 is based entirely on its failure (or refusal) to acknowledge the actual basis for Kaster's claims. Contrary to the state's core assumption, the disputed issue here does not concern the temporal nexus between the sexual contact and one's status as a "school staff" member. There is no dispute that Kaster and his trial counsel were on notice that the "school staff" requirement must coincide with the sexual contact requirement.

State's Brief at 12-15. Nor is there any dispute that the jury instructions adequately required a finding on that particular nexus requirement. *See id.* at 18-22.

While focusing its argument on the temporal nexus required between "school staff" and "sexual contact," the state wholly ignores the *separate* nexus requirement forming the basis for the constitutional defects actually identified by Kaster. Specifically, when this Court rejected Kaster's claim that volunteers who are neither employees nor under contract to a school are not "school staff" under Wis. Stat. §948.095(1)(b) (1999-2000), it still required a temporal nexus between the active provision of services by the volunteer and his status as a "school staff." *See State v. Kaster*, 2003 WI App 105, ¶¶16-17, 264 Wis.2d 751, 663 N.W.2d 390 (App. 44-45).

That is, while an employee or person under contract to a school reasonably may be deemed to be "school staff" throughout the term or employment or contractual relationship, a non-employee, non-contractual volunteer is deemed "school staff" *only* while actively providing services to the school.

This second nexus requirement in the case of volunteers did not exist before this Court's decision on Kaster's direct appeal. Before then, the dispute was over whether volunteers *ever* could fall within the statutory meaning of "school staff." Given this Court's decision that volunteers may be "school staff," however, this nexus became mandatory because to hold otherwise would render the statute unconstitutionally vague as applied to non-employee, non-contractual volunteers who, as a reasonable jury could have found regarding Kaster, were not in the act of providing services to a school at the time of an alleged sexual contact. Kaster's Brief at 18-20.

It is the absence of notice regarding this *second* nexus requirement at the time of Kaster's trial which denied him the rights to present a defense and to a jury verdict on all facts necessary to his conviction on Count 1. Kaster's Brief at 10-15. It was the absence of a jury instruction on this *second* nexus requirement which, if technically

waived, also justifies reversal in the interests of justice. *Id.* at 17-18. And it is the absence of this *second* nexus requirement which would render the statute unconstitutionally vague as applied to non-employee, non-contractual volunteers not actively providing services to the school at the time of an alleged sexual contact. Kaster's Brief at 18-20.

Because it chose to address all of its arguments to the *first* nexus requirement, and thus to assertions not raised by Kaster, the state failed to respond to the claims he actually raised. Those claims accordingly are undisputed before this Court, and only a few specific assertions require response beyond the unrebutted showings of Kaster's opening brief.

First, because the second nexus requirement did not exist prior to this Court's decision on his direct appeal, Kaster did not waive his constitutional claims. It is "impractical to expect a defendant to present a legal argument until a higher authority adopts it." *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 762 (1997).[1] Kaster's failure to object to the jury instructions likewise does not constitute "waiver" because the issue is one of statutory construction and what the jury was required to find for conviction, and not merely a defect in the jury instructions. *Howard*, 564 N.W.2d at 762-63; *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149, 152 (1994).

Second, even to the extent that Kaster challenges the jury instructions, the state cites the wrong legal standard for assessing the instructions. State's Brief at 17-18. Kaster does not assert that "the interplay of legally correct instructions impermissibly misled the jury," so *State v. Lohmeier*, 205 Wis.2d 183, 556 N.W.2d 90, 93 (1996), and *Victor v. Nebraska*, 511 U.S. 1, 6 (1994), have no application here. Rather, the constitutional defect in the instructions is that, by not requiring a finding that Kaster was either under contract or actively providing services to the school at the time of the alleged sexual contact, they relieved the state of its burden of proving all facts or

---

[1] The Supreme Court overruled a different portion of *Howard* on other grounds in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

elements necessary for conviction beyond a reasonable doubt. *E.g.*, *California v. Roy*, 519 U.S. 2 (1996) (per curiam) (instruction which omitted necessary element violated due process); *Carella v. California*, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond reasonable doubt violate due process).

