

STATE OF WISCONSIN CIRCUIT COURT CALUMET COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2022 CF 79

JOHN C. ANDREWS,

Defendant.

MOTION TO DISMISS

John C. Andrews, by counsel, moves this Court for an Order dismissing the criminal complaint as the charge is time-barred. As a result, the court cannot exercise personal jurisdiction over the defendant. *State v. Jennings*, 2003 WI 10, ¶ 15, 259 Wis. 2d 523, 657 N.W.2d 393; *State v. Kollross*, 2019 WI App 30, ¶ 7, 388 Wis. 2d 135, 139, 931 N.W.2d 263, 265.

The facts alleged in the Criminal Complaint seek to establish probable cause to believe that John Andrews hid a corpse in 1983. But WIS. STAT. § 939.74(1) makes clear that this offense must be filed within six years of the commission of the offense or it is time-barred. No statutory exception applies. And no facts or inferences are offered to show that the statute of limitation was tolled during the

intervening years. The Criminal Complaint alleges that John Andrews' statements to investigators on June 7, 2021 – that he did not know where the remains of Starkie Swenson could be found; that he never spoke to Swenson; and that he has never seen Swenson in person (Criminal Complaint at 5) – was the last act to complete the offense, so the statute of limitations did not begin to run until that date. Such an interpretation of § 940.11(2) is not supported by any prior Wisconsin decision, nor does the Criminal Complaint offer legal authority to support this position. The offense has always been interpreted to be committed by acts – hiding and burying – not words.

This motion is made pursuant to WIS. STAT. § 939.74 and John Andrews' rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §§ 7 & 8 of the Wisconsin Constitution, as well as the cases cited herein.

***The Criminal Complaint Establishes Probable Cause
To Believe That John Andrews Hid A Corpse In 1983.***

WIS. STAT. § 940.11(2) provides, in relevant part, that: "Whoever hides or buries a corpse, with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime ... is guilty of a Class F felony." WIS. JI-CRIM 1194 sets forth two elements for the State to prove: (1) The defendant (hid) (buried) a corpse;

and (2) the defendant (hid) (buried) a corpse with intent to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime].

The Criminal Complaint alleges that, between June 7 and September 28, 2021, in violation of § 940.11(2), John Andrews allegedly hid the corpse of Starkie Swenson with the intent to conceal a crime.¹ The former date is when investigators spoke to John Andrews at his home. According to the Criminal Complaint, Andrews denied knowing Starkie Swenson:

Det. Schroeder asked John if he had any information on any other location where the remains of Starkie Swenson could be. John replied that he did not have a clue. John said he has never seen the man. John said he has seen photos of him. John said he never spoke to Starkie in person and never seen him in person.

Criminal Complaint at 5. The latter date is when the decomposed remains of Starkie Swenson were discovered; the remains were recovered and then identified in the days following.

¹ Before 1992 Wisconsin did not have a criminal offense for hiding a corpse; that offense did not exist in 1983. *See* 1991 Wisconsin Act 205, § 2 (creating § 940.11) (date of publication: May 4, 1992). This raises an ex post facto issue separate and apart from whether the offense is time-barred. *See, e.g., Beazell v. Ohio*, 269 U.S. 167 (1925) (“It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.”).

According to the State's expert witness, Professor Jordan Karsten, the skeletal remains were likely placed at the location where they were found soon after the individual's death.

[I]t is highly unlikely [Starkie Swenson] was moved to this location long after death, as decomposition at a different location would have reduced anatomical articulation. Further it appears the body was intentionally covered, or "buried," with limestone rocks in an attempt to conceal the body. Recovered in direct association with the skeleton was a Mello Yello can with a design that was in use during the first half of the 1980s.

Criminal Complaint at 6. Statements of other witnesses named in the Criminal Complaint support an inference that Starkie Swenson's corpse was hidden in the days after his disappearance in 1983. *See* Criminal Complaint at 3 (statement of W3) and 4 (statement of W6).² Thus, as alleged, Starkie Swenson's corpse was likely hidden with the intent to conceal a crime in the 1980s. No evidence in the Criminal Complaint supports the inference that John Andrews took steps to hide the corpse at any time in the past six years, even if the corpse remained concealed during this time.

² The Criminal Complaint also recounts that John Andrews was prosecuted for the death of Starkie Swenson. Criminal Complaint at 4. In Winnebago County Case No. 1993 CF 305, Andrews was charged with first degree intentional homicide. After four days of trial, in 1994, Andrews entered an *Alford* plea to an amended charge of homicide by negligent operation of a motor vehicle, § 940.08(1). *Id.* He was convicted, sentenced to a term of incarceration, and later discharged from the sentence upon its completion.

