STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent

v.

JOEL M. HURLEY,

Defendant-Respondent-Cross-Appellant.

APPEAL FROM AN ORDER VACATING A JUDGMENT OF CONVICTION AND GRANTING A NEW TRIAL ENTERED IN THE CIRCUIT COURT FOR MARINETTE COUNTY, THE HONORABLE DAVID G. MIRON, PRESIDING

BRIEF AND APPENDIX OF THE STATE AS APPELLANT

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SUMMARY OF THE CASE

Joel Hurley filed a postconviction motion pursuant to Wis. Stat. § (Rule) 809.30 alleging several grounds for an order to vacate his conviction for repeated sexual assault of a child (39). The trial court granted Hurley's motion on the ground that the prosecutor made an improper and prejudicial statement in his closing argument, and rejected all other claims for relief (66:62-

73; A-Ap. 105-16).[1] The State appealed the order vacating the conviction, and Hurley filed a cross-appeal to seek review of claims that were rejected by the trial court (48; 52). This brief addresses only the issue on which the trial court vacated the conviction and ordered a new trial.

ISSUE PRESENTED FOR REVIEW

Did the prosecutor strike a "foul blow" during closing argument by noting that Hurley had not *denied* sexually assaulting his sister in his testimony, and had instead only testified that he did not *recall* having assaulted her, when the prosecutor had information that Hurley had denied the allegations to his accuser, but not to authorities? Citing *State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372, the circuit court concluded this remark was improper and prejudicial, and vacated Hurley's conviction on this ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, and the issue presented should be adequately addressed in the briefs. Publication may be useful to distinguish *Weiss*, 312 Wis. 2d 382, and *State v. Bvocik*, 2010 WI App 49, 324 Wis. 2d 352, 781 N.W.2d 719, which prohibit a prosecutor from asking jurors to draw an inference that the prosecutor knows to be false, from factual circumstances like those in the present case. Here, the prosecutor's invited inference was arguably inconsistent with a witness's statement in an investigator's report, but this account alone was insufficient to establish that the inference was false.

[1] To protect the identity of the child victim, all references to the victim's name in portions of the record reproduced for the State's appendix have been redacted. *See* Wis. Stat. § (Rule) 809.19(2)(a).

STATEMENT OF THE CASE

In July 2011, Joel Hurley was charged in an amended complaint with repeated sexual assault of a child for assaulting his former step-daughter, M.C.N. (D.O.B. 11/22/1994), on three or more occasions on and between 2000 and 2005 (4:1). Hurley was married to M.C.N.'s mother from 2000 to 2006 (4:1). According to the complaint, the repeated assaults consisted of Hurley digitally penetrating M.C.N.'s vagina on approximately five separate occasions, and, on at least 20 occasions, stripping M.C.N. naked when she got home from school and carrying her on his shoulders to the bathroom to weigh her on the scale (4:2).

Hurley entered a plea of not guilty (32:1; A-Ap. 101). Before trial, the State moved to allow other acts testimony of Hurley's younger sister, Janell, that Hurley sexually assaulted her repeatedly as a child when she was approximately the same age as M.C.N. was during the time of the charged assaults (14:2). The court granted the motion, allowing the testimony for purposes of showing method of operation and opportunity (61:33-38).

At trial, M.C.N. testified at length about the charged assaults (63:94-100). Janell testified that Hurley had repeatedly assaulted her for about two years starting when she was eight and he was twelve, and that the assaults occurred when their parents were out and included acts of digital penetration of the vagina (63:173-77). On cross-examination, Janell offered testimony that she had confronted Hurley about the allegations, and he did not admit having done anything wrong (63:195).

Hurley testified in his own defense, and denied M.C.N.'s allegations (63:255, 274-81). Seeking to address Janell's allegations, defense counsel asked whether Hurley "recall[ed]" assaulting Janell; Hurley responded he did not:

> Q: Now, [Janell] testified that she was assaulted when she believed she was around eight years old. Do you recall having an encounter with [Janell] when she was around eight?
>
> A: No.

