State of Wisconsin
Court of Appeals
District 1
Appeal No. 2012AP002190 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Adrian J. Jackson,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Kevin E. Martens, presiding

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Defendant-Appellant's Brief and Appendix

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Table of Authority

Cases

State v. Jones, 147 Wis.2d 806, 434 N.W.2d 380 (1989) 22

State v. Mendoza, 80 Wis. 2d 122, 258 N.W.2d 260 (1977) 22

State v. Morse, 126 Wis. 2d 1 (Wis. Ct. App. 1985) 14

State v. Neumann, 179 Wis. 2d 687 (Wis. Ct. App. 1993) 18

State v. Peters, 2002 WI App 243 21

State v. Poellinger, 153 Wis. 2d 493 (Wis. 1990) 13

Statutes

Sec. 940.225(2)(a), Stats 12

Table of Contents

Statement on Oral Argument and Publication 4

Statement of the Issues 4

Summary of the Arguments 4

Statement of the Case

I. Procedural History 6

II. Factual Background 8

Argument

I. The evidence was insufficient as a matter of law to establish that Jackson committed the offense of second degree sexual assault when he struck Perkins with the bat 12

II. The trial court erred in denying Jackson's request for the self-defense instruction...................................... 19

Conclusion 23

Certification as to Length and E-Filing

Appendix

Statement on Oral Argument and Publication

The issue presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I. Whether the evidence was sufficient as a matter of law to support the jury's verdict finding the appellant guilty of second degree sexual assault, use of force?

Answered by the trial court: Yes.

II. Whether the trial court erred in denying appellant's requested self-defense instruction as to Count 2 of the information (substantial battery)

Answered by the trial court: No.

Summary of the Arguments

I. The evidence was insufficient to convict Jackson of second degree sexual assault. Sec. 940.225(2)(a), Stats. makes it second degree sexual assault for one to batter another on her "intimate parts." Here, the evidence was insufficient, as a matter of law, to establish that Jackson battered Perkins on an "intimate part". Perkins' testimony was that Jackson hit her with the bat on her "pelvic bone". The pelvic bone includes

many areas that are not even arguably part of an "intimate part". Additionally, the record contains no clear description of the manner in which Jackson struck Perkins with the bat such that the jury could reasonably conclude that Jackson intend to strike her in the vaginal area, as opposed to some other area of the body. Rather, Perkins described being hit "in the side" with the bat, and then wrestling with Jackson over the bat.

II. The trial court erred in denying Jackson's request for the self-defense instruction. Whenever a defendant can point to evidence in the record which, when viewed in the light most favorable to the defendant, would support a theory of self-defense, the court is obligated to give the instruction. Here, Jackson pointed out that, at the outset of the incident, the victim, Perkins, armed herself with a scissors. There was testimony that Perkins attempted to stab Jackson with the scissors. The judge denied Jackson's request.

In evaluating a defense request for the self-defense instruction, the judge is not permitted to view the totality of the circumstances-- including conflicts in testimony-- and denying the request merely because the judge does not believe the jury could find self-defense. This is precisely what the judge did in this case. In denying Jackson's request, he noted numerous conflicts in the testimony, and he then concluded that "under the circumstances" the jury could not find that Jackson acted in self-defense. In other words, the judge applied the wrong legal standard. If the correct legal standard is applied, Jackson is

entitled to the instruction. Viewing the evidence in a light most favorable to Jackson, one must conclude that the victim was violently aggressive toward Jackson when she attempted to stab him with the scissors. Thus, the self-defense instruction should have been given.

