STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Appeal No. 2014-AP-1758
Circuit Court Case No. 12-CF-254

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

WADE M. RICHEY,

Defendant-Appellant.

On Appeal from the Circuit Court of Barron County,
Hon. J. Michael Bitney, Circuit Judge, presiding

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

I. Did the trial court err in excluding Mr. Richey's health care provider records?

Trial Court Decision: The trial court acknowledged that the health care provider records had been timely filed under Wis.Stat. §908.03(6m), but held that any statements that Mr. Richey made to his health care providers in those records were not admissible, and that the records themselves could not be admitted unless the statements were redacted.(R.112,p.196-197).

II. Was the improper exclusion of the health care provider records prejudicial or harmless error?

Trial Court Decision: The trial court did not consider the exclusion of the records as error.

III. Were the judge's post verdict, but pre-sentencing, communications with the jurors plain error?

Trial Court Decision: The trial court judge acknowledged that he met with jurors after verdict but before sentencing. Judge also acknowledged that letter from juror to court, which was apparently prompted by the meeting, could raise some concerns on the part of the Defendant-Appellant. But judge denied motion for mistrial or request to re-poll jury concluding that his meeting with jurors was not objected to and would not affect his decision on sentencing.(R.116,p.5-13).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the factual and legal issues raised in this appeal. Accordingly, oral argument is not required. Wis.Stat. §809.22.

Publication is appropriate under Wis.Stat. §809.23 because it would clarify the issue of admissibility of medical records and the statements therein. Publication

would also help clarify or develop the law with regard to judicial interaction with jurors post-verdict but before sentencing. Such a practice appears to be something that frequently occurs and there should be some guidance.

STATEMENT OF THE CASE

This case arises from a July 13, 2012 single vehicle accident in Barron County. The Defendant-Appellant, Wade Richey, was driving a Ford Bronco when he lost control and crashed into a ditch. Two juveniles, JRR and TAS, were riding in the open back bed of the vehicle without a seat or seatbelts. TAS died from his injuries and JRR was significantly injured.

Mr. Richey was charged with Homicide by Negligent Operation of a Vehicle(Wis.Stat. §940.10(1), 939.50(3)(g)), Reckless Driving Causing Injury (Wis.Stat. §346.62(3), 346.65(3)), Reckless Driving Causing Great Bodily Harm (Wis. Stats. §346.62(4), 939.50(3)(i)), and Homicide by Intoxicated Use of a Vehicle - Restricted Controlled Substances (Wis.Stat. §940.09(1)(am)).(R.9;16;23).

Upon Mr. Richey's motion to dismiss multiplicitous counts, a Third Amended Information was filed setting forth two charges, Homicide by Vehicle - Use of Controlled Substance and Reckless Driving Causing Great Bodily Harm.(R.41,55). Mr. Richey was found guilty on both charges after a three day jury trial February 25-27, 2014.(R.111; 112;114;79;80).

Prior to sentencing, Mr. Richey filed a Motion for Mistrial or in the Alternative a New Polling of the Jury and

for Recusal of the Trial Court.(R.88). The basis for this Motion was a letter which a juror wrote to the trial judge stating, in part:

> Thank you for offering us, the Jurors the opportunity to share our thoughts and/or concerns with you prior to the sentencing date....(R.87;App.31).

The trial court denied Mr. Richey's motion holding, in part, that there was no objection to the judge's statement that he was going to meet with the jurors after the verdict; that no juror suggested what type of sentence should be imposed; and that neither the letter nor anything that happened in the jury room influenced the court with regard to the sentence.(R.116,p.5-13).

Mr. Richey was sentenced to ten years on the conviction for Homicide by Intoxicated Use of a Vehicle - Restricted Controlled Substances (5 years confinement, 5 years extended supervision), and 3 years on the Reckless Driving Causing Great Bodily Harm conviction (1.5 years confined, 1.5 years extended supervision), consecutive.

This appeal follows.

STATEMENT OF FACTS

The facts of the accident were disputed at trial. The State maintained that Mr. Richey had methamphetamine in his system and was driving at a high rate of speed, in a vehicle that was poorly maintained and that he knew, or should have

known, had brake problems, with two juveniles riding in the open bed of the vehicle without a seat or seat belts.