(63:265; A-Ap. 118). Minutes later, defense counsel asked again:

> Q: Do you recall any of the allegations [Janell] brought up here today?
>
> A: No, I do not.

(63:267; A-Ap. 120).

In his closing argument, Marinette County Assistant District Attorney Kent Hoffman noted that the jury could consider Janell's allegations of assault for the purpose of establishing opportunity and method of operation, and highlighted the similarities between Janell's alleged assaults and the charged assaults (64:25-26; A-Ap. 122-23). The prosecutor invited the jury to draw an inference from the fact that, in his testimony, Hurley did not deny Janell's allegations, and said only that he did not "recall" having assaulted her:

> When the defendant testified, he was asked by his—by the attorney regarding Janell he said well, do you recall any of these incidents with Janell ever happening? And his answer was no. The question wasn't did you do this or not, it was do you recall? That's different than it did not happen.

(64:25-26; A-Ap. 122-23).

The jury found Hurley guilty of repeated sexual assault of a child (26:1). Hurley was sentenced to 18 years' initial confinement and 7 years' extended supervision, and judgment was entered against him (32:1; A-Ap. 101).

Hurley filed a motion for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30 seeking an order to

vacate the judgment of conviction, alleging multiple grounds for relief, including that trial counsel was ineffective for failing to object to the prosecutor's statements in his closing about Hurley's testimony that he did not "recall" assaulting Janell (39:10-12). Alternatively, Hurley contended that this unobjected-to remark constituted plain error mandating reversal in the interest of justice (39:12).

In support of these claims, Hurley submitted a portion of a sheriff's department report showing that Janell reported to law enforcement that she had confronted Hurley about her allegations of assault, and Hurley had "denied having any kind of inappropriate sexual contact with her" (39:15; A-Ap. 124). Hurley asserted that the inference that the prosecutor asked the jury to draw from Hurley being asked only whether he could "recall" assaulting Janell was, in Hurley's words, that Hurley "would not deny" the allegations if he would have been asked by defense counsel (39:11). Hurley maintained that the prosecutor knew or should have known that this inference was false, in light of Janell's statement to law enforcement that Hurley denied the allegations to her (39:11-12).

A *Machner*[2] hearing was held at which Hurley's trial counsel John D'Angelo testified (66:4-43). As pertinent, trial counsel said he recalled the prosecutor's statement in closing argument about Hurley testifying that he did not "recall" assaulting Janell, and that he did not make an objection to this statement because he believed that Hurley "came across" as denying Janell's allegations on the stand, and he made a strategic decision not to object so as to avoid drawing attention to the prosecutor's remark (66:31-33).

[2] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

In a bench ruling, the trial court did not address Hurley's claim that trial counsel was ineffective for failing to object to the prosecutor's remark, concluding that the statement constituted plain error warranting a new trial (66:68-73; A-Ap. 111-16). Citing *Weiss*, 312 Wis. 2d 382, the court determined the remark was improper because the prosecutor knew or should have known that the inference he asked the jury to draw was false based on Janell's statement to law enforcement that Hurley had denied the allegations when she confronted him (66:68-73; A-Ap. 111-16). The court further concluded that the remark was not harmless because it bore on the jury's determinations of witness credibility, and the case turned on those determinations:

> So this is a huge credibility case. And when the State makes a comment to the jury knowing full well that the defendant has in fact denied those charges concerning the sister, but yet makes a comment to the jury that the question wasn't did you do this or not, it was do you recall, that's different than it didn't happen. And, again, granting great credibility to the sister, which again bolsters the State's case, but the State knows that it's inaccurate and it's incorrect and in fact he had denied and when he was confronted he immediately denied.
>
> Paragraph 9 of the Weiss case states Weiss's post conviction counsel argued that the closing argument was improper because it misled the jury into drawing an inference not supported by the record and which the prosecutor knew or should have known was untrue.
>
> You know, I find that almost right on point from what I'm looking at here.