Statement of the Case

I. Procedural History

The defendant-appellant, Adrian J. Jackson (hereinafter "Jackson") was charged with (1) second degree recklessly endangering safety, (2) substantial battery with intent to do bodily harm, (3) second degree sexual assault[1], (4) false imprisonment, and (5) possession of a firearm by a felon. Jackson entered not guilty pleas to all charged. (R:48-3)

Jackson filed a motion to suppress all evidence seized by police as a result of a warrantless search of Jackson's residence at 4124 N. 21st, Milwaukee. (R:7) The court

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[1] Sec. 940.225(2)(a), Stats., provides that is second degree sexual assault if one, "Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence." Later, that section defines "sexual contact" as, "Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):" Finally, Sec. 939.22(1), Stats., provides that, ""Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina or *pubic mound* of a human being." (emphasis provided)

conducted a hearing into the motion on March 25, 2010. The court granted Jackson's motion. (R:51-99)

The matter later proceeded to jury trial on September 13, 2010. During the instructions conference, Jackson requested that the court instruct the jury on self-defense as to count two (substantial battery). The judge denied Jackson's request. (R:60-67) On September 16, 2010, the jury returned verdicts finding Jackson guilty on all counts. (R:24 t0 28).

On November 11, 2010, the court sentenced Jackson as follows: (1) recklessly endangering safety, five years initial confinement and five years extended supervision; (2) substantial battery, one year six months initial confinement and two years extended supervision concurrent to count three; (3) sexual assault, ten years initial confinement and five years extended supervision, consecutive (except concurrent to count two); (4) false imprisonment, three years initial confinement and three years extended supervision, consecutive; and, finally, (5) felon in possession of a firearm, five years initial confinement and two years of extended supervision, consecutive. Thus, Jackson's total sentence is twenty-three years of initial confinement and fifteen years of extended supervision.

Jackson timely filed a notice of intent to pursue postconviction relief. There were a number of extension granted to a court reporter and, ultimately, Jackson timely filed a notice of appeal. There were no postconviction motions.

II. Factual Background

Iesha Perkins, Olethia Perkins, and Kezia Perkins (hereinafter "Perkins") were sisters who lived together. (R:58-63) According to (Kezia) Perkins, she and Jackson dated and lived together from April 2009 until October 2009. (R:57-18) Perkins testified that she left Jackson because he had a new girlfriend named "Nicki." (R:57-19)

Nevertheless, Jackson invited Perkins to his house for Thanksgiving (November 25, 2009). (R:56-92) Perkins accepted the invitation, and then she decided to stay the night. Landry Evans, who was a friend of Jackson's, was also there. (R:59-43) When the couple awoke the following morning, they had sexual intercourse. (R:56-93) According to Perkins, immediately following, Jackson became angry because he claimed that "something feels different", and he accused Perkins of cheating on him. (R:56-94) At that point, they each got dressed, and Perkins prepared to leave. As she was about to leave, Jackson punched her in the mouth with a closed fist, and he told her that she was not going anywhere. (R:56-95) Perkins grabbed a scissors, and so Jackson went to the kitchen and returned with a knife. *Id.* Perkins admitted that she was first to grab a weapon. (R:57-35) Jackson's mother, Delores Jackson, who lived in the lower of the duplex, apparently heard the commotion, and she came upstairs. She tried to get the knife from Jackson (R:56-96), but the mother's boyfriend, Levi

Preston, also came upstairs, and he told her to stay out of Jackson's business. (R:56-96; R:60-17) While upstairs, Delores Jackson saw Perkins attempt to stab Jackson with the scissors. (R:60-23) Once Delores Jackson and her boyfriend left, Jackson pulled Perkins' hair, dragged her down the hallway to the bedroom, and then closed the door. (R:56-97) According to Perkins, Jackson then punched her numerous times in the face. *Id.* Perkins testified that Jackson was in a rage, and he alternated between saying that she was not going anywhere, to threatening to kill her. (R:56-99) While in the bedroom, Jackson hit her over the head with a Budweiser bottle, which lacerated her scalp and caused a bald spot. (R:56-100) The laceration required four staples to close. (R:57-92)

At that point, Jackson told his friend, Evans, to go get a bat and, when Evans balked, Jackson threatened to do the same thing to Evans. (R:56-101) Evans testified that he did not want to get the bat, but because Jackson threatened him, he did so. (R:59-45) Once Evans returned with the bat, Jackson taped Perkins' hands behind her back, and he then ordered her to lie on the bed with her legs spread[2], which she did. (R:56-103) Perkins claimed that while she was in that position, Jackson, "[S]truck me three times in the vagina right on my *pelvic bone*." (R:56-104) Significantly, though, Perkins told the jury that she and Jackson struggled over the bat. She testified that:

[2] Perkins was clothed at the time. She was wearing pants.