The defense maintained that Mr. Richey had not taken any meth. He showed no signs of impairment at the accident scene or afterward in the ER (R.112,p.189-197), and that if any meth appeared in his blood work it was the result of a false positive due to his asthma medication and over the counter cold medications he was taking (R.112,p.145,147-149). Mr. Richey denied speeding or driving erratically. (R.112,p.184,199-200, 205). He indicated he did not know that the vehicle had any brake problems until he went to brake for an intersection but the brakes didn't work. The pedal went straight to the floor and the vehicle would not stop.(R.112,p.182-188). He maintains he attempted a variety of maneuvers to slow or stop the vehicle which included going into the ditch. He was not successful and the vehicle crashed. ***Id.***

Additional facts will be provided as relevant to each argument section.

ARGUMENT

I. IT WAS AN ERROR OF LAW FOR THE TRIAL COURT TO REFUSE TO ADMIT HEALTH CARE PROVIDER RECORDS WHICH HAD BEEN PROPERLY NOTICED BY THE DEFENDANT UNDER WIS.STAT. §908.03(6m).

While Mr. Richey was on the stand, defense counsel provided Mr. Richey with a copy of his ER report which had previously been filed pursuant to Wis.Stats.§ 908.03(6m), and started to question him about statements he had made to the ER doctor as outlined in the medical record.(R.112, p.189-190). The State objected on the basis of hearsay.(R.112,p.190). The court determined that sub.(6m) did not permit hearsay testimony within the records (R.112,p.193), so that Mr. Richey could not read from the records, and that the records themselves would have to be redacted to remove his statements to the health care provider.(R.112,p.196). The court held:

> THE COURT: Well, yes, you can use them during your closing argument and it alleviates the necessity of calling somebody in as a medical records custodian. That's what the statute was intended to do, was to lessen the amount of red tape to get these documents actually in the courtroom. But if you want somebody to come in and talk about the content of them, they need to be either a health care provider or someone else who was talking about that these were generated for purposes of diagnosis or treatment and then talk about what the patient said to that physician or whatever as to how he got there, what happened to him, what the nature of his injuries were and how they were sustained.
>
> MR. HEIT: So can I use them in my closing argument?
>
> THE COURT: Well if they come in as an exhibit, why can't he talk about what's in the records? That's part of the evidence. Whether they go to a jury or not is another matter, but if these -- if these documents are going to come in as an exhibit, it's evidence.
>
> MR. HEIT: Right.

> THE COURT: And he can argue from the medical report what's in there, but he's limited to what's in the exhibit.
>
> MS. JENSWOLD: Then I'll object and ask him to redact. Those statements shouldn't be -- that's the whole point. Those are hearsay statements. He's essentially offering his client's statements made -those are out-of-court statements. Whether they're made by his client or not, those are still hearsay statements, and he's not arguing they fit within -- that's hearsay within hearsay, and he's not coming up with an exception that says that those should be admitted.(R.112,p.194-195).
>
> . . . . . .
>
> THE COURT: Mr. Heit, it's going to be the ruling of the Court that unless you can come up with one of the other stated exceptions under 908.03 that this witness will not be allowed to testify about the medical records that are in Exhibit 106 [sic]. Again, what you have accomplished by prefiling those with the Court is eliminating the need for a records custodian to come in and authenticate them and nothing more. Absent a stipulation from counsel that these medical records will be admitted into evidence without either being redacted or even with being redacted, you're going to have to come up with another exception in the hearsay rule to permit this witness to testify about these medical records.(R.112,p.196;App.15).

The trial court erred in excluding Mr. Richey's health care provider records. The court held that before anyone could testify to the content of them [or read the content of them to the jury], then it would have to be a health care provider or someone else that could testify that they were generated for the propose of diagnosis or treatment and then talk about what the patient said to the physician, how he got there, what the nature of his injuries were and how they were sustained.(R.112,p.193-194).

