WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

Milwaukee County
Case No. 10-CF-004596
Appeal No. 2013AP000913-CR

BRIAN J. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE DENNIS R. CIMPL,
THE HONORABLE JEFFREY A. CONEN, AND
THE HONORABLE ELLEN R. BROSTOM, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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STATUTES

I. STATEMENT OF ISSUES.

Did the trial court improperly limit the Defendant's *McMorris* evidence?

Answered By The Trial Court - No

Defendant Asserts - Yes

Did the trial court improperly allow "Other Acts" evidence against the Defendant?

Answered by the Trial Court - No

Defendant Asserts - Yes

Was trial counsel ineffective in advising the Defendant that he did not waive his right to appeal *McMorris* evidence by not testifying?

Answered by the Court - No

Defendant Asserts - No

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

The Defendant believes that oral argument is not necessary and the issues can be addressed adequately by briefing.

As to Publication, the Defendant believes that publication would be appropriate. The use of *McMorris* evidence (*McMorris v. State*, 58 Wis.2d 144, 205 N.W.2d 559 (1973)), while not common, is an important issue and usually arises in major homicide cases. The trial court has great discretion on picking and choosing what evidence is allowed in, but has to balance the rights of the defendant to present his/her case. Clarification of the role of the trial court in this regard would be advantageous.

III. STATEMENT ON THE CASE AND JURISDICTION.

The Defendant was charged in Milwaukee County with First Degree Intentional Homicide, Use of a Dangerous Weapon on September 20, 2010. (R-2) Attorney Steven Kohn represented the Defendant prior to and during the trial.

On September 16, 2010, the defendant Brian J. Anderson (hereinafter referred to as "Anderson") resided at 2372 North 58th Street, Milwaukee, Wisconsin. He lived there with several other roommates, including the alleged victim, Joseph Hall (hereinafter referred to as "Mr. Hall") and Jason Hall (Mr. Hall's son). Anderson was a longtime associate and friend of both Mr. Hall and his son.

At the time of the shooting which is the subject of this matter, there was a person by the name of Marshall Provost (hereinafter referred to as "Provost") temporarily living in the property. At that same time, Anderson was dating a girl named Nikita McClain (hereinafter referred to as "McClain"). Anderson came to the belief that McClain was cheating on him with Provost. The record reflects a series of acts engaged in by Anderson to determine if, in fact, this was true.

According to the statement given by Anderson to the police, as well as his subsequent affidavit and his own testimony at the *McMorris* hearing, Anderson was convinced that Provost was cheating with his girlfriend. Therefore, on the day in question, he waited for Provost to come home. Anderson was going to confront Provost with a shotgun on the tip of which Anderson placed an empty milk jug. Further, as indicated in Anderson's statement, as well as at the *McMorris* hearing, it happened that Hall came home first. Hall noticed that Anderson was there with a weapon. A confrontation developed. Anderson indicated that he was fully aware of the dangerous

propensities of Mr. Hall, including allegations or statements made by Mr. Hall of past violent conduct including killing persons, beating up persons, etcetera. Anderson indicated that, even though he tried to get Mr. Hall to back off, Mr. Hall kept coming at him. Anderson indicated that, based on his knowledge and contact with Mr. Hall, he felt that he was in danger of great harm or death if Mr. Hall was able to get his hands on him and, therefore had no choice but to shoot. (R-49: -31; R-50: 1-53)

After Anderson's arrest, he gave a statement to the police, as has been indicated before, wherein he indicated that he shot Mr. Hall because he believed that he had no choice because Mr. Hall was advancing towards him and Anderson felt his life was in danger. Anderson based this belief on his knowledge of Mr. Hall, his violent past and conduct that Mr. Hall engaged in prior to and at the time of the shooting.

