STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 99-2587-CR
(Winnebago County Case No. 97-CF-109)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY SAMUEL,

Defendant-Appellant.

Appeal From The Judgment Entered In The Circuit Court For Winnebago County, The Honorable Thomas S. Williams, Circuit Judge, Presiding, And From The Order Entered in the Circuit Court For Winnebago County, The Honorable Barbara Hart Key, Circuit Judge, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION UNDER COUNT 1

The state's analysis of Wis. Stat. §948.31(2) is virtually identical to that proffered by the defense.[1] Like the defense, the state distinguishes between the separate offenses of "causing a child to leave" and "taking a child away" based on the moving force in the child's separation from her parents. As the state concedes, therefore, "[t]aking

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[1] The state is correct that Mr. Samuel was charged and convicted under Wis. Stat. §948.31(2) rather than Wis. Stat. §948.31(1)(b). Both sections, however, focus on three separate offenses: causing a child to leave, taking a child away, and withholding a child for more than 12 hours.

away" a child from the child's parents involves a defendant physically removing the child from the parents' possession," while "'causing a child to leave" his or her parents means being responsible for or to bring about a child abandoning, departing, or going away from his or her parents." State's Brief at 2, 6-7.

Despite this concession, the state attempts to shoehorn the facts of this case into the offense of taking a child away from her parent's possession. Although unclear, the state first apparently repeats the post-conviction court's conclusion that Samuel's act of driving from the area or the state after Tisha left her parents constitutes the "taking" necessary for conviction. State's Brief at 9. As already demonstrated, that is not the case. Samuel's Brief at 7-11. Once Tisha left of her own free will (or was thrown out by her parents), she no longer was within the custody or possession of her parents. Samuel's later act of leaving the area or the state with her thus did not "physically remove[her] from the parent's possession." She was not in the possession or custody of her parents at that point.

The state's secondary assertion fails for the same reasons. The state appears to argue that, although there was no evidence that Samuel actually took Tisha from her parents' possession, the Court should construe all of the circumstances as a continuous act of taking Tisha away. In short, the state asks this Court to amend the statute to define the offense of taking a child from her parents' possession as requiring nothing more than the defendant's involvement in the child's act of leaving. Under this theory, the state asks the Court to ignore the fact that the result addressed by the statute, i.e., the severance of parental possession, was completed by Tisha's leaving, *prior* to any act by the defendant which would constitute a "taking." Unlike the "withhold-

ing" offense under §948.31(2), the "taking" and "causing to leave" offenses are not continuous offenses. By their terms, they occur, if at all, only at the point when parental possession or custody ends.

The applicable offense here thus was complete when Tisha left home. While the evidence may have supported conviction for causing Tisha to leave, that evidence was not legally sufficient to find Samuel guilty of taking her away under §948.31(2).

II.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION UNDER COUNT 2

For the same reasons, the evidence likewise was insufficient to convict Samuel of abducting Tisha under Wis. Stat. §948.30(1)(a).

The crime of abduction is committed only by one who "[t]akes" a child "from the child's home or the custody of his or her parent." Wis. Stat. §948.30(1)(a). There was no evidence that Samuel took Tisha from her home. Also, because Tisha left of her own free will (or because her mother threw her out), she was neither in the "actual physical custody of the parent," Wis. Stat. §948.30(3)(a), when Samuel allegedly drove her from the area, nor under the control of the parent, *id.* §948.30(3)(b). Once Tisha asserted her independence by leaving, her mother no longer "ha[d] control" of her and Samuel's subsequent act of driving her from the area thus did not constitute "abduction" under §948.30(1)(a).

III.

ADMISSION OF TISHA'S PRIOR STATEMENTS TO STATE AGENTS VIOLATED SAMUEL'S RIGHTS TO DUE PROCESS

While the state presents what it views as divergent holdings on the issue of standing to challenge admission of a witness' coerced out-of-court statements, State's Brief at 13-15, it does not argue against Samuel's standing here and thus concedes the point. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979).