This was an error of law contrary to Wis. Stat. §908.03(6m), which provides:

> (b) Authentication witness unnecessary. A custodian or other qualified witness required by sub.(6) is unnecessary if the party who intends to offer patient health care records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:
>
> > 1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian.
> >
> > 2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

There is no dispute that this process was followed in this case. Thus, the records should have been admitted into evidence. Admissibility of hospital records as an exception to hearsay was discussed in ***Hagenkord v. State***, 100 Wis. 2d 452, 460, 302 N.W.2d 421(1981):

> There is no question of admissibility of these hospital records under the Wisconsin Rules of Evidence. Even when a doctor or other declarant who furnishes such medical or hospital services is actually available and does not testify as to his entries and although no record custodian appears to vouch for the regularity of the records, hospital records are not excluded as hearsay. They are specifically excepted from the rule against admission of hearsay, provided that a copy certified by the record custodian is filed with the court ten days prior to trial and a notice of the filing is given to all parties. Secs. 908.03(6m)(a) and 910.03, Stats. Hospital records so introduced in compliance with sec. 908.03(6m)(a) are

> self-authenticating by operation of sec. 909.02(11). The defendant acknowledged that these procedural requirements were fully complied with. Thus, on an evidentiary basis, as distinguished from constitutional grounds, the records were properly received.

There was no dispute that the procedural requirements for Mr. Richey's health care provider records were fully complied with. Thus, the records should have been admitted. In ***Hagenkord*** the Court discussed the unique reliability and trustworthiness of hospital records:

> Basically, certain types of evidence are excepted from the hearsay rule because they are thought to bear sufficient indicia of reliability that, upon proper authentication, they may be admitted into evidence without the accompanying testimony and presence for cross-examination of their maker. Depending on the degree of reliability, some of such evidence may satisfy the strictures of the Constitution which guarantee the right of confrontation.
>
> In respect to the hearsay rule, a hospital record clearly falls within the category of evidence that is so reliable that not only factual observations recorded in hospital records but medical opinions and diagnoses may be admitted into evidence upon compliance with the procedural rules even though the declarants, the makers of the records, are available for cross-examination.
>
> The unusual reliability and trustworthiness of hospital records was recognized by this court's adoption of Rule 908.03(6m)(a), 67 Wis.2d xvii. The reasons for the special credence and treatment given to hospital records, even in the absence of the supporting testimony of the makers of the records, are explained in 6 Wigmore on Evidence, sec. 1707, pp.51-2. Wigmore states:
>
> > "Sec. 1707. Hospital records. The medical records of patients at a hospital, organized on the usual modern plan, deserve to be placed under the present principle. They should be admissible, either on identification of the original by the

> keeper or on offer of a certified or sworn copy. There is a necessity (sec. 1421 supra); the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a circumstantial guarantee of trustworthiness (sec. 1422 supra); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists.
>
> "Accordingly, modern legislation respecting regular entries (sec. 1561a supra, Chadbourn rev.) is now applied to hospital records, subject to various limitations noted below."

McCormick on Evidence, sec. 313, p.730 (1972 ed.), also emphasizes the unusual degree of reliability which can be placed upon hospital records because of the standardized type of record keeping and because life and health depend upon the accuracy of such records. See also ***Holz***, supra, p.1003.

This court, in ***Rupp v. Travelers Indemnity Co.***, 17 Wis.2d 16, 22, 115 N.W.2d 612 (1962), has commented upon the societal costs in terms of disruption of hospital and medical administration if the large number of the participants necessary to the making of even a single hospital record were obliged to be called as witnesses. Moreover, that case also pointed out that such a witness "no doubt, would be unable to recall any independent recollection of his particular entry other

> than it was in his handwriting and was true."(P. 22, 115 N.W.2d 612)
>
> Accordingly, the hearsay exception in respect to hospital records, as scholarly works and a specific holding of this court show, has been given attributes of unusual reliability and trustworthiness, and consideration has been given to the countervailing practical considerations which would be involved were it necessary to call all of the original witnesses. ***Hagenkord***, 100 Wis.2d at 469-71.

While a confrontation clause case and addressing the victim's, as opposed to the defendant's, hospital records, the Wisconsin Supreme Court's analysis in ***Hagenkord*** is equally applicable here. Hospital records have attributes of unusual reliability and trustworthiness and, as such, are excepted from the hearsay rule and should have been admitted. No further testimony or medical witness was required for the records, and the statements within them, to be admitted. Any concerns about multiple hearsay are addressed in the underlying assumptions about the medical records and the information therein, including the patient's statements to medical personnel.