Third, given the state's misinterpretation of the constitutional defects at issue, it's "harmless error" argument actually proves the contrary. *See* State's Brief at 23. As the state points out, "the dispute at trial was precisely over whether Kaster was 'school staff' at the time of the alleged sexual contact with Laura B. on March 14, 1999." *Id.* It is for exactly that reason that prior notice of the facts necessary to prove a volunteer's status as "school staff" was so critical to Kaster's ability to present a defense. Absent such notice, the defense is left to "shoot in the dark," hoping that it has not omitted facts or arguments from its presentation which might prove decisive to some, as yet unidentified legal standard. It is also for exactly that reason that the failure of the instructions to require a jury finding beyond a reasonable doubt of the facts necessary to establish a volunteer's status as a "school staff" deprived Kaster of a jury verdict on all necessary elements of the offense.

Given the facts presented, a reasonable jury could have found that Kaster was neither under contract nor actively providing services to the school as a volunteer at the time of the alleged offense while he was at home watching television in the early morning of March 14, 1998. Kaster's Brief at 15. The state accordingly has failed to meet its burden of proving harmlessness beyond a reasonable doubt. *State v. Gordon*, 2003 WI 69, ¶36, 262 Wis.2d 380, 663 N.W.2d 765.

Fourth, although the state attempts to limit Kaster's alternative "interests of justice" claim to the instructions' failure to require proof of a fact necessary for conviction, State's Brief at 16, it is not so limited. Rather, it is the combined effect of the lack of prior notice to Kaster and his counsel of the facts necessary for conviction and the

instructions' failure to require a jury verdict on all such facts which caused the real controversy not to be fully tried. Kaster's Brief at 17-18.

Also, while the Supreme Court did not expressly overrule *State v. Allen*, 159 Wis.2d 53, 464 N.W.2d 426 (Ct. App. 1990), in *State v. Armstrong*, 2005 WI 119, ¶113, n.25, ___ Wis.2d ___, 700 N.W.2d 98, the Court's criticism of *Allen's* rationale should be viewed as implicitly overruling it.

## II.

## THE EVIDENCE WAS LEGALLY INSUFFICIENT FOR CONVICTION UNDER COUNT 7 (DISORDERLY CONDUCT)

The state's attempts to elevate a case of, at most, personal annoyance and subsequent public disapproval to the status of a crime lacks merit. State's Brief at 30-37. As is clear from Kaster's Brief at 23-25, he challenges only the sufficiency of the evidence on the element that his conduct, "under the circumstances as they then existed, tended to cause or provoke a disturbance." Wis. Stat. §947.01. More specifically, given the purely private nature of the alleged disturbance in this case, his claim is based on the Supreme Court's recognition that,

> when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well.

*State v. Schwebke*, 2002 WI 55, ¶31, 253 Wis.2d 1, 644 N.W.2d 666.

The minor personal annoyance and subsequent public disapproval relied upon by the state at trial and on this appeal fail even to approach the level of either an actual or threatened "disrupt[ion to] the peace, order or safety of the surrounding community," which is the minimum required for conviction. *Schwebke*, ¶30. *See* Kaster's Brief at 23-25. Public disapproval, which is all the state has shown, is not the

same as the threat of a "public disturbance."

In its effort to transmogrify concededly improper conduct into a criminal offense, the state attempts to equate the facts here with those found sufficient for conviction in *Schwebke*, and *In re Douglas D.*, 2001 WI 47, 243 Wis.2d 204, 626 N.W.2d 725. State's Brief at 36. The state, however, ignores the fact that, while the communications at issue in those cases raised significant public safety concerns, no such concerns reasonably arose from or were threatened by Kaster's alleged actions with M.B. Kaster's actions may have risked or resulted in purely personal annoyance and subsequent public disapproval, but neither constitutes a "disrupt[ion to] the peace, order or safety of the surrounding community,"

Finally, the state's conclusory assertion that Kaster cannot challenge the disorderly conduct conviction because he is not "in custody" on that charge, State's Brief at 25-26, is meritless. Because Kaster's 52-day sentence on that count was one of a string of consecutive periods of incarceration he is serving,[2] he remains in custody on all of them for purposes of Wis. Stat. §974.06. Under Wisconsin law, "[a]ll consecutive sentences imposed for crimes committed before December 31, 1999, shall be computed as one continuous sentence." Wis. Stat. §302.11(3) (1999-2000). *See also Peyton v. Rowe*, 391 U.S. 54 (1968) (so holding with regard to federal habeas statute).