The state's attempted categorization is wrong in any event. No case cited by the state holds that the defendant lacks standing under these circumstances.[2] It is, after all, the defendant's own rights to due process and a fair trial which are at stake, and it is well-established that coercion of a witness may violate the defendant's own rights. *E.g.*, *Webb v. Texas*, 409 U.S. 95 (1972) (coercion of defense witness denied defendant due process). As the Alaska Supreme Court recently recognized, "both our case law and that of other jurisdictions uniformly recognize a defendant's ability to assert a due process violation based on the coercion of witnesses whose statements are used against the defendant at trial." *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000).

Nor do the many cases expressly recognizing standing base that right either on the status of the witness as a co-defendant or on the existence of "extreme coercion or physical torture." State's Brief at 14.

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[2] The cases cited by the state for this proposition do not address standing but rather hold that there was no due process violation based on the particular circumstances before the court.

The language and holdings of those decisions demonstrate that it is the state coercion and resulting involuntariness which renders admission of coerced witness statements violative of the defendant's right to a fair trial; whether the witness also was a co-defendant or whether the coercion fell somewhat short of physical torture are wholly irrelevant. *E.g.*, *Raphael*, 994 P.2d at 1008 ("the 'blood of the accused [or witness] is not the only hallmark of an unconstitutional inquisition.'" (citation omitted)).

A. The Statements Were Coerced and Involuntary

The state's claim that Tisha's statements were not the results of police coercion rests upon either ignorance or distortion of the factual record in this case. *See* State's Brief at 16-22. Contrary to the state's bald assertions, every witness who testified at the suppression hearing supported the fact that the return of Tisha's baby depended on her "cooperation" with the police in their investigation of Mr. Samuel.

Tisha, for instance, testified that the state agents at the intake conference specifically told her that she would not get her baby back unless she "cooperated" with the police. It was obvious to her that what they requirede her to tell them was not the truth but what they wanted to hear about Mr. Samuel. (R100:12-14).

Tisha's father testified that he was surprised at the questions asked, given the supposed purpose of the intake conference (R100:34). He further testified that, although there were no *express* threats, the agents were very angry for Tisha's failure to "cooperate" in the investigation of Samuel and, as a result, the baby was taken from her (*id.*:36-37). He was told that Tisha's "cooperation" was needed to prosecute Samuel and relayed the officers' message to Tisha about

what information they wanted (*id.*:41, 43).

Although Attorney Keck claimed to have perceived no threats, he acknowledged as well that Tisha's baby was placed in a foster home pending her "cooperation" with the police, which he understood to mean a statement supporting a criminal prosecution of Samuel (R100:46-48).

Finally, Cathy Stelsner testified that the agents told her at the intake conference that they would consider giving the baby back to Tisha at the next hearing if they saw some "cooperation," a position she viewed as "blackmail." (R100:50-51).

Contrary to the central premise of the state's argument, therefore, it was quite obvious to everyone at the intake conference that the return of Tisha's baby turned on her providing a statement to the police which would support prosecution of Samuel. This was a clear threat, whether express or implied, and was backed by the fact that the baby indeed was kept from Tisha pending her "cooperation."

Here, as in *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981), the requirement that Tisha "cooperate" in the prosecution of Samuel by making a statement to the police and the taking of Tisha's child pending that "cooperation" "must be read together, as they were intended to be, and as they would reasonably be understood." *Id.* at 1336.

Tisha refused to make any statements inculpating Samuel prior to the threats. As in *Tingle* and *Lynumn v. Illinois*, 372 U.S. 528 (1963), therefore, there can be no reasonable doubt but that Tisha's statements were the direct result of state coercion. *See also Raphael*, *supra* (incarceration of witness and taking of her children pending her testimony against defendant resulted in coerced testimony and

reversal).