(66:70-71; A-Ap. 113-14). The trial court vacated the judgment of conviction and ordered a new trial. The State appealed this order, and Hurley filed a cross-appeal.

ARGUMENT

THE PROSECUTOR'S UNOBJECTED-TO REMARK IN CLOSING ARGUMENT DID NOT CONSTITUTE PLAIN ERROR WARRANTING A NEW TRIAL, AND THE TRIAL COURT ERRED IN VACATING THE CONVICTION ON THIS BASIS.

A. Introduction.

By noting that defense counsel asked Hurley only whether he "recall[ed]" assaulting Janell, not whether he had, in fact, assaulted her, the prosecutor in his closing argument invited the jury to draw the following reasonable inference from the trial evidence: Hurley was not asked by defense counsel whether he assaulted Janell (and Hurley did not volunteer a denial of Janell's allegations) because Hurley believed it was *possible* he had assaulted her, but could not *recall* having done so.

As developed below, the prosecutor's remark was not improper. Hurley has not shown that the prosecutor knew or should have known that the inference he invited the jury to draw was false. What the prosecutor knew was that Janell had told investigators that she confronted Hurley with her allegations, and he had denied them *to her*. Even assuming that Janell's second-hand report of Hurley's denial is accurate, just because Hurley denied the allegations to his accuser does not mean that he would have *denied* the allegations to investigators or at trial—under threat of prosecution if untrue—rather than asserting that he could not *recall* having assaulted Janell. The sheriff's report containing Janell's second-hand account of Hurley's denial was therefore insufficient to demonstrate that Hurley would have plainly denied assaulting Janell had he been asked about it at trial. Thus, unlike the prosecutors' remarks in *Weiss* and *Bvocik*, the remark here did not invite the jury to draw an inference the prosecutor knew to be false, and the trial court erred in

vacating the conviction on this ground. Finally, even if the prosecutor's remark was improper, this error was harmless and Hurley is not entitled to a new trial in the interest of justice.

B. Legal Principles and Standard of Review.

1. Closing Argument Challenges Generally.

The prosecutor is permitted to draw any reasonable inference from the evidence in closing argument. *See State v. Nemoir*, 62 Wis. 2d 206, 213 & n.9, 214 N.W.2d 297 (1974). "Considerable latitude is to be allowed counsel in closing arguments, subject only to the rules of propriety and the discretion of the trial court." *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16 (1970). "'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements . . . must be viewed in context.'" *State v. Wolff*, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted).

When the defendant makes a timely objection to a prosecutor's remarks at closing, the constitutional test is whether the prosecutor's remarks "so infect[ed] the trial with unfairness as to make the conviction a denial of due process." *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

In general, however, when a defendant fails to make a contemporaneous objection and move for a mistrial, he or she waives the right to review of a complaint about a prosecutor's closing argument. *See State v. Davidson*, 2000 WI 91, ¶ 86, 236 Wis. 2d 537, 613 N.W.2d 606. Such waiver may be overlooked only if the defendant establishes ineffective assistance of counsel, plain error, or that reversal is warranted in the interest of

justice. *See State v. Neuser*, 191 Wis. 2d 131, 140, 528 N.W.2d 49 (Ct. App. 1995).[3]

2. Plain Error.

Wisconsin Stat. § 901.03(4) provides that unobjected-to rulings admitting evidence may not be the basis for reversible error unless "plain error" affecting "substantial rights" has occurred. "Plain error" analysis also has been applied to review of a defendant's postconviction challenge to an unobjected-to prosecutorial closing argument. *See, e.g., Davidson*, 236 Wis. 2d 537, ¶ 88; *United States v. Young*, 470 U.S. 1, 14-16 (1985). Plain error "is one that is 'both obvious and substantial' or 'grave,' . . . and the rule is 'reserved for cases where there is the likelihood that the [error] . . . has denied a defendant a basic constitutional right.'" *State v. Vinson*, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct App. 1994) (citations omitted); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997). Plain error is to be "'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Young*, 470 U.S. at 15 (citation omitted).