An appropriate motion *in limine* to introduce evidence of prior violent acts was filed by the defense regarding Mr. Hall's previous violent conduct. (R-6) The State filed their response (R-7) and there was an extensive *McMorris* hearing conducted by Judge Dennis Cimpl. (R-49 and 50) The defense laid out a substantial number of facts that Anderson indicated that he knew about Hall that led him to fear for his life. The trial court's ruling significantly limited the facts Anderson would be allowed to testify on at trial. (R-50: 69-72)

The State filed their own "other acts" motion to introduce testimony about an incident that occurred about three weeks before Mr. Hall was killed. (R-8) As outlined in the State's brief, they wished to introduce evidence that Anderson overheard McLain's landlord and two other men talking and heard the two men make sexual comments about McLain. The State claimed that Anderson took a pistol and then

confronted and assaulted the men who made the comments. The State believed this evidence went to his motive for killing Mr. Hall; the motive being jealousy over McLain. The State also claimed it showed jealously, possessiveness and that he was capable of severely beating two men. The defense claimed that what the State wanted to show was not at issue at the time of the shooting. They also claimed that this involved different individuals other than the victim, was not relevant, was substantially prejudicial and was not applicable to the Defendant's self-defense claims. The court allowed in the "other acts" evidence with only a brief explanation. (R-53: 10-14) At trial, defense counsel again objected to the use of the "other acts" evidence, but his objection was overruled. (R-65: 78)

At trial, as Anderson indicated in his affidavit (R-34), Anderson did not testify. In giving up his right to testify, Anderson did not believe that he was effectively giving up his self-defense claim. Because the State chose not to use Anderson's statement in its case, there was no evidence or testimony in the record regarding why the shooting occurred, defense counsel could not argue self-defense in his closing. Anderson indicated that he did not understand that and was not advised of that fact. Had he been aware of that, he would have decided to testify. Ultimately the jury convicted Anderson of First Degree Intentional Homicide. (R-29) In the post-conviction hearing, the trial court made a determination that trial counsel was not ineffective.

IV. ARGUMENT.

A. THE COURT IMPROPERLY LIMITED ANDERSON'S *MCMORRIS* DEFENSE

Whether to admit or exclude evidence is within the discretion of the trial

court. On appeal, that decision is reviewed using the erroneous exercise of discretion standard. *State v. Jackson,* 188 Wis.2d 187, 196, 525 N.W.2d 739 (Ct.App. 1994). The appellate court will sustain a discretionary act of the trial court if it finds that the trial court: (1) Examined the relevant facts; and (2) applied the proper standard of law; and (3) using a demonstrated, rationale process, reached a conclusion that a reasonable judge could reach. *State v. Gudenschwater*, 191 Wis.2d 432, 440, 529 N.W.2d 225 (1995).

Wisconsin Statutes §904.04 deals generally with character evidence, prohibiting evidence of character trait to prove that a person acted in conformance with that trait. Generally, Sec. 904.04(2)(a) prohibits introduction of specific crimes or other acts to show a person's character, but then carves out an exception to the prohibition when the acts are offered for a purpose other than proof of character. This is known as an "other permissible purposes" exception. The statute creates an exception to the prohibition for the character of the victim as follows:

> (b) Character of Victim. Except as provided in Sec. 972.11(2), evidence of a pertinent trait of character of the victim of a crime offered by the accused or by the prosecution to rebut the same, or evidence of a character trait of the peacefulness of a victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

When character evidence is permitted, Sec. 904.05, Wis. Stats., provides that the permitted method of proof is by: (1) Evidence of reputation in the form of an opinion; or (2) specific instances of the person's conduct when the character or trait is an essential element of the charge, claim or defense. (Sec. 904.05(2)) How all of this fits in to a claim of self-defense was detailed in the case of *McMorris*. In *McMorris,* the Supreme Court established the current rule that, when the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such a

defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident. When the defendant seeks to introduce such evidence to establish his state of mind at the time of the offense, it must be shown that he knew of such violent acts of the victim prior to the offense. *McMorris,* 58 Wis.2d at 152. Since the *McMorris* decision, a defendant's prior knowledge of the victim's character, either by reputation or specific acts, has been consistently held to be a prerequisite to an admission of such evidence as part of a self-defense claim. *Werner v. State*, 66 Wis.2d 736, 743, 226 N.W.2d 402 (1975). A defendant who establishes a factual basis for the issue of self-defense may testify as to his personal knowledge of prior specific acts of violence by the victim of the assault. *State v. Nevarro,* 2001 WI App. 225, §13, 248 Wis.2d 396, 636 N.W.2d 481. A defendant's state of mind at the time of an alleged offense is relevant to his claim of self-defense. Therefore, in order to introduce evidence at trial of a victim's reputation for violence or past violent acts, a defendant must establish that, at the time of the incident, he knew of that reputation or of those acts.