Nor has the state made any serious attempt to demonstrate, as required by *State v. Clappes*, 136 Wis.2d 222, 401 N.W.2d 759, 765 (1987), that Tisha's personal characteristics were sufficient to resist the overwhelming coercive effect of having one's newborn child taken away pending her "cooperation" against Samuel. *See* State's Brief at 22. The fact that Tisha's age and other factors might not have mandated a finding of involuntariness in the absence of the official coercion does not, as the state suggests, act to negate the actual coercion employed by the state here.

B. Admission of Tisha's Coerced Statements Violated Samuel's Due Process Rights

The state attempts to argue that this Court should just ignore the fact that Tisha's statements were coerced and involuntary because Samuel had an opportunity to bring out the fact of coercion at trial. State's Brief at 23-24. The state is wrong. *See* Samuel's Brief at 22-25, and the cases cited therein. A defendant is not limited to challenging the reliability of coerced witness statements before the jury. *E.g.*, *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999). *See also Jackson v. Denno*, 378 U.S. 368 (1964).

The authorities cited by the state do not hold otherwise. *United States ex rel. Portelli v. LaVallee*, 469 F.2d 1239 (2d Cir. 1972), for instance, did not even address admission of coerced, out-of-court statements. Rather, the issue was whether the defendant had a due process right to bar testimony of a witness who previously had been coerced into making a statement. It was admissibility of the testimony, not the prior statement, which was in issue. Because the witness

claimed his testimony was not the result of coercion, and because the defendant was allowed to bring out the prior coercion to impeach his testimony, there was no due process violation.

Three other decisions relied upon by the state likewise fail to support its position. *See Wilcox v. State*, 301 S.E.2d 251 (Ga. 1983); *State v. Montgomery*, 229 S.E.2d 904 (N.C. 1976); *State v. Vargas*, 420 A.2d 809 (R.I. 1980). In each of these cases, the issue was whether a witness' prior coerced statement could be used solely for impeachment purposes.

While the Supreme Court has permitted use of illegally obtained evidence for impeachment under some circumstances, it has squarely held that "'evidence that has been illegally obtained . . . is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.'" *James v. Illinois*, 493 U.S. 307, 313 (1990) (citation omitted).[3] Of course, Tisha's statements were admitted not solely for impeachment, but as substantive evidence against Samuel. *Vogel v. State*, 96 Wis.2d 372, 291 N.W.2d 838 (1980).

The state's argument also ignores this Court's observations in *State v. Pheil*, 152 Wis.2d 523, 449 N.W.2d 858, 863 (Ct. App. 1989), that "[t]he fourteenth amendment prohibits involuntary statements because of their inherent unreliability and the judicial system's unwillingness to tolerate illegal police behavior." Both reasons apply equally when, as here, it is a witness whose statements are coerced. *See, e.g., Dimmick v. State*, 473 P.2d 616, 619-20 (Alaska 1970):

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[3] The Wisconsin Supreme Court reached the same conclusion in *State v. Cartagena*, 40 Wis.2d 213, 161 N.W.2d 392, 395-96 (1968), upholding the conviction but emphasizing that the allegedly involuntary witness statement "was not used, and would not have been admissible, for the purpose of substantive evidence."

> Statements which are the product of coercion may be unreliable and untrustworthy, and thus should be excluded as evidence against one not coerced into making them. But more important, coerced statements are condemned because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." Those human values may be as much involved and in need of protection when an involuntary statement is used to convict one not coerced into making it as well as when used against the one from whom the statement was obtained.

See also People v. Underwood, 389 P.2d 937, 943 (Cal. 1964) (an involuntary "statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crime").

The only case cited by the state which superficially supports its desired conclusion is *Johnson v. Washington*, 119 F.3d 513 (7th Cir.), *cert. denied,* 522 U.S. 973 (1997). The court there upheld admission of a witness' prior coerced statements as substantive evidence, noting that "Johnson has not identified any law that entitles him to relief." *Id.* at 521. In so holding, however, the court overlooked the ample and consistent authority holding to the contrary, including its own prior decision in *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995), as well as the legal analysis applied in those cases.