## III.

## SUFFICIENT REASON FOR NOT RAISING ISSUES ON DIRECT APPEAL

### A. Challenges to Count 1

The state's assertion that Kaster's challenges to Count 1 are

---

[2] The circuit court imposed the disorderly conduct sentence first, and that is the only sentence on which the court granted credit for Kaster's pre-sentence incarceration (R91:115-16; R44; R45).

barred by Wis. Stat. §974.06(4) as construed in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), rests on the same failure or refusal to acknowledge the true nature of Kaster's claims that dooms the state's objections to those claims on the merits. *See* State's Brief at 9-12.

The state argues, for instance, that Kaster's claims do not fall within the "novel argument" exception recognized in *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 762 (1997) (finding sufficient reason for not raising the claim on direct appeal because it is "impractical to expect a defendant to present a legal argument until a higher authority adopts it"). State's Brief at 9-10. The state claims that *Howard* does not apply here because

> Kaster did *not* have to await this court's decision on his direct appeal to claim lack of notice that conviction on Count 1 required proof that he was "school staff" *at the time of the alleged sexual assault* of Laura B. or that the jury had to be instructed on such temporal connection. This court's decision on direct appeal simply did *not* create an otherwise unforeseeable issue concerning the essential elements of Count 1.

State's Brief at 10 (emphasis in original).

The state's argument fails on two grounds. First, *Howard's* reading of "sufficient reason" does not require the legal claim to be "unforeseeable." After all, the attorney on Howard's direct appeal could have foreseen the same argument later raised in *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994). Rather, the issue is whether the defendant was actually aware of the legal basis for the claim at the time of the direct appeal. Where, as here, the Court had not construed a particular provision of law, it is "impractical to expect a defendant to present a legal argument until a higher authority adopts it." *Howard*, 564 N.W.2d at 762.

Second, and more fundamentally, however, the state again misstates Kaster's claim. Kaster's challenges do not rest on the required temporal nexus between one's status as "school staff" and the

sexual contact. Kaster's entitlement to relief here is based on the *separate* nexus requirement, first recognized by this Court on his direct appeal, to the effect that a non-employee, non-contractual volunteer may be deemed "school staff" *only* while actively providing services to the school.

This second nexus requirement did not exist prior to this Court's decision on Kaster's direct appeal. His claim thus falls squarely within the "novel argument equals sufficient reason" holding of *Howard*.

As demonstrated in Kaster's opening brief at 27-30, should this Court deem his challenges to Count 1 not sufficiently novel to constitute "sufficient reason" under *Howard*, then the resulting ineffective assistance of appellate counsel independently constitutes "sufficient reason." While acknowledging that ineffectiveness of post-conviction or appellate counsel satisfies the "sufficient reason" requirement of §974.06(4), State's Brief at 8, 10-12, the state once again relies on its misstatement of Kaster's claims to argue there was no ineffectiveness:

> For appellate counsel to argue on direct appeal either that Kaster did not know at trial that he had to be "school staff" *at the time of the alleged sexual assault* or that the jury had to be instructed on such temporal connection would have been unreasonable. . . . Moreover, as discussed below, both Kaster and the jury did, in fact, know at trial that for Kaster to be found guilty of Count 1, he had to be "school staff" *at the time of the alleged sexual assault* of Laura B.

State's Brief at 12 (emphasis in original).

It is irrelevant whether Kaster's appellate counsel acted reasonably in not challenging the nexus between "school staff" and the alleged sexual contact; once again, that is not the claim Kaster raises here. Rather, he was denied the right to present a defense and to a jury verdict on all facts necessary for conviction on Count 1 because of the absence of notice and jury instructions regarding the *separate* temporal nexus requirement that a non-employee, non-contractual volunteer be

actively providing services to the school at the time of the alleged sexual assault. If this Court deems Kaster's challenges to Count 1 insufficiently novel to constitute "sufficient reason" under *Howard*, then his appellate counsel's ineffectiveness in failing to raise those claims necessarily constitutes "sufficient reason." Kaster's Brief at 27-30.