> From me doing like this (indicating) and how I was hit on my side because when he hit me on my side, I would grab the bat, and we would be wrestling over that . . .
>
> * * *
>
> And you indicated that after you deflected the blows when he would hit you in the body, you would grab ahold of the bat and at that point the two of you would struggle over it?
>
> A. Right.

(R:57-50).

Evans testified that, although he was in the apartment most of the day, he never saw Jackson strike Perkins. (R:59-58) Evans was not in the bedroom, though, while Jackson and Perkins were in there together.

Following the incident, Jackson ordered Perkins to mop up the blood, and to then take a shower while he stood in the doorway watching. (R:56-106, 107) Jackson told Perkins that if she called the police, he would kill her. (R:56-116)

Eventually, Jackson allowed Landry to take Perkins to the hospital. (R:56-116)

Perkins told the jury that she had a fracture in her face from being kicked. The fracture required surgery to repair. (R:56-109) Medical personnel also documented the laceration to Perkins' scalp mentioned above. Additionally, Perkins had recently had her lip pierced and, during the incident, her lip was ripped open. (R:57-8) The doctor who examined Perkins'

vaginal area, though, observed no direct injury to Perkins' vagina. Dr. Carla Kelly testified that she observed some significant swelling on the mons pubis[3]. (R:57-98) Dr. Kelly could not say what caused the redness and swelling.

Later that same night, while Perkins was still at the hospital, Olethia Perkins heard a knock on her door and, when she looked through the peephole, she saw "a hood." (R:57-111; R:59-9) When Olethia did not open the door, the person outside began kicking at the door. *Id.* At that point, she and her sister, Iesha, ran to the balcony. Olethia jumped over the balcony. (R:59-12) Iesha was getting ready to jump when she saw Jackson come through the door, and he fired a pistol in the direction of Olethia as she went over the railing of the balcony. (R:57-111) At the time Jackson shot, he was not wearing a hood. (R:58-36)

Jackson then pointed the pistol at Iesha and asked, "Where is that bitch at? I know that bitch called the police." (R:57-112) Jackson was apparently referring to Kezia Perkins. (R:58-90)

Police found a shell casing in the Perkins home on the rear balcony. (R:59-88, 91)

Argument

[3] The mons pubis is the fatty area that overlies the front part of the pelvic bond. (R:57-88)

I. The evidence was insufficient as a matter of law to establish that Jackson committed the offense of second degree sexual assault when he struck Perkins with the bat.

Sec. 940.225(2)(a), Stats. makes it second degree sexual assault for one to batter another on her "intimate parts." The question presented by this appeal is whether the evidence was sufficient, as a matter of law, to establish that Jackson battered Perkins on an "intimate part" where Perkins' testimony was that Jackson hit her with the bat "on her vagina, right on her pelvic bone". Perkins did not point out for the jury the area on her body where she was struck. The record contains no clear description of the manner in which Jackson struck Perkins with the bat such that the jury could reasonably conclude that Jackson intend to strike her in the vaginal area, as opposed to some other area of the body. Rather, Perkins described being hit "in the side" with the bat, and then wrestling with Jackson over the bat.

A. Standard of Appellate Review

The standard of appellate review on challenges to the sufficiency of the evidence to support a verdict in a criminal case is well-known. In *State v. Poellinger*, 153 Wis. 2d 493, 501 (Wis. 1990), the Supreme Court held:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence,

> viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

B. The elements of second degree sexual assault

The State accused Jackson of committing sexual assault by battering Perkins in the vagina. The trial judge instructed the jury that:

> Sexual contact is an intentional touching of the vagina area of Kezia Perkins by the defendant. The touching may be of the vaginal area directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching. Sexual contact also requires that the defendant acted with the intent to cause bodily harm to Kezia Perkins.