The basic specific details Anderson sought to be admitted (R-6) and the court's ruling are as follows:

> a) That shortly after July 2010 and his moving in with the Defendant, Mr. Hall told the Defendant that he (Mr. Hall) killed his form drug partner sometime around 1985. The Defendant believes the former drug partner's name to be Randy Dunn. Mr. Hall elaborated by saying that he (Mr. Hall) owed Mr. Dunn money, and that there was a dispute between the two men about Mr. Hall's wife. Mr. Hall proceeded to describe going to Mr. Dunn's home, holding a gun to the back of Mr. Dunn's head, and pulling the trigger, thus killing Mr. Dunn. Mr. Hall referenced killing Mr. Dunn often to the Defendant during the time that Mr. Hall resided with the Defendant.
>
> (Denied by the court)

b) That the Defendant believed that Mr. Hall killed Mr. Dunn because of the specificity of Mr. Hall's description of the murder, and because the Defendant believed that Mr. Hall's three sons, Chris Marinda, Jason Hall, and Matt Hall as well as a man named Marshall Provost, also had knowledge of the murder.

(Denied by the court)

c) That Mr. Halls son, Matt Hall, told the Defendant that Mr. Hall took medication to control his temper and violent outbursts. Further, the Defendant observed medications prescribed to Mr. Hall that the Defendant believed to be used for the aforementioned purpose.

(Allowed by the court)

d) That the Defendant was told that Mr. Hall, in a fit of rage aimed at his (Mr. Hall's) son Chris Marinda, lifted up the son's car while the son was in it and threatened to kill the son. The Defendant believes that Jason Hall and Matt Hall are also aware of this incident.

(Denied by the court)

e) That Mr. Hall told the Defendant that he (Mr. Hall) slashed another individual's throat during a robbery in 1985 or 1986.

(Denied by the court)

f) That Mr. Hall asked the Defendant if "God could forgive a few murders."

(Denied by the court)

g) That Mr. Hall told the Defendant that he (Mr. Hall) threatened some teenagers who were mocking his (Mr. Hall's) wife at a Dunkin' Doughnuts. Mr. Hall stated that he was brandishing a knife when he threatened the teens.

(Denied by the court)

h) That Mr. Hall told the Defendant that Mr. Hall threatened a man who mocked his (Mr. Hall's) wife, and that he used a shotgun to threaten the man.

(Denied by the court)

i) That the Defendant is both personally aware and has been told by others of other incidents of rage-based violence on the part of Mr. Hall.

(Denied by the court)

j) That Mr. Hall told the Defendant that he would hill his (Mr. Hall's) property manager and the property manager's family if he (Mr. Hall) was evicted from his flat on 68th and Clark.

(Allowed by the court)

k) That Mr. Hall told Matt Hall and the Defendant that he (Mr. Hall) would shoot his (Mr. Hall's) son Chris Marinda in the fact if he (Mr. Hall) lost a lawsuit involving both himself and Mr. Marinda. During the same conversation Mr. Hall also threatened to kill his (Mr. Hall's) brother in law who was the individual suing Mr. Hall and Mr. Marinda.

(Allowed by the court)

l) That Mr. Hall would frequently speak to the Defendant of killing his (Mr. Hall's) employer when he (Mr. Hall) would become frustrated with his job.