C. The Error was not Harmless

The state's suggestion that admission of Tisha's coerced statements is somehow harmless beyond a reasonable doubt, as required by *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222 (1985), is at best frivolous. Tisha's testimony under oath was that she did not have sex with Samuel in Wisconsin and she expressly denied the statements attributed to her by her so-called "friends" and by a young man who had attempted to make out with her (R103:139-40; R104:196, 212-16). Tisha, however, never talked much about her boyfriends, even to her best friend, and never told her that she was having sex with Samuel (R103:191-92), making it quite unlikely that she would have made such statements to those with whom she was not to close. Mr. O'Kray also had ample reason to lie given that he had been in a fight with Samuel (R103:38:41).

The issue here, in any event, is not whether there may have been sufficient evidence to convict absent the coerced statements, but whether the jury necessarily would have convicted even without the improper evidence. Given Tisha's testimony and the reasons to discredit the evidence relied upon by the state, introduction of the coerced statements was not harmless.

IV.

THE COURT DENIED SAMUEL DUE PROCESS AT SENTENCING BY CONSIDERING SEALED EVIDENCE FROM A SEPARATE PROCEEDING

Mr. Samuel did not waive his due process objection to the sentencing court's reliance upon undisclosed evidence which he had no opportunity to rebut. Unlike in the cases relied upon by the state, that court did not disclose its reliance upon such evidence until the time of

its ruling and imposition of sentence (R107:62-71). Samuel accordingly had no opportunity to object before the damage was done.

Under such circumstances, it makes no difference whether the objection is made immediately after sentence is imposed or at the time of the post-conviction motion. In either event, the remedy is resentencing before a different judge untainted by the improper evidence. By raising his objection at the appropriate time, in his post-conviction motion, Samuel did nothing which prevented that remedy.

Moreover, had the state timely identified the problem below rather than delaying its objections until now, Samuel would have been on notice of the need to present alternative claims of ineffectiveness, plain error and interests of justice in his opening brief as he did below (R84:20-23). Because the state has never before claimed waiver, however, he reasonably believed it not to be in issue, and the state's belated waiver claim should be denied *See, e.g., State v. Van Camp*, 213 Wis.2d 131, 569 N.W.2d 577, 584 (1997); *State v. Brown*, 96 Wis.2d 258, 291 N.W.2d 538, 541 (1980) (state waived waiver argument by raising it for first time on appeal).

The state likewise is wrong on the merits. The sentencing court did not disclose its intent to rely upon the secret evidence until it actually imposed sentence. Even then, it did not reveal the actual testimony relied upon, but merely stated its conclusions derived from the evidence. Samuel thus had no opportunity to rebut the supposed facts relied upon by the court, either before sentencing or afterwards.

The state's alternative assertion that the sentence might have been the same despite the improper reliance on secret evidence, State's Brief at 31-32, likewise must fail. Samuel's Brief at 27; *see United States ex rel. Welch v. Lane*, 738 F.2d 863, 867 (7th Cir. 1984). This

"harmless error" argument also is negated by the fact that the court specifically relied upon the sealed transcript, and not those other possible bases cited by the state, in reaching its conclusions (R107:63-64, 71).

CONCLUSION

For these reasons, as well as for those in Samuel's opening brief, the judgment of conviction and the order denying his motion for post-conviction relief must be reversed.

Dated at Milwaukee, Wisconsin, June 12, 2000.

Respectfully submitted,

STANLEY SAMUEL, Defendant-Appellant

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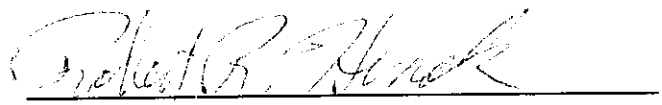

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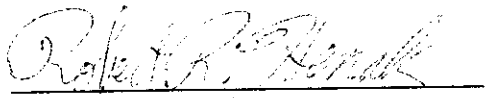
Samuel Ct. App. Reply 2.wpd

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 2,998 words.



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