(R:60-84, 85). The use of the phrase “vaginal area” was held to be appropriate when instructing the jury on this offense. In *State v. Morse*, 126 Wis. 2d 1 (Wis. Ct. App. 1985), the Court of Appeals explained:

> The instruction did not expand the scope of the area of prohibited touching. The trial court had wide discretion to choose the language and emphasis of the jury instructions as long as they fully and fairly informed the jury of the rules of law applicable to the case. (internal citation omitted) We conclude that a reasonable jury would construe the phrase "vaginal area" to refer to the female genitalia. This conclusion is consistent with *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 541, 280 N.W.2d 316, 322 (Ct. App. 1979), where we held that the "vaginal area" of a child was an enumerated intimate part within the prohibition against touching. *See also State v. Gustafson*, 119 Wis. 2d 676, 696, 350 N.W.2d 653, 663 (1984) ("public area" is an intimate part covered

by statute prohibiting touching of breast, buttock, anus, scrotum, penis, vagina or public [sic] mound).

C. The evidence was insufficient to prove that Jackson intentionally struck Perkins in the "vaginal area" and caused her bodily harm.

Perkins' testimony about being struck with the bat is as follows:

> [M]ade me lay on the bed and like made me hold my legs open and hit me in my-- in my vagina with the bat.
>
> * * *
>
> He struck me three times in my vagina *right on my pelvic bone. . . . I was so swollen and my pelvic bone was bruised.*

(R:56-101 to 104).

Significantly though, a medical pelvic exam at the hospital revealed no trauma to Perkins' vagina, but did document redness and swelling to the mons pubis (also known as the "pubic mound"), which is the tissue that covers the front of the pubic bone.

So, the question for this appeal is whether Perkins' testimony that Jackson hit her with the bat "in my vagina", which she then clarified to mean her "pelvic bone", in conjunction with the doctor's testimony that she observed redness and swelling on the mons pubis is sufficient to permit the jury to reasonably find that Jackson battered Perkins in her "vaginal area". An important part of this question is also whether the evidence was sufficient to establish that Jackson intentionally struck Perkins in the "vaginal area" as opposed to

some other part of her body.[4]

i. The "pelvic bone" is not necessarily the "pubic bone" or the mons pubis.

Perkins testified that Jackson struck her with the baseball bat on her "pelvic bone". The "pelvic bone" is one of the larger bones in the body[5], and it extends to areas of the body that are not even arguably part of the "vaginal area." These areas include the iliac crest on either side of the body, and the coccyx in the rear. Thus, Perkins' testimony that Jackson struck her on the "pelvic bone" covers so general an area of the body that no jury acting reasonably could conclude that this meant that Jackson struck her on the mons pubis which is, by statute, an "intimate part." The prosecutor could have asked Perkins-- but she apparently did not[6]-- to indicate for the jury the area of her body where she was struck with the bat. This would have settled the issue.

Perhaps, at this point, the court may be inclined to accuse Jackson's appellate counsel of attempting to draw

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[4] In order to convict Jackson of second degree sexual assault, the state must prove that Jackson intended to strike Perkins in an intimate part, and that he did, in fact, strike her in an intimate part. In other words, it is a battery-- and not a sexual assault-- if the defendant swings at the complainant intending to strike her in the stomach, but inadvertently strikes her in the vagina area.