(Denied by the court)

m) That Mr. Hall, in demanding that a friend of his son return some stolen jewelry, told the friend that "if I would kill my own son and get rid of the boy what makes you think I won't do the same to you." (R-49: 28)

(Denied by the court)

o) That Mr. Hall threatened a fried of his son about fourteen years earlier after Mr. Hall's son gave some stolen jewelry to the boy. (R-49: 26-27)

(Denied by the court)

The record reflects that the court arbitrarily denied Anderson the right to present most of his *McMorris* testimony while allowing bits and pieces of it. (R-50: 69-73) The reasons and distinctions for what was denied or allowed are not clear by any means. The court's decision was short and incomplete. The result was to gut Anderson's defense to his case. Yet, under the rules of the *McMorris* case and subsequent cases, the defendant has a right to present this evidence. The court seemed to engage in a credibility determination which was not appropriate.

The court went far beyond its duty in a *McMorris* issue by making a determination of remoteness; whether a gun was involved or not; denying Anderson the right to disclose that Mr. Hall admitted to Anderson that he (Mr. Hall) had murdered people; denying evidence because the specific date of the event was not known; making a credibility determination; and on and on and on. Making a general statement that a particular act is "too remote" is not an exercise in discretion. Rather, it is setting arbitrary cutoffs without any rhyme or reason. Yet, that is what the court did.

The issue of a *McMorris* hearing is to establish what specific character and/or actual traits the defendant knew of that formed the defendant's state of mind at the time of the shooting. It is not the role of the judge to engage in a credibility determination of the evidence the defendant wants to submit or to determine that the evidence has to rise to a certain level or type before it can be discussed. Those determinations would have been fair game for the prosecution at trial. It was not appropriate at the motion level. Yet, that is exactly what the court did here. Because the court improperly limited a key aspect of Anderson's defense, that defense was gutted and, thus, Anderson was denied a fair trial. The trial judge did not use a reasoned, rational process in denying or admitting what evidence could be used. It did not apply or follow relevant law. Instead, the trial court hopscotched through the evidence. It decided some was not credible. It decided some was too remote without explaining why. It decided some was not admissible because the victim did not have a weapon.

Whether the victim had a weapon at the time of his death is not a factor as to whether evidence of the victim's violent tendencies should be admitted. Whether the victim's statement about God forgiving a few murders is a philosophical question is not a

controlling factor on admitting *McMorris* evidence. Whether a victim's statement is a "hyperbole" is not a factor. This goes on and on. (See: App. B; R-50: 69-783) The court was simply wrong.

While the court allowed the other acts evidence in bits and pieces, it disallowed the major evidence upon which Anderson relied to establish the violent and dangerous tendencies of Mr. Hall. The court disallowed the historical and accumulated knowledge Anderson had of Mr. Hall. The court did all of this without sufficient reasoning and, thus, denied Anderson his defense.

B. THE COURT IMPROPERLY ALLOWED "OTHER ACTS" EVIDENCE AGAINST THE DEFENDANT

The appellate court reviews the admission of "other acts" evidence using the erroneous exercise of discretion standard as outlined in Section A. Other acts evidence is governed by Wis. Stat. §904.04(2). As laid out by the State, the evidence is admissible to show motive and absence of mistake or accident. *State v. Plymesser*, 172 Wis.2d 583, 493 N.W.2d 367 (1992). The three step other acts analysis is laid out in *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998):

1. Is the evidence offered for an acceptable purpose under Wis. Stat. §904.04(2)?

2. Is the evidence relevant?

3. Is the probative value of the other acts substantially outweighed by prejudice?

While this issue was not raised on the Defendant's Post-Conviction

Motion for New Trial and Request for Evidentiary Hearing it was fully briefed at trial and there are no factual disputes, hence the issue can be address on appeal. *Estate of Hegarty v. Beauchaine*, 2001 WI App 300 ¶¶ 11-13, 249 Wis. 2d 142, 638 N.W.2d 355. (R-8, R-9). The issue may also be addressed since it was previously raised and briefed before and a clear ruling was given by the trial court. Wis. Stat. §974.02(2).

Specifically, the court allowed the State to introduce evidence of an alleged beating that occurred approximately three weeks prior to the homicide. (R-8) The allegation is that Anderson, believing his girlfriend was having an affair, climbed on to the roof of her garage and listened to his girlfriend's landlord and two other men talking. He overheard them talk about the girlfriend in a sexual manner. It is alleged that Anderson then left. He returned with a pistol and pistol whipped the two men.