### B. Challenge to Count 7

As for Kaster's sufficiency claim on the disorderly conduct charge, the state perceives some relevant distinction between incarceration for a penalty enhancer that is unauthorized by law because unsupported by proof beyond a reasonable doubt and incarceration for an underlying offense that is unauthorized by law because unsupported by proof beyond a reasonable doubt. The state concedes that the former may be remedied under Wis. Stat. §973.13 without a showing of "sufficient reason," but asserts that the latter may not. State's Brief at 27-29. The state is wrong. Kaster's Brief at 30-31.

It is well-established that penalties which are unsupported by proof beyond a reasonable doubt of all facts necessary to the particular sentence are "in excess of that authorized by law." *E.g.*, *State v. Flowers*, 221 Wis.2d 20, 586 N.W.2d 175, 179 (Ct. App. 1998) ("If the State does not meet the proof requirements of [Wis. Stat.] §973.12(1), the trial court is *without authority* to sentence the defendant as a repeat offender" (emphasis in original, citation omitted)); *see State v. Hanson*, 2001 WI 70, 244 Wis.2d 405, 628 N.W.2d 759, 763-64 (approving both the rationale and holding in *Flowers*).

There is no rational basis for the state's assumption that an unlawful sentence imposed following conviction for a crime without sufficient evidence of guilt should be treated differently under §973.13 than an unlawful sentence imposed following conviction of a repeater enhancement suffering from the same fatal defect. Indeed, the rationale expressed in both *Flowers* and *Hanson* precludes such treatment:

> To adopt the State's argument would promote finality, but at the expense of justice. It would raise the specter of a defendant being incarcerated for a term (possibly years) in excess of that prescribed by law simply because he or she failed to raise the issue earlier. Such a result is in direct conflict with the explicit language of §973.13.

*Flowers*, 586 N.W.2d at 179. *See also Hanson*, 628 N.W.2d at 764 ("to allow the imposition of a criminal penalty where none is authorized by the legislature, simply on the basis of waiver, would ignore the dictate of §973.13").

### C. Challenges to Both Counts

Regarding Kaster's challenges to both counts, the state also simply ignores the fact that "sufficient reason" is not limited to those specific instances previously recognized by the courts. Rather, it also exists where, as here, the defendant did not know the basis for a claim and intentionally omit it from a prior post-conviction motion. *See* Kaster's Brief at 32-35. By not contesting the point, the state is deemed to have conceded it. *E.g.*, *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979).

## CONCLUSION

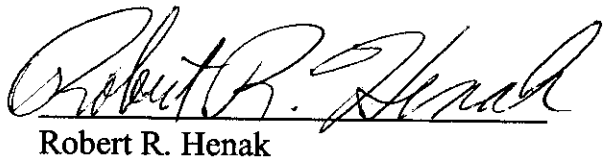
For these reasons, as well as for those in his opening brief, David Kaster respectfully asks that the Court reverse the order denying his post-conviction motion, dismiss Count 7, vacate the judgment of conviction on Count 1, and order a new trial on that count.

Dated at Milwaukee, Wisconsin, October 10, 2005.

Respectfully submitted,

DAVID R. KASTER,
Defendant-Appellant

HENAK LAW OFFICE, S.C.



Robert R. Henak
State Bar No. 1016803

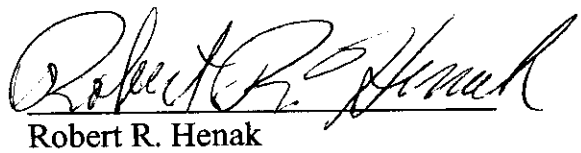
P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Kaster CA Reply.wpd

## RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,981 words.

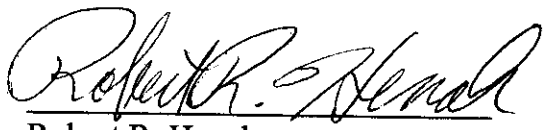


Robert R. Henak

Reply cert.wpd

## CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 10th day of October, 2005, I caused 10 copies of the Reply Brief of Defendant-Appellant David R. Kaster to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.



Robert R. Henak

Cert. Mailing 10-10-05.wpd