Even if not already accounted for in the medical records exception itself, the State and the court's concerns of multiple hearsay were unfounded because the statements within the medical records are also excepted from hearsay under Wis.Stat. §908.03(4) which provides:

> (4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical

> diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The court itself recognized that this exception existed, along with (6m), but still refused to accept the records:

> It's my belief that 908.03(6m), if the documents are properly filed in advance, eliminates the need for a medical records custodian to come in and authenticate or verify the authenticity of the records. What I think we're addressing here is whether or not under (4), information about what happened to this young man and whether he was treated or not is admissible as an exception to the hearsay rule.

However, despite acknowledging both of these exceptions to the hearsay rule, the court still held:

> The exception that you're stating under sub (6m)...allows the records to come in but doesn't allow hearsay testimony within the records to be admissible...I think you need something in the nature of either a physician or some kind of health care provide who actually provided the treatment to this young man to talk about what he gave in terms of a subjective narrative of what occurred or what his injuries were or how they were sustain to be allowed to testify about the actual content of the report itself.(R.112,p.193).

This holding is in error because (6m) addresses this very concern regarding any statements within the record itself. The records, and the statement within them, should have been admitted without any further foundation or exception.

Even if, *arguendo*, separate analysis was required because Mr. Richey's statements could be classified as hearsay within hearsay, the court still erred because the proper application of both (4), as specifically referenced and acknowledged by the court, in conjunction with (6m) makes these records, and Mr. Richey's statements therein for the purpose of medical treatment, admissible.

A very similar example is outlined as a "textbook" multiple hearsay analysis in the Wisconsin Practice Series, §805.1, Multiple hearsay:

> The rule, then, was intended to deal generally with the problem of multiple hearsay and did not set any limit on the permissible number of hearsay levels. As long as each level satisfies the hearsay rule, there are sufficient guarantees of reliability to warrant admission. Problems involving an attenuated hearsay "chain" should be directed at weight or, where appropriate, considered under Wis.Stat. §904.03. The real challenge of multiple admissibility is correctly analyzing what is being asserted at each level and how the statements are being used in evidence.
>
> For example, assume that a hospital record contains notes by a nurse to the effect that a private ambulance attendant informed her that while in the ambulance the patient said that he had attempted suicide with a gun. This example contains three levels of hearsay, each of which assert something very different. Starting with the first statement in chronological order, the hearsay problem is as follows:
>
> > Level 1: The patient asserts that he was injured when he attempted suicide; this is in the form of an oral statement made by the patient to the ambulance attendant.
> >
> > Level 2: The ambulance attendant asserts that the patient told him that the wound occurred when he

attempted suicide; this is in the form of an oral statement made by the ambulance attendant to the nurse.

Level 3: The nurse asserts that the attendant told her that patient told him that the injury occurred when the patient attempted suicide; this appears as a written note made by the nurse in the hospital record.

The hearsay analysis turns upon what the proponent is trying to prove with the hospital record.

Assume that the patient later sues the gun manufacturer in a products liability action alleging that the gun accidentally misfired. The gun manufacturer intends to introduce the hospital record to show that the injury occurred during a suicide attempt, not because of an accidental misfire. As we will see, the proponent is using the record as triple hearsay. Each level must be brought within an exception or admitted for a relevant nonhearsay purpose. Although purely a matter of personal preference, it is suggested that multiple layers of hearsay are analyzed most effectively by starting with the last layer and moving backward in time, as it were, to the initial layer.

Level 3 is hearsay because the manufacturer is offering it for the truth of the matter asserted; i.e., that the attendant told the nurse that the patient had told him that the injury occurred during a suicide attempt. This written statement by the nurse would seem to fall within Wis.Stat. §908.03(6m), the exception for health care provider records.

Level 2 is also hearsay. The manufacturer is offering the ambulance attendant's oral statement to the nurse for the truth of the matter asserted; i.e., that the patient told him that he had injured himself during a suicide attempt. This statement appears to fall within Wis.Stat. §908.03(4), statements made for purposes of medical diagnosis or opinion.

Level 1 is also hearsay because the manufacturer is offering it to prove that the injury did in fact occur during a suicide attempt. It is admissible as an admission by a party opponent, Wis.Stat. § 908.01(4)(b)(1).