This incident was never reported to the police. This evidence was introduced through the testimony of Matthew Hall, son of the victim and friend of Anderson. Matthew Hall claimed that Anderson told him of the incident. (R-65: 72-76) McClain also alleged that Anderson told her about this incident. (R-66: 60-63)

Anderson contends that the court improperly allowed these "other acts" at trial. First because the evidence is not relevant under the *Sullivan* test. The prior incident does not overlap in fact and involves different victims than the conviction in this case. The evidence does not make the facts of the present case any more true or plausible. These are two separate and distinct incidents.

Secondly, Anderson contends that the probative value of the evidence was substantially outweighed by its prejudicial effect on the jury. As the defense lays out in

its response brief and as we again allege here, the evidence should not have been admissible based on *State v. Gray*, 225 Wis.2d 39, 590 N.W.2d 918 (1998). (R-9: 2) In that case, the court addresses the fear that jurors will judge the defendant based on his prior alleged acts and not on the case at hand. The prior incident in this case was serious and certainly eye opening for the jury. That furthers the argument that its prejudicial effect was enormous. When witnesses testify at trial they normally do not have to reveal the nature of their prior criminal convictions because of its prejudicial nature. Allowing the earlier incident into evidence falls within the same line of thinking. In this instance we do not have a previous criminal conviction; however, the nature of the incident clearly creates a prejudice which is substantially outweighed by any probative value. The incident has nothing to do with any element of the crime and does not go to motive as the State contends.

The State states, and the court ruled, that the evidence was admissible because it provided "context" as to what Anderson did. (R-53: 11) It provided evidence of jealousy and motive. All these are acceptable reasons and might outweigh the prejudice to Anderson in some circumstances; however, all of this misses the point. It is conceded that Anderson shot Mr. Hall, but Mr. Hall was not and had never been the target of Anderson's rage or jealously. Anderson thought that Provost was having an affair with McClain. All this evidence might have been relevant if Provost was the victim, but he was not.

This entire case revolved around the confrontation between Mr. Hall and Anderson. There is no evidence that this confrontation involved any degree of jealously or rage between the two men. Yet, the court allowed evidence against Anderson that had

no direct relationship to what happened between Mr. Hall and Anderson, Anderson was waiting on Provost coming home to confront him when Mr. Hall showed up. Why Anderson was waiting there with a gun could have been explained without all of the evidence of Anderson's alleged beating of two other men weeks prior, but the court allowed it in and the prejudice to Anderson as overwhelming. The reasons the court used to allow this evidence did not apply to the relationship between Mr. Hall and Anderson. Thus, Anderson was denied a fair trial.

C. ANDERSON DID NOT WAIVE HIS RIGHT TO CHALLENGE THE RULING ON THE *MCMORRIS* EVIDENCE BY NOT TESTIFYING

The State's has suggested in previous filings that, even if the trial court was wrong in its rulings on the *McMorris* evidence, this was harmless error because Anderson waived his right to challenge the ruling by not testifying. We totally disagree.

i. THERE IS NO RULING OR FINDING IN THE *WENGER* CASE THAT A DEFENDANT HAS TO TESTIFY AT TRIAL IN ORDER TO PRESERVE HIS RIGHT TO APPEAL A *MCMORRIS* RULING

The case of *State v. Wenger*, 225 Wis.2d 495, 593 N.W.2d 467 (Ct.App. 1999) sets down the procedure that the court must follow in making its original determination of whether *McMorris* evidence can be used at trial. The criteria set forth in *Wenger* is that: (1) Self-defense has to be raised; and (2) There must be a factual basis to support the self-defense claim. Nowhere in *Wenger* does the court state or imply that a

defendant waives the right to appeal the court's ruling on the admission of *McMorris* evidence by not testifying. That would make no sense. If a court denies a defendant the ability to use *McMorris* evidence in his defense, would the defendant then still need to somehow testify at the trial in order to preserve his right to appeal that decision? No. To so deny the defendant the right to appeal an adverse evidentiary decision unless he testifies is to require a defendant to testify at trial in some manner in order to preserve his appeal rights. That is wrong.