***John Andrews Did Not Commit the Charged Offense
When He Denied Having Knowledge of Starkie Swenson.***

The offense with which John Andrews has been charged is not ambiguous. It makes criminal the *physical act* of hiding or burying a corpse. See WIS. STAT. § 940.11(2). The gravamen of the statute, when examined by courts, relates to the act of hiding or concealing a corpse.

WIS. STAT. § 940.11(2) does not define the word “hides,” nor has any Wisconsin published appellate case. When not specifically defined in the statutes, a non-technical term must be given its ordinary and accepted meaning, and that meaning may be ascertained from a recognized dictionary. *State v. Steenberg Homes, Inc.*, 223 Wis. 2d 511, 519 n.3, 589 N.W.2d 668, 672 n.3 (Ct. App. 1998). Thus, in *State v. Badker*, 2001 WI App 27, 240 Wis. 2d 460, 479, 623 N.W.2d 142, 151, the court, when defining “hides,” “look[ed] to the standard dictionary definition for guidance. WEBSTER’S II NEW COLLEGE DICTIONARY 521 (1999) defines ‘hide’ as to ‘put or keep out of sight.’” 2001 WI App 27, ¶ 25. Hiding requires a physical act by the defendant. Applying that definition to the facts of the case, the *Badker* court determined that the “secluded nature of the spot where the corpse was discovered, as well as [the defendant’s] actions in dragging it to the ditch and rolling it down into the water, provided sufficient evidence from which the jury could have concluded beyond a reasonable doubt that he hid [the] corpse.” *Id.* at

¶ 26. Caselaw is in accord with the physical act requirement. *See, e.g., State v. Kupaza*, 2003 WI App 111, 264 Wis. 2d 892, 664 N.W.2d 126, cert. denied, 540 U.S. 1012 (2003) (evidence sufficient to sustain conviction where the victim's blood was found on defendant's bathtub, knives, mop, and cutting board, and the body parts were found in defendant's duffel bag); *State v. Maloney*, 2000 WI App 233, 239 Wis. 2d 234, 619 N.W.2d 308 (evidence sufficient to sustain conviction where defendant killed the victim and then set the victim's body and a couch on fire to destroy evidence of the crime); *State v. Badker*, 2001 WI App 27, 240 Wis. 2d 460, 623 N.W.2d 142 (evidence sufficient to sustain conviction where defendant strangled his ex-girlfriend in his truck, used a blanket to drag her body to a six-foot deep ditch in a remote and secluded area of a wildlife refuge, and dumped the body into the ditch so that it was covered by 10 inches of water); *State v. Bratchett*, 2020 WI App 31, 392 Wis. 2d 381, 944 N.W.2d 354 (evidence sufficient to sustain conviction because the State presented sufficient circumstantial evidence to prove that defendant burned the victim's body to conceal the crime of delivery of a controlled substance; a jury could reasonably infer that defendant burned the victim's body with the intent to conceal the crime of delivery of a controlled substance).

Nothing about the statements John Andrews made to investigators on June 7, 2021, falls within the meaning of hiding a corpse, as that word is used in § 940.11(2). His statements were not an act toward the action of hiding a corpse.

John Andrews can find no published case that has ever held mere words to constitute hiding a corpse.

***The Six-Year Statute of Limitations Applies and Bars
Charging John Andrews with a violation of § 940.11(2).***

The statute of limitations is a well-recognized tenet of criminal procedure that serves important purposes. The statute of limitations dictates the time period within which a legal proceeding must begin. Its purpose in a criminal case is to ensure the prompt prosecution of criminal charges and thereby spare the accused of the burden of having to defend against stale charges after memories may have faded or evidence is lost. *State v. Jennings*, 2003 WI 10, ¶ 15, 259 Wis. 2d 523, 531, 657 N.W.2d 393, 397. According to our supreme court:

The criminal statutes of limitations serve a number of functions but the primary purpose is to protect the accused from having to defend himself against charges of remote misconduct. A corollary purpose is to ensure that criminal prosecutions will be based on evidence that is of recent origin. It also assures that law enforcement officials will act promptly to investigate and prosecute criminal activity. This helps to preserve the integrity of the decision-making process in the trial of criminal cases.

John v. State, 96 Wis. 2d 183, 194, 291 N.W.2d 502 (1980). Compliance with the criminal statute of limitations is required for personal jurisdiction. *State v. Pohlhammer*, 78 Wis. 2d 516, 523, 254 N.W.2d 478 (1977).