> Note that in the example just given, the multiple layers of hearsay are reminiscent of a chain of custody regarding information relating to the shooting. The patient passed the information to the attendant who gave it to the nurse who wrote it in the report. The truth of the matter asserted is very different at each level. Nor is this exercise limited to the law school evidence class. A failure to break down the multiple hearsay into its constituent parts may result in a serious misunderstanding of the hearsay nature of the problem.[footnotes omitted].

Applying this analysis to Mr. Richey's statements in the medical records – the records themselves are excepted from hearsay under §908.03(6m) and his statements to the ER personnel contained in those records are likewise excepted under §908.03(4). Thus, either through sub.(6m) alone, or in combination with sub.(4), both Mr. Richey's ER records and his statements within them should have been admitted.

And once admissible, they could be read in for the jury by anyone - - including Mr. Richey himself as counsel attempted. While a confrontation clause case and not directly on point, the case of ***State v. Ellington***, 2005 WI App 243, ¶12-14, 288 Wis.2d 264, 707 N.W.2d 907 is instructive. In the discussion of medical records, the court of appeals said

> As noted, Ellington complains that he was denied his right to confront the witnesses against him because the trial court permitted the detective to read to the jury excerpts of medical records that were already in evidence....First, as we have seen, the certified medical records were received by the trial court without objection. Certainly, the jurors could have read the pertinent excerpts, and, also, the prosecutor

> or defense counsel could have read to the jury excerpts from those records. Ellington does not explain why any witness could not also read pertinent excerpts to the jury. Generally, the lawyer is the best reader in the courtroom, but there is no rule or doctrine that prevents the lawyer from asking a witness to read to the jury material that is in evidence.[emphasis added].

It was error to exclude the records and error to prohibit Mr. Richey from reading from the records. Whether a statement is admissible under a hearsay exception is a question of law this court reviews de novo. ***State v. Stevens***, 171 Wis.2d 106, 111-112, 490 N.W.2d 753(Ct.App.1992), holding: "The question of admissibility of hearsay evidence is one of law. See ***Christensen v. Economy Fire & Casualty Co.***, 77 Wis.2d 50, 55, 252 N.W.2d 81, 84 (1977). The issue here is admissibility under one or more of the hearsay exceptions. Thus, we are not bound by the trial court's conclusions on the admissibility of the hearsay testimony, and as a matter of law we decide it de novo. See ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992)."

II. THE ERROR IN FAILING TO ADMIT THE HEALTH CARE PROVIDER RECORDS WAS PREJUDICIAL.

Even though properly filed, the court excluded Mr. Richey's medical records because they contained statements he made to medical personnel. When evidence has been erroneously excluded, this court will independently

determine whether that error was harmless or prejudicial. ***State v. Patricia A.M.***, 176 Wis.2d 542, 557, 500 N.W.2d 289 (1993). Because the records were not in evidence Mr. Richey was prejudiced. The jury did not see them or hear anything that was contained in them. Counsel was not able to argue as to the medical records and what they established and/or refuted. The court was not able to rely on the information in the records when sentencing.

The records indicate, in part:

> ...He states he was belted and his seatbelt didn't work. He states the brakes didn't work, so he put the vehicle into the ditch to try and stop it. He did hit the windshield. He denies any loss of consciousness ....He is complaining of pain to the left chest, some pain to the neck, and the tailbone area as well.(R.39,p.5;R.112,p.189;Defense Exhibit 102,p.2).

This shows that his story was consistent – from the very aftermath of the accident through the PSI. He was not making up this story to avoid trouble. The exclusion of the records was prejudicial because the statements contained therein, which went to the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, were relevant to the jury's determination of criminal negligence. Were his actions criminally negligent, or, was there an emergency situation as he testified (i.e., brakes failed and he drove into ditch to try to stop)?

But the records are important as much for what they do not indicate as for what they do. Notably, there is no mention in those records of any signs of impairment. There is no mention of any signs of meth usage. There are no health symptoms or characteristics noted that are consistent with meth usage. This was a key fact in the case. The defense maintained that even *if* methamphetamine was in Mr. Richey's system in the trace amounts identified by the State, 1.) It was a false positive from cold medicine, and 2.) the accident would have happened anyway as a result of the unanticipated brake failure. The medical records were consistent with, and were strong evidence of, both the lack of impairment at the time of the accident (i.e. accident the result of something else such as brakes going out) and Mr. Richey's testimony that he was not a meth user. These records went directly to the elements of Mr. Richey's affirmative defense.