ii. IF, IN FACT ANDERSON WAIVED THE RIGHT TO APPEAL THE *McMORRIS* RULINGS BY NOT TESTIFYING, THEN ANDERSON'S TRIAL COUNSEL WAS INEFFECTIVE AND THE TRIAL COURT MADE AN ERRONEOUS DECISION

When Anderson made the decision not to testify, his attorney told the court:

> . . . and based on what I've just said and what has been presented to date and what could or could not be presented in his testimony, he has opted not to testify.
>
> (R.67: 47)

Later, when the trial court was questioning trial counsel if Anderson's decision not to testify was in Anderson's best interest, trial counsel stated:

> Based on the prior rulings of the court – yes.
>
> (R.67: 49)

In his affidavit in support of the post-conviction motion, Anderson

specifically asserted that trial counsel told him he could appeal the *McMorris* issues even if he did not testify. (R-34, par. 6)

At the time of the post-conviction motion hearing, the initial discussion focused on whether trial counsel gave proper advice on whether Anderson could appeal the *McMorris* issues. The court stated:

> If Mr. Kohn's advice . . . if it turns out the evidence shows that Mr. Kohn advised Mr. Anderson not to testify, erroneously believing that that would not waive the appellate issue, than I think that . . . I think that's where the crux of the issue is.
>
> (R.71: 5)

Judge Brostrom went on to say that she would not find that Judge Cimpl's *McMorris* rules were erroneous.

(R.71: 5)

At the post-conviction motion, Attorney Kohn testified concerning the issue of the possible waiver of the right to appeal the *McMorris* issues if Anderson did not testify. He said:

Q. Did you give him advice in that regard:

A. I did, and I believe I stated it on the record, and that was that I did not believe he was waiving his ability to appeal Judge Cimpl's *McMorris* ruling if he did not testify.

Later on Attorney Kohn testified in part:

> . . . it was a difficult situation, because we had to make certain decisions, and I believe, quite frankly, one of the reasons he chose not to testify may not have had to do with the issues we're talking about right now, but may have had to do with the fact that I told him I believed if he did not testify, he was not waiving his ability to appeal Judge Cimpl's *McMorris* ruling, which I put on the records as well, if I recall.
>
> (R-71: 24)

Following this testimony, Judge Brostrom indicating that due to the lack of on point case law on the issues of *McMorris* waivers and trial counsel's analysis of why he felt the issue was not waived, she could not find that trial counsel's advice was below the standard of care that would render him ineffective. (R-71: 27)

Any argument that Anderson has waived his right to appeal the *McMorris* issue is wrong and is certainly contrary to the trial court's determination. If it is determined, however, that contrary to the advice of trial counsel, which Anderson relied upon when deciding not to testify at trial; and, contrary to the determination of the trial court that Anderson had not waived his right to appeal the adverse evidentiary ruling by not testifying at trial; that Anderson has, in fact, waived his rights, then Anderson is entitled to a new trial. This is because his attorney gave him very incorrect advice upon which Anderson relied in making a determination of giving up a very important right, i.e., his right to testify and also that advice resulted in Anderson giving up his right to appeal the issues at the core of his defense.

Further, Anderson is entitled to a new trial because the trial court made a determination that Anderson did not waive his appeal rights on the *McMorris* issue by not testifying.

V. SUMMARY

This is a sad case. Anderson killed one of his closest friends, Mr. Hall.

Mr. Hall was not the one Anderson had a beef with. Mr. Hall just showed up at a time that Anderson was upset and waiting to confront Marshall. That Anderson shot Mr. Hall is not in dispute. The issue in dispute is "Why".

The trial court's pretrial rulings gutted Anderson's self-defense motion. The ruling limited Anderson to being able to use only a few minor incidents to explain why Anderson had a fear of Mr. Hall in a violent confrontation. Anderson was not looking to fight with Mr. Hall. Per Anderson, Mr. Hall pushed the issue by coming at Anderson even though Anderson was armed with a shotgun. Bused upon Anderson's knowledge of Mr. Hall and his past relationship, Anderson knew how dangerous Mr. Hall was and, when backed into a corner, felt his life was threatened and he had to shoot. Anderson was never allowed to present the substance of his case. His beliefs regarding Mr. Hall were his whole defense. This was unfair and cause Anderson irreparable harm in his defense.