The Wisconsin Supreme Court has explained that the "plain error" doctrine has a two-pronged analysis, stating that "any error that satisfies the first prong of our plain error doctrine, i.e., any error that is fundamental, obvious, and substantial, must then undergo the second prong of whether that error is nonetheless harmless."

[3] *But see State v. Burns*, 2011 WI 22, ¶¶ 24-27, 47-52, 332 Wis. 2d 730, 798 N.W.2d 166 (applying the so-infected-the-trial-with-injustice test to a complaint about a prosecutor's remark without addressing whether a contemporaneous objection had been raised in a review for discretionary reversal under Wis. Stat. § 751.06). If this court were to review Hurley's unobjected-to complaint under the standard normally reserved for preserved claims, the State submits that the prosecutor's remark did not so infect the proceedings with unfairness as to violate his right of due process for the same reasons the remark was not plain error, or, if error, was harmless.

State v. Jorgensen, 2008 WI 60, ¶ 23 n.4, 310 Wis. 2d 138, 754 N.W.2d 77. According to the Wisconsin Supreme Court, "[t]he burden is on the State to prove that the plain error is harmless beyond a reasonable doubt." *State v. Mayo*, 2007 WI 78, ¶ 29, 301 Wis. 2d 642, 734 N.W.2d 115; *compare United States v. Olano*, 507 U.S. 725, 734 (1993) (burden is on the defendant to show prejudice from alleged "plain error").

This court reviews de novo a circuit court's determination of plain error. *See Virgil v. State*, 84 Wis. 2d 166, 189, 267 N.W.2d 852 (1978).

C. The prosecutor's remark was not improper because it did not invite the jury to draw an inference that the prosecutor knew to be false, and Hurley is not entitled to a new trial in the interest of justice.

1. *Weiss* and *Bvocik*.

A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows" *Berger v. United States*, 295 U.S. 78, 88 (1935). But he or she "is not at liberty to strike foul ones." *Id.* This court has held that asking the jury in closing argument to draw an inference that the prosecutor knows or should know to be false is a foul blow, and may be grounds for reversal. *See Bvocik*, 324 Wis. 2d 352, ¶¶ 11-15; *Weiss*, 312 Wis. 2d 382, ¶¶ 11-17.

In *Weiss*, the prosecutor's closing argument attacked the credibility of the defendant's testimony denying that he had committed the crime by asserting he had "never" denied the allegations previously, and this was "the first time" he had protested his innocence. *Weiss*, 312 Wis. 2d 382, ¶¶ 5, 7. But the prosecutor knew when she made these assertions that Weiss had denied the allegations on two occasions before trial. *Id.* ¶ 15. As this court explained, the prosecutor "knew better" than to

argue that Weiss had never previously denied the allegations. *Id.* "The importance of what we are about to say cannot be underscored enough. Prosecutors may not ask jurors to draw inferences that they know or should know are not true. That is what occurred here and it is improper." *Id.*

In *Bvocik*, the defendant was alleged to have used a computer to arrange a meeting to have sex with a person he thought was underage. *Bvocik*, 324 Wis. 2d 352, ¶ 1. The person was actually a 28-year-old woman, who was pretending to be 14 years old. *Id.* ¶¶ 2-3. The jury was not told the real age of the woman. *Id.* ¶¶ 8, 13. The prosecutor knew the woman was 28 years-old, but nonetheless made a remark during closing argument that suggested to the jury that the woman was, in fact, 14. *Id.* ¶ 6. This remark plainly affected the jury, which submitted a written question to the court during deliberations asking how old the "girl" actually was. *Id.* ¶¶ 7-8. In a response approved by counsel, the court declined to answer the jury's question, explaining it could not comment on the evidence. *Id.* ¶ 8. Applying *Weiss*, the *Bvocik* court concluded that the prosecutor had asked the jury to reach a factual conclusion about the victim's age that the prosecutor knew was not true. *Id.* ¶ 10. And this "muddied up" the real issue in the case—whether Bvocik arranged a meeting to have sex with someone he believed was underage—and prevented this issue from being fully tried. *Id.* ¶ 15.