At the accident scene, Mr. Richey did not show any signs of impairment. Trooper Prohovnik testified that he conducted the field sobriety tests and there was no sign of impairment.(R.111,p.202). Mr. Richey voluntarily consented to a routine blood draw as the result of the serious accident.(R.111,p.152). His blood was drawn at the hospital at 8:05 p.m. (R.11,p.158). Deputy Hulback who spoke with Mr.

Richey both at the scene and at the hospital at the time of the blood draw testified that Mr. Richey did not appear to be under the influence of an intoxicant.(R.111,p.160). He was seen in the ER at the time of the blood draw as indicated by the 8:43 p.m. time mark on his medical record and the 1900 hours order sheet, and the 20:15 leaving AMA sheet.(R.39). Given the significance of the accident, and the fact that he was there with an officer for a blood withdrawal, it is safe to assume that had there been any evidence of impairment, or any evidence of substance use, it would have been noted in the medical records. But there is no such notation.

That the absence of the records impacted the jurors is borne out in the letter from Juror Fisk where she indicates that the jurors questioned what happened with Mr. Richey at the hospital:

> My concern in this case is the part that sate "Controlled Substance". I do not understand how the prosecution could possibly be allowed to make this the target area to hang the Homicide charge when there was absolutely no impairment whatsoever. If there was impairment then yes absolutely. But as Trooper Prohovnik and the other officer on the scene testified, there was no impairment found while conducting the field sobriety test. I also question another area, why was his blood drawn later if there was no impairment at the accident site? Is this standard procedure?...The trace amount of methamphetamine found in his system, could have quite possibly been a false-positive test result of some over the counter medication....These points are what the jurors solely deliberated on trying to find a way around the guilty verdict.(R.87;App.31)

Had the jurors seen the medical records which show no sign of impairment and no signs of any meth usage or effects, it would have additionally contributed to their reasonable doubt that the meth was a false positive and that the accident would have happened anyway. The State Lab of Hygiene witness testified that the result was 110 nanograms per milliliter of methamphetamine.(R.112,p.92,107). Amphetamine, which is also found with methamphetamine, was below the detection limit. (R.112,p.113-114,119,122). The defense expert had testified that the presence of amphetamine is necessary to confirm methamphetamine. Here, because the amphetamine was below the level of detection then there was no confirmation of amphetamine and therefore no confirmation of methamphetamine. (R.112,p.140-141, 143,159-161). The defense expert further opined that the medications Mr. Richey stated he was taking could have led to false positive for meth and that the level was so low it would likely not lead to impairment.(R.112,p.146-148,149-150,161-164). The State Lab witness disagreed and testified that the meth result was still valid.(R.112,p.219-223). Had the medical records been admitted and had defense counsel been able to use them in his argument to the jury it would have gone directly to the points the jurors were deliberating.

Also, the medical records corroborate Mr. Richey's testimony that the brakes didn't work. They corroborate his testimony that he refused further treatment in the ER because there was only one doctor present in the ER bouncing between the three rooms.(R.112,p.198).

Finally, there were references in the PSI, and upon which the judge stated he relied in part on sentencing, that Mr. Richey was a meth user, which he denied.(R.116,p.31-32)[1]. Had the medical records been admitted and had defense counsel been able to use them in his argument to the court as part of the sentencing, the lack of any signs of meth usage could have strengthened and corroborated his denial and countered the prejudicial references to his purported meth usage.

III. THE JUDGE ERRED IN MEETING WITH THE JURORS AFTER THE VERDICT BUT BEFORE SENTENCING. THE ERROR WAS COMPOUNDED WHEN, ON A MOTION FOR MISTRIAL, THE JUDGE MISCONSTRUED THE APPLICABLE STANDARD AND HELD THAT SUCH CONTACT WAS ACCEPTABLE AS LONG AS IT DID NOT INFLUENCE HIS SENTENCING DECISION. SUCH CONTACT, EVEN IF NOT PREJUDICIAL, WAS PLAIN ERROR REQUIRING RELIEF.

After accepting the jury's verdict, the court stated:

> Ladies and gentlemen of the jury, I want to thank you very much for your service. I know this has been very difficult. It's been a very emotional case for

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[1] "In reaching my sentencing decision this afternