

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2010AP678
(Racine County Case No. 2008CF634)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRON D. JACKSON,

Defendant-Appellant.

**Appeal From the Judgment of Conviction and the
Final Order Entered in the Circuit Court for Racine County,
the Honorable Judge Stephen Simanek, Circuit Judge, Presiding**

**REPLY BRIEF OF
DEFENDANT-APPELLANT**

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ARGUMENT

I.

**BECAUSE RECKLESSLY ENDANGERING SAFETY
WHILE ARMED IS NOT A LESSER-INCLUDED OFFENSE
OF ATTEMPTED FIRST-DEGREE INTENTIONAL
HOMICIDE, THE TRIAL COURT ERRED
BY INSTRUCTING ON THE OFFENSE**

**A. The Trial Court Erred in Instructing the Jury on
First-degree Recklessly Endangering Safety While
Using a Dangerous Weapon**

The state neither disputes that the lesser offense instruction was improperly given here, nor suggests that the error was harmless. Rather, its sole argument is that, by failing to object on this ground,

Jackson's trial counsel waived the claim. State's Brief at 2-5. As demonstrated in Jackson's brief, however, counsel's unintentional failure to object on grounds clearly established by prior case law denied Jackson the effective assistance of counsel.

II.

THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS JACKSON'S STATEMENT

Voluntariness of a custodial statement depends on the totality of the circumstances and must be evaluated on a case-by-case basis. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The State's Brief at 4-7 seeks to address each coercive factor in artificial isolation to minimize their coercive effect. The state ignores the fact that the detective's misrepresentations, trickery, and implicit threats weigh more heavily than they may with an older, smarter defendant because of Jackson's youth and limited cognitive abilities. *See State v. Pheil*, 152 Wis.2d 523, 534, 449 N.W.2d 858, (Ct. App. 1989) ([d]etermination of whether a statement is voluntary requires a "balancing of the personal characteristics of the defendant against the coercive or improper police pressures.")

Klinkhammer admitted he lied to Jackson (R51:15,16). There is no question that he did so with the intent to obtain an inculpatory statement from Jackson. There is no dispute that Kinkhammer used, whether intentionally or not, what anyone with knowledge of race relations could or would view as a reference to our national history of police sanctioned lynching of young black men (R51:18). The officer's alleged lack of intent to threaten Jackson is irrelevant; it is the effect on the suspect not the officer's intent, that controls. *See* Jackson's Brief at 13.

This Court must weigh the effect of these lies and implicit threats against Jackson's limited mental capabilities and youth. Jackson was very young and had an IQ of 73 (R51:40). "[S]ubtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in ones' set of circumstances may be coercive in another set of circumstances if the defen-

dant's condition renders him or her uncommonly susceptible to police pressures.” *State v. Hoppe*, 2003 WI 43, ¶ 37, 261 Wis.2d 294, 661 N.W.2d 407.

In re Jerrell C.J., 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, applies here. See Jackson's Brief at 11-12. The state attempts to contrast the facts here with *Jerrell C.J.*, by arguing Jerrell was 14 to Jackson's 15, nearly 16. However, there is no indication in *Jerrell C.J.* that the difference between 14 and 15 mattered. Also, contrary to the state's assertion, although Jackson's stepfather accompanied him to the police station, police did not allow Jackson to have contact with him during the interview. Jackson did not speak with his stepfather until the interview concluded (R55:56-57).

Although Jackson told Klinkhammer that he was 15 and in the Transitional Education Program (TEP); he also explained that TEP is housed in “the detention center, the work force” (R55:5). Jackson explained TEP is not a regular high school, but a program to help him find employment and improve his poor grades (R55:6-7). The state argues that Jackson did not provide evidence contrary to Klinkhammer's assumption that police had interviewed him in the past. The burden is on the state, not Jackson to show that his statement was voluntary. See *Jerrell C.J.*, 2005 WI 283 at ¶17. Regardless, Klinkhammer's assumption was wrong, as the state explained at the post-conviction motion hearing, Jackson never gave a confession to police regarding either of his prior juvenile adjudications (R61:19-20).

Regurgitating large portions of the trial court's holding, as the state does here, does not somehow make it right. For these and the reasons given in Jackson's Brief at 8-14, the trial court's admission of Jackson's custodial statement was erroneous, and violated his due process rights. The state does not attempt to prove harmlessness. Jackson is therefore entitled to a new trial.