Further, the court went too far in allowing in other acts evidence of the alleged confrontation Anderson had with two other men at his girlfriend's house. The fact that Anderson was jealous and obsessed with his girlfriend could have been presented without evidence of the alleged beating. It was clear that Anderson was waiting on Provost to come home to confront him regarding his girlfriend when Mr. Hall showed up. What happened then was not directly related to Anderson's jealously over his girlfriend. None of Anderson's issues with other men being around his girlfriend had anything directly to do with Mr. Hall. Mr. Hall was a friend of Anderson and had no relationship with Anderson's girlfriend. He had nothing to do with the alleged beating two weeks before.

By allowing in the evidence, the prejudice to Anderson far outweighed the probative value to the State. The State did not need to go into details to show that Anderson was jealous or paranoid. They had plenty of other evidence of that without having to use the evidence of the beatings. Certainly if Marshall was the victim, the probative value might have outweighed the prejudice, but he was not. This resulted in an unfair trial for Anderson.

Finally, while we believe that both the trial court and the trial attorney were correct in ruling and advising Anderson that he was not waiving his appeal rights by not testifying if that is wrong, than Anderson is entitled to a new trial due to ineffective assistance of counsel. In addition, the trial court made an erroneous decision in that regard. Waiving the right to appeal a ruling that was at the heart of Anderson's defense was of vital concern to Anderson. If he was improperly advised and then denied this vial right, he was denied effective assistance of counsel.

For all of the foregoing reasons, we hereby request that the court find that there were substantial errors made in the evidentiary rulings; that the errors were substantial; and that as a result Anderson was denied a fair and just trial.

Respectfully Submitted,

HART LAW OFFICE

/s/

_____

Richard H. Hart
State Bar No. 1017217
Attorney for Brian J. Anderson

Date: November 25, 2013

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

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Case No. 10-CF-004596
Appeal No. 2013AP000913-CR

BRIAN J. ANDERSON,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)
ELECTRONIC FILING OF BRIEF

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any which complies with the requirements of s. 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.

HART LAW OFFICE

/s/

Richard H. Hart
State Bar No. 1017217
Attorney for the Defendant-Appellant

Date: November 25, 2013

CERTIFICATION OF FORM
AND LENGTH OF APPELLATE BRIEF

I certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats., for a brief produced using the following font:

> Proportionate font; 12 characters per inch; double-spaced; 1.5-inch margin on left side and 1-inch margins on the other 3 sides. The length of this brief is 5,152 words, not including the Table Of Contents and the brief certification.

HART LAW OFFICE

/s/

_____

Richard H. Hart
State Bar No. 1017217
Attorney for the Defendant-Appellant

Dated: November 25, 2013

WISCONSIN COURT OF APPEALS
DISTRICT I

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Plaintiff-Respondent,

-vs-

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Appeal No. 2013AP000913-CR

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Defendant-Appellant.

APPENDIX

EXHIBIT NO.	**EXHIBIT**	**RECORD LOCATION**
A	Criminal Complaint Dated September 20, 2010	R-2
B	Partial Transcript of Motion Hearing of January 24, 2011, Before the Honorable Dennis R. Cimpl	R- 50
C	Order From Hearing On March 22, 2013, Dated April 8, 2013 by Honorable Ellen R. Brostrom	R-42

APPELLANT'S BRIEF APPENDIX CERTIFICATION

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 x. 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 or persons, specifically including juveniles and parents of juveniles, with a notation that the portion of the record have been so reproduced to preserve confidentiality and with appropriate reference to the record.

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/s/

_____

Richard H. Hart
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Dated: November 25, 2013

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-vs-

Milwaukee County
Case No. 10-CF-004596
Appeal No. 2013AP000913-CR

BRIAN J. ANDERSON,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)
ELECTRONIC FILING OF APPENDIX

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that:

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

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

HART LAW OFFICE

/s/

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State Bar No. 1017217
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Date: November 25, 2013