[5] The "pelvic bone" is "A basin-shaped structure of the vertebrate skeleton, composed of the innominate bones on the sides, the pubis in front, and the sacrum and coccyx behind, that rests on the lower limbs and supports the spinal column." *The Free Online Dictionary,* http://www.thefreedictionary.com

[6] Based on the absence of such a question in the transcript of Perkins' testimony

distinctions where none exist. Admittedly, the distinction here is fine. However, given the offense that Jackson is accused of committing, a fine distinction can make the difference between misdemeanor battery and second degree sexual assault, which is a Class C felony. If, for example, Jackson struck Perkins on the iliac crest, which is part of the pelvic bone, it would indisputably be misdemeanor battery as opposed to second degree sexual assault. The possibility that Perkins was hit in the iliac crest is not far-fetched. Recall that she told the jury she was hit with the bat "on the side", and she then started wrestling with Jackson over the bat.

Thus, the evidence is insufficient as a matter of law to prove that Jackson struck Perkins on an intimate part of her body.

ii. The evidence failed to establish that Jackson intended to strike Perkins in the "vaginal area."

In order to prove Jackson guilty of second degree sexual assault-- as opposed to mere battery-- it is required that the State prove that Jackson intended to strike Perkins in the vaginal area, as opposed to some other part of her body. If, for example, Jackson intended to strike Perkins in the side with the bat but, as the two wrestled over the bat, the blow was redirected toward her vaginal area, it is not a sexual assault.

In, *State v. Neumann,* 179 Wis. 2d 687, 706-707 (Wis. Ct. App. 1993), the Court of Appeals made clear:

> If the offense involves sexual contact, the State must prove an intentional touching of an intimate part of the body, for the purpose of sexually degrading or sexually humiliating the complainant, or for the purpose of sexually arousing or gratifying of the defendant. See sec. 940.225(5)(b), Stats. By the language of the statute, the legislature has clearly indicated that sexual contact requires intent, both in the form of an intentional act, and a purpose for that act.

Here, the record contains no clear description of the manner in which Jackson struck the blows with the baseball bat. On direct examination, Perkins said merely that Jackson "struck her" with the bat. She was not prompted to describe the manner in which the bat was used, nor was she prompted to demonstrate the area which was hit. On cross-examination, Jackson's attorney attempted to elicit a more clear description, but he was successful only in getting Perkins to admit that Jackson struck her "in the side" with the bat, and then she would grab the bat and wrestle with it.

Thus, there is no evidence concerning Jackson's conduct that permits an inference that he intended to strike Perkins in the vaginal area.

What, then, about Jackson's words? According to Perkins, Jackson taped her wrists behind her back, and ordered her lie on the bed with her legs spread. Her trial testimony seemed to suggest that she was in this position when she was struck with the bat. However, Perkins could not possibly have been in that position when she was struck because, by her own admission, she grabbed the bat,

"wrestled" with it, and was bruised on her forearms by the bat. (R:57-70) In other words, Perkins' hands were free during the time she was struck with the bat.

Thus, the evidence is insufficient for the jury to have reasonably concluded that, in striking Perkins with the bat, Jackson intended to strike her in the vaginal area.

For these reasons, the evidence was insufficient as a matter of law to support the jury's verdict finding Jackson guilty of second degree sexual assault.

II. The trial court erred in denying Jackson's request for the self-defense instruction.

Evidence was presented that, at the very outset of the incident, Kezia Perkins armed herself with a scissors. (R:56-95). Delores Jackson testified that she saw Perkins attempt to stab Jackson with the scissors. (R:60-23). Consequently, at the instruction conference, Jackson requested that the court give the jury the self-defense instruction as to Count Two (substantial battery). (R:60-67)

The trial judge denied Jackson's request. The court reasoned:

> The court notes and overrules the defense objection to the instructions to the extent that the defense is asking that a self-defense instruction be included.
>
> In the substantive instructions provided to the jury on Count 2, I think that reasoning is a little bit different. I don't find relevant the size and weight issues at all, first of all, on the issue

on number one.

Number two, what the record reflects with respect to-- I guess any evidence as I think fairly well summarized by the parties; that is, at least differing accounts of the circumstances in the kitchen which involves the knife, whether or not there had been a scissors there or not, again who was holding the knife, whether there was an argument and struggle or simply an argument, how the knife was removed and ultimately where it was placed.

Though I think in the end everybody-- everybody would acknowledge and agree that-- I think all the testimony indicates that whatever occurred there that at some point the knife was removed and the parties then left and went to the bedroom and how they got there again may be a subjective argument.

* * *

I don't think that that circumstance and those facts by themselves are-- rise to the level or could be used by a reasonable jury to make conclusions that would make self-defense an issue . . .

(R:60-71, 72). Plainly, the judge's reason for denying Jackson the self-defense instruction was that, under the totality of the circumstances and due to the conflicts in the testimony, the judge did not believe that the jury could find that Jackson acted in self-defense.

A. Standard of Appellate Review

In order to obtain a self-defense instruction, the party requesting it must point to some evidence to show that the defendant held an objectively reasonable belief that force was necessary to prevent or terminate an unlawful interference with

the defendant's person. *See* Wis. Stat. § 939.48(1); Whether sufficient facts have been presented to warrant a self-defense instruction is a question of law subject to *de novo* review on appeal. *State v. Peters*, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300.

B. Jackson pointed to sufficient evidence to entitle him to a self-defense instruction.

Jackson had the right to advance a self-defense theory. If a reasonable construction of the evidence supports such a theory, then the jury-- not the judge-- must decide whether or not it believes Jackson's version of what transpired. The court is not permitted look at the totality of the evidence in determining whether the self-defense instruction was warranted. *State v. Mendoza,* 80 Wis.2d 122, 152, 258 N.W.2d 260, 273 (1977). To do so would require the court to weigh the evidence--accepting one version of facts, rejecting another--and thus invading the province of the jury. *Id.* The question is not what the totality of the evidence reveals, but rather whether a *reasonable construction of the evidence will support the defendant's theory* viewed in the most favorable light from the standpoint of the accused. *Id.* at 153, 258 N.W.2d at 273. If from an objective standpoint, the answer is in the affirmative, then it is for the jury, not for the trial court to determine whether to believe that Jackson was acting in self-defense. *Id.* Therefore, it is error for the trial court not to instruct the jury on

self-defense if the above question is answered affirmatively. *State v. Jones,* 147 Wis.2d 806, 816, 434 N.W.2d 380, 383 (1989).

Here, the judge expressly stated on the record that he was denying Jackson's request for the self-defense instruction because, under the judge's evaluation of the circumstances of the incident, and due to the conflicting testimony, no reasonable jury could find that Jackson acted in self-defense. Indisputably, then, the judge applied the incorrect legal standard. This was precisely the approach that was condemned in *Mendoza.*

Rather, the question is whether a *reasonable construction of the evidence will support* Jackson's request for the self-defense instruction, when viewed in the light most favorable to Jackson.

Here, in viewing the evidence in the light most favorable to Jackson, one must accept the fact that, right from the very beginning, Perkins was aggressive, and she was willing to be violent toward Jackson. When the argument started, she armed herself with a scissors. Jackson then armed himself with a knife. Apparently, the weapons were then discarded, and the scuffle moved into the bedroom. Viewing the evidence favorably to Jackson, though, would certainly permit an inference that, once inside the bedroom, Perkins continued to use violence and threats toward Jackson. From an objective standpoint, then, Jackson was entitled to meet Perkins'

aggressiveness with force.

Conclusion

For these reasons, it is respectfully requested that the court vacate Jackson's conviction for second degree sexual assault, and order that judgment of acquittal be entered. Additionally, the court should reverse Jackson's conviction for substantial battery, and order a new trial on that count.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2012.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4192 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

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

Dated this _____ day of ___________, 2012:

____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2012AP002190 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Adrian J. Jackson,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of Kezia Perkins' testimony about Jackson striking her with the bat

C. Except of Dr. Carla Kelly's testimony concerning her examination of Kezia Perkins' pelvic area

D. Excerpt of trial court's bench ruling on Jackson's request for self-defense instruction.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix

that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of December, 2012.

____
Jeffrey W. Jensen