In both *Weiss* and *Bvocik*, the court examined the prosecutor's statement to determine whether it was improper, and then considered the impact of the error to determine whether a new trial was warranted in the interest of justice. *Bvocik*, 324 Wis. 2d 352, ¶ 13; *Weiss*, 312 Wis. 2d 382, ¶ 16.

2. The prosecutor's remark was not improper because the contents of the sheriff's report did not tell the prosecutor that Hurley would have denied Janell's allegations at trial had he been directly asked whether he assaulted her.

As noted, the prosecutor during closing argument highlighted that defense counsel had asked Hurley only whether he "recall[ed]" assaulting Janell, which the prosecutor said was "different than it didn't happen" (64:25-26; A-Ap. 122-23). By this remark, the prosecutor invited the jury to conclude that Hurley was not asked by defense counsel whether he assaulted Janell (and Hurley did not volunteer a denial of Janell's allegations) because Hurley may have believed it was *possible* he had assaulted her, but could not *recall* having done so. This inference was a reasonable—if not particularly compelling—one based on the trial evidence, and may have been relevant in determining just how much stock the jury could put in Janell's allegations in addressing the issues of opportunity and mode of operation.

Hurley believes the prosecutor knew or should have known that this inference was false (39:11-12). He points to a sheriff's report indicating that Janell told investigators that she had confronted Hurley about her allegations, and he had denied them to her (39:15; A-Ap. 124). Based on this report, the court agreed with Hurley that the prosecutor knew that the inference he invited the jury to draw—that Hurley was not asked whether he assaulted Janell because he believed it was possible he assaulted her, but could not recall having done so—was false. The trial court erred in reaching this conclusion for the reasons developed below.

First, the contents of the sheriff's report did not tell the prosecutor how Hurley would have answered the question of whether he assaulted Janell had it been asked at trial. All that the prosecutor would have known from the sheriff's report was Janell had told investigators that Hurley had denied her allegations when she confronted him (39:15; A-Ap. 124). Because this is a second-hand account of what Hurley said, it is possible that Janell construed a response short of a categorical denial—such as "I don't recall doing anything like that"—to be a denial.

Even assuming that Janell's account of Hurley's statements is accurate, the fact that Hurley denied the allegations to his accuser is not sufficient to demonstrate that he would have denied the allegations to investigators or at trial. In an interview with investigators—or in testifying at trial—Hurley would have faced the threat of prosecution for providing untruthful answers. Under these circumstances, Hurley may have responded differently to the question of whether he assaulted Janell *if the truth of the matter was simply that he could not recall having assaulted her* many years earlier. Hurley faced no such threat when Janell asked him this question. Moreover, Hurley would have had other reasons for making a strong denial to Janell, such as to challenge Janell's own recollections and dissuade her from coming forward with the allegations.

Second, the information that the prosecutor had in his possession—that Hurley denied the allegations to Janell—was essentially provided to the jury in Janell's testimony on cross-examination. Defense counsel asked

Janell if she had confronted Hurley with her allegation (63:195). Janell indicated she had, and that Hurley did not "admit" to having done "anything wrong":

> Q: . . . [A]fter you came out with this, did you ever attempt to confront Joel about it?
>
> A: After I came out with this?
>
> Q: Yes.
>
> A: Yes.
>
> Q: Did he ever admit that he did anything wrong?
>
> A: No.

(63:195).

Third, unlike the prosecutor in *Weiss*, the prosecutor here did not assert that Hurley had *never* issued a full denial of the allegations, and instead his remark was confined to the reasonable inferences that could be drawn from the trial record. The prosecutor in *Weiss* plainly said something she knew to be false: that Weiss had denied the charges against him "for the first time" at trial, when she knew, in fact, that he had personally denied them on two prior occasions to authorities. *See Weiss*, 312 Wis. 2d 382, ¶ 15. The prosecutor here did not comment on whether Hurley had previously denied the allegations to authorities or to anyone else, stating only that Hurley was asked whether he "recalled" having assaulted Janell, which, the prosecutor argued, "is different than it didn't happen" (64:25-26; A-Ap. 122-23).

Fourth, the prosecutor's remark is also plainly distinguishable from the prosecutor's misleading statement in *Bvocik*. There, the prosecutor suggested to the jury that the actual age of the person who *Bvocik* arranged to meet for sex was 14, when the prosecutor knew that she was, in fact, 28. This was an important deception where the jury trial was about whether Bvocik

believed or had reason to believe that the person he was meeting was underage. By contrast, the prosecutor in this case did not invite the jury to draw an inference that the prosecutor knew to be false; the contents of the sheriff's report did not tell him that Hurley would have plainly denied Janell's allegations had he been asked at trial whether he assaulted her.

Thus, the prosecutor did not ask the jury to draw an inference that the prosecutor knew to be false, and the circuit court erred in vacating the judgment of conviction on this basis.

3. Even if the prosecutor's remark was improper, a new trial is not warranted in the interest of justice, and the prosecutor's error was harmless.

If this court were to conclude that the prosecutor's remark was improper, it must then address whether the impact of this error was so serious as to require a new trial. This court may answer this question under either the rubric of the interest of justice, *Weiss*, 312 Wis. 2d 382, ¶ 16, or harmless error. *See Jorgensen*, 310 Wis. 2d 138, ¶ 23 & n.4. The State submits that, under either test, a new trial is not warranted.

By his challenged remark, the prosecutor sought to bolster Janell's other acts allegations by contrasting Janell's certainty that these events occurred with Hurley's testimony that he could not "recall" them having taken place. If the jury believed Janell's allegations, it could use what the allegations showed about mode of operation and opportunity in assessing whether Hurley was guilty of the charged offense. To this extent, Janell's credibility, and the credibility of her allegations, were issues of importance in the case. But while the prosecutor's invited inference sought to influence the jury's credibility

determinations, the State submits that the inference was not a particularly compelling one, and would not have had a great impact on a reasonable jury.

Although Hurley's testimony did not include a full-throated denial of Janell's allegations, Hurley did respond in the negative when asked twice whether he recalled having assaulted Janell (63:265-67; A-Ap. 118-20). Given that these alleged assaults occurred many years ago starting when Hurley was 12 years old, testimony that Hurley did not recall these alleged events was unsurprising. The lack of a categorical denial would have been much more notable had these allegations been more recent, and had Hurley been an adult when they occurred.

Moreover, it is doubtful that the difference between "I don't recall" and "it didn't happen" would have mattered greatly in the jury's assessment of the credibility of Janell's allegations. Even if Hurley had offered a categorical denial, the defense did not offer a plausible theory as to why Janell would fabricate such allegations. Defense counsel's cross-examination of Janell attempted to sow doubt about whether the events occurred (63:183-96). And defense counsel labeled her allegations "incredible" during closing arguments by suggesting that they would have been caught had the incidents actually occurred, and by noting that Janell had made Hurley the godfather of her first born child (64:32-34). But the defense never explained why Janell would want to hurt Hurley.

In short, the inference that the prosecutor invited the jury to draw from Hurley's testimony that he did not "recall" the alleged incidents did not prevent the issue of the credibility of Janell's allegations from being fully tried. Accordingly, a new trial is not warranted in the interest of justice, and any error in the prosecutor's remark was harmless.

CONCLUSION

For the reasons discussed above, the trial court erred in vacating the judgment of conviction and ordering a new trial based on the prosecutor's remark during closing argument. This court should reverse the court's order and reinstate the conviction.

Dated this 3rd day of July, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,060 words.

Dated this 3rd day of July, 2013.

_____
Jacob J. Wittwer
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of July, 2013.

_____
Jacob J. Wittwer
Assistant Attorney General