III.

PROSECUTORIAL MISCONDUCT DENIED JACKSON A FAIR TRIAL AND DUE PROCESS

A. The Prosecutor's Jury Argument Regarding the Witness' Credibility Was Plain Error

The state's lengthy block quotes of the closing argument, State's Brief at 13-16, do not undermine Jackson's showing that the prosecutor repeatedly asked the jury to punish Jackson for the insincerity of all of the witnesses. *See* Jackson's Brief at 17-19. The prosecutor lumped Jackson with witnesses he alleged were trying to fool the jury (R56:77-78;91). He tried to bolster the weakness of his case by calling all of the witnesses liars and putting the responsibility to punish these liars on the jury there to decide Jackson's fate. This misconduct rose to the level of plain error, so no contemporaneous objection was required. *See* Jackson's Brief at 17-19.

B. The Prosecutor's Attempt to Shift the Burden of Proof to Jackson Was Plain Error

The prosecutor impermissibly attempted to shift the burden of proof to Jackson. *See* Jackson's Brief at 19-20. Again, the state cuts-and-pastes large sections of the prosecutor's closing argument in a half-hearted attempt to disprove Jackson's claims. Reading the entire argument changes nothing. The state claims that because the prosecutor told the jury the burden was not on the defendant, this Court should ignore the fact that in the next breath he effectively told the jury Jackson had to prove his innocence.

The prosecutor twice told the jury that, because Jackson chose to put on a defense, it could hold him accountable for his witnesses *i.e.* put a burden on him. (R56:91("...but when you choose to put on a defense, you, as a jury can hold them to some type of standard.); R56:124 ("... but once they put on a defense and make arguments, you should hold them to some type of standard.")) Both statements were plain error. It was particularly inappropriate when the prosecutor told the jury the defense should have brought in a gunshot residue expert if

one was necessary to prove Jackson was not the shooter (R56:124). Contrary to what the prosecutor told the jury, the defendant is neither required to put on what the prosecutor thinks is a good defense nor call witnesses to prove his innocence. *See* Jackson's Brief at 19-20.

C. The Prosecutor's Suggestion that Jackson was in a Gang Was Plain Error

The state concedes that the prosecutor's use of the word gang was error. *See* State's Response at 19-20. To say that the prosecutor "did not suggest that Jackson was a gang member" is disingenuous given the prosecutor's actual argument directly connecting police records of "gang members" with Jackson's alleged street name, "Big Bub," even though no evidence that Jackson was a gang member was presented (R56:84). Gang association is highly prejudicial, and even one unsupported use of such association is an obvious and substantial error. The state acknowledges this by using the term "g-word" to soften its blow. *See* State's Response at 19. The prosecutor could have proven his point without suggesting Jackson's gang membership, but chose not to do so, likely because of the stigma which could do nothing but help his already weak case.

The error here is particularly offensive because it places defense counsel in a no win situation. If he objects, it emphasizes the insinuation, and if he does not, the jury still is prejudiced, but the issue is forfeited.

D. The Errors Were Not Harmless

The prosecutor undoubtedly knew his case was weak without some assistance from him. Reginald Bell did not pick Jackson out of a photo lineup shortly after the shooting; he only fingered Jackson when he was sitting in the courtroom, as a lone defendant, charged with the shooting (R45:20-21;R53:48-55). The state's three other witnesses who were sworn and under oath and were also present on the day of the shooting, some of whom were closer to the shooter than Bell, did not identify Jackson as the shooter. Officer Jungbluth's impeachment of Christopher and Nicholas Brown meant little because a reasonable explanation for the purported changes of heart is that the witnesses did not want to perjure themselves by telling the lies they told Jungbluth in

court. The state had a weak case, no matter how you run the numbers.

Given the weakness of the state's case, the prosecutor's improper suggestion that Jackson was a gang member, that the jury should punish Jackson for the alleged misconduct of the state's witness, and that the jury should shift the burden to Jackson could not help but skew the jury's perceptions and verdict. *See Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("if you throw a skunk into the jury box, you can't instruct the jury not to smell it").

IV.

JACKSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Trial Counsel's Failure to Object to the Improper Lesser-included Offense Instruction was Deficient Performance

Trial counsel's failure to object to the lesser-included offense instruction on grounds that it was not a lesser-included offense fell below an objective standard for reasonableness. It may be true that ineffective assistance of counsel claims are "limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis.2d 68, 85, 519 N.W.2d 621, 628 (Ct. App.1994). However, the law here cannot reasonably be viewed as unsettled, as the state suggests. *See* State's Response at 24-27. While there may be no published Wisconsin decision that is factually identical to the instant case, the applicable legal standard is well settled. *See* Jackson's Brief at 4-7; *State v. Carrington*, 134 Wis.2d 260, 397 N.W.2d 484 (1986). A trial attorney must be aware of well defined legal principals. *See State v. Maloney*, 2005 WI 74, ¶ 23, 281 Wis.2d 595, 698 N.W.2d 583. The state argues wrongly that trial counsel is expected only to object when relevant case law exists in which the facts exactly parallel the case at hand. That is not the law. In fact, the Wisconsin Supreme Court has held that ignorance of applicable general legal standards is not acceptable even from a *pro se* defendant. *See State v. Allen*, 2010 WI 89, §91, ___ Wis.2d ___, 786 N.W.2d 124. No lesser standard reasonably can be applied to trained legal counsel.

The state's position that there are two reasonable interpretations on the point is especially curious in light of the fact that it has repeatedly conceded that the "while armed" enhancer adds an additional element to an offense.¹ *State v. Carrington*, 134 Wis.2d 260, 267 n.5, 397 N.W.2d 484 (1986); *State v. Peete*, 185 Wis.2d 4, 22, 517 N.W.2d 149 (1994). In fact, the state conceded at the post-conviction motion hearing here that the trial court should remove the while armed element (R61:21-22,31).

The state's current argument makes no sense and is contrary to its position in this and other cases. The state is not generally shy about arguing points that are arguable, but has conceded more than once that the "while armed" enhancer is an element of the offense and does not seriously dispute that fact here. Accordingly, the point is settled.

The cases cited by the state, *Maloney*, *supra*, and *McMahon*, *supra*, are not applicable. In *McMahon*, it was not unreasonable that the trial attorney failed to object, on the grounds of the very specific question raised because both parties interpretations were reasonable and authorities were split. 186 Wis.2d at 85.

In *Maloney*, the Wisconsin Supreme Court similarly rejected an ineffectiveness claim where the trial attorney's failure to challenge the admissibility of a statement purportedly taken in violation of the Wisconsin Rules of Ethics was one of first impression in the Court. *Maloney*, 2005 WI 74, 281 Wis. 2d 604, 698 N.W.2d 583.

In *Maloney* and *McMahon*, the law was unsettled and the parties presented reasonable interpretations based upon either a lack of precedent or a split in persuasive opinions. Here, the law is settled and no such split exists. Jackson's trial attorney thus should have known enough to object because first-degree recklessly endangering safety while armed is not a lesser-included offense of attempted first-degree

¹ Accordingly, the state would be judicially estopped from arguing the while armed enhancer is not an element of the offense. See *State v. Petty*, 201 Wis.2d 337, 346, 548 N.W.2d 817 (1996). (Judicial estoppel is an equitable doctrine intended to prevent a litigant from "playing fast and loose with the courts.") Although coming dangerously close, that does not seem to be the state's argument here.

intentional homicide.

B. Failure to object during the prosecutor's closing argument

Attorney Johnson failed to object to the prosecutorial misconduct in the state's closing argument not for strategic reasons, but because he failed to recognize the prosecutor's assertions to be objectionable. *See* Jackson's Brief at 26; R61:5-6. Because they in fact were clearly objectionable, the failure to object was unreasonable.

C. Trial Counsel's Deficient Performance Prejudiced Jackson's Defense at Trial

No matter how you try and spin it, the state had a very weak case against Jackson and the prosecutorial misconduct easily could have spelled the difference. Section III,D, *supra*; see Jackson's Brief at 17, 26. Even if the trial court's instruction regarding the prosecutor's attempted shift of burden of proof was enough to mitigate that error, the trial court never instructed the jury regarding the prosecutor asking the jury to punish Jackson for the incredibility of the other witnesses. Further, even if the trial court had not failed to instructed the jury regarding the prosecutor's reference to "Big Bub" as a gang name, it is doubtful the prejudice could have been cured. *Dunn, supra*.

As for the improper lesser offense instruction, the jury did not convict on the greater offense when given the opportunity. This is not speculation, but fact.

V.

**PLACING THE BURDEN ON JACKSON TO JUSTIFY
REVERSE WAIVER AFTER TRIAL VIOLATED HIS
RIGHTS TO DUE PROCESS AND EQUAL PROTECTION**

The state charged Jackson with a crime that gave the adult court original jurisdiction. *See* Wis. Stat. §938.183(1)(a) - (am) (criminal courts have jurisdiction over juvenile who is alleged to have committed

a violation of Wis. Stat. §940.01 after 10th birthday).² Prior to trial, a juvenile charged with such an offense must prove by a preponderance of the evidence that he could not receive adequate treatment in the adult system, that transferring him to the juvenile system would not depreciate the seriousness of the offense, and that it is not necessary for the adult court to retain jurisdiction for deterrence purposes. Wis. Stat. §970.032 (2)(a-c). If the juvenile is later convicted of an offense other than the charge giving the criminal court original jurisdiction, he must show by clear and convincing evidence that it would be in his and the public's best interests for the circuit court to impose a juvenile disposition after trial. Wis. Stat. §983.183(1m)(c)3. The circuit court considers the factors enumerated in Wis. Stat. §938.18(5) in making this determination.

Had the state originally charged Jackson only with his offense of conviction and Jackson contested waiver, the state would have had the burden of “present[ing] relevant testimony” to prove that the Wis. Stat. §938.18(5) criteria warrant waiver if it desired to waive Jackson into adult court. *See* Wis. Stat. §938.18(4)b.

The process is not only confusing, but denied Jackson due process and equal protection. *See* Jackson's Brief at 30-32. Regardless whether there was minimally sufficient evidence to convict Jackson of the charge granting the criminal court original jurisdiction, the jury did not convict him on that charge. The state cannot punish someone for an acquitted charge.

Nor does the fact that Jackson was convicted of a lesser charge rationally distinguish his circumstances from that of a juvenile originally facing such a charge in juvenile court. The relevant comparison is between the types of sanctions available in juvenile court

² Jackson's inadvertent citation to the prior version of Wis. Stat. §938.183 in his Opening Brief does not change the analysis here. Effective April 29, 2006, the legislature renumbered and amended Wis. Stat. §938.183(2) with §§938.183(1)(am) and (1m)(c)3. The crux of the amendment gave the criminal courts original jurisdiction over Wis. Stat. §940.01 charges against those who are 10 years or older as opposed to 15 years or older. *See* 2005 Wis. Act 344. As Jackson was over the age of 15, accordingly the unintentional oversight does not change the analysis here. Jackson cites to only the 2007-2008 version of the statutes here and sincerely apologizes to this Court for his error.

versus adult court, and such sanctions may be imposed only upon those convicted or adjudged delinquent. The state's proffered distinction accordingly makes no sense.

Likewise meritless is the state's attempted analogy to cases upholding prosecutorial discretion in charging. State's Brief at 36. Unlike in those cases, Jackson *was not convicted of the greater charge*.

Finally, the state's conclusory waiver argument, State's Brief at 30, ignores the fact that waiver is not jurisdictional, *State v. Moran*, 2005 WIS 115, 284 Wis.2d 24, 700 N.W.2d 884, and that a contemporaneous objection would have made no difference here. Constitutional challenges are reviewed *de novo*. *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis.2d 520, 665 N.W.2d 328. Moreover, the Court will overlook waiver when, as here, the parties have fully briefed the issue and it is an issue of statewide importance. See *Mack v. State*, 93 Wis.2d 287, 296-97, 286 N.W.2d 563 (1980).

CONCLUSION

For these reasons, Jackson respectfully asks that the Court reverse the circuit court's order denying his post-conviction motion and remand the matter for a new trial.

Dated at Milwaukee, Wisconsin, October 7, 2010.

Respectfully submitted,

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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 2,995 words.

Rebecca R. Lawnicki

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.

Rebecca R. Lawnicki

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on this 7th day of October, 2010, I caused 10 copies of the Reply Brief of Defendant-Appellant Jackson to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Rebecca R. Lawnicki

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