WIS. STAT. § 939.74(1) provides for the statute of limitations for criminal charges, and provides as follows:

Except as provided in subs. (2) and (2d) and s. 946.88 (1), *prosecution for a felony must be commenced within 6 years* and prosecution for a misdemeanor or for adultery within 3 years *after the commission thereof*. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.³

(Emphasis added.) No exception under § 939.74(2) or (2d) applies to the charged offense.

The Criminal Complaint does not allege that the statute of limitations was tolled. Statutes of limitation “normally begin to run when the crime is complete,” which occurs when the last element of the crime has been satisfied. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quoting *Pendergast v. United States*, 317 U.S. 412, 418 (1943)); *John v. State*, 96 Wis. 2d 183, 188, 291 N.W.2d 502 (1980). However, no Wisconsin court has held that § 940.11 is a continuing offense, and John Andrews can find no case that has interpreted § 939.74(1) in the manner advanced by the District Attorney here. To the contrary, two courts have rejected “continuing offense” arguments when interpreting similar statutes. *See McClanahan v. State*, 2009 Ark. App. 493, 324 S.W.2d 692 (rejecting argument that prolonging concealment of a corpse is continuing conduct sufficient to toll the

³ Reference to § 946.88 relates to Wisconsin’s Organized Crime Control Act and is not applicable here. The Legislature has modified § 939.74 so as to extend the statute of limitations for certain sex offenses. *See* § 939.74(2). But the Legislature has made no effort to modify the statute of limitations with respect to § 940.11(2).

three-year statute of limitations; because charge was not brought within statute of limitations, the charge was dismissed); and *State v. Harelson*, 147 Ore. App. 556, 563, 938 P.2d 763 (holding that relevant statute defined the criminal violation “as the performance of specific actions at specific times. Disinterring, removing or carrying away a corpse are all discrete events that are completed once they have occurred ... [A]buse of a corpse terminates when the defendant’s actions terminate. For that reason, statutes of limitations foreclose prosecution of these counts.”).⁴

As it is applied here, § 939.74(1) is not ambiguous. It requires the prosecution of a violation of § 940.11(2) to begin within six years after the last act toward the completion of that offense. The Criminal Complaint places the last act—the hiding of the corpse—well outside of the statute of limitations. The time in which John Andrews could be prosecuted for the charged offense ended no later than 1989. *But see* n.1, *supra*.

⁴ Other states’ courts have required the statute of limitations to be construed in favor of the defendant. Statutes of limitation must be “liberally construed in favor of a criminally accused,” and “[e]xceptions that extend the limitation period, such as a provision tolling the statute during periods of concealment, are to be strictly construed against the state.” *See State v. March*, 395 S.W.3d 738, 785 (Tenn. Crim. App. 2011) (citing *State v. Henry*, 834 S.W.2d 273, 276 (Tenn. 1992) (adopting reasoning of *Toussie v. United States*, 397 U.S. 112, 114-15 (1970))).

This court may not exercise personal jurisdiction over the defendant when the relevant criminal statute of limitations has expired. *State v. Jennings*, 2003 WI 10, ¶ 15, 259 Wis. 2d 523, 657 N.W.2d 393; *State v. Kollross*, 2019 WI App 30, ¶ 7, 388 Wis. 2d 135, 139, 931 N.W.2d 263, 265. Compliance with the criminal statute of limitations is required for personal jurisdiction. *State v. Pohlhammer*, 78 Wis. 2d 516, 523, 254 N.W.2d 478 (1977) (“The jurisdictional question involved is one of personal jurisdiction, that is, power to proceed to judgment against a particular defendant, rather than power to proceed against any defendant.”).⁵

WHEREFORE, because the criminal charge is time-barred the Criminal Complaint must be dismissed because the Court may not exercise personal jurisdiction over the defendant.

Dated this 28th day of April, 2022.

Respectfully submitted,

JOHN C. ANDREWS, *Defendant*

Electronically signed by Jonas B. Bednarek

Jonas B. Bednarek

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⁵ Wisconsin case law which holds that a criminal complaint is sufficient to obtain personal jurisdiction over a defendant. Because a “complaint is the statutory procedure for acquiring personal jurisdiction over the defendant,” *State v. Smith*, 131 Wis. 2d 220, 238, 388 N.W.2d 601 (1986), “the essential element of personal jurisdiction in a criminal action is the sufficiency of the complaint ...” *Id.* at 239; *State v. Jennings*, 2003 WI 10, ¶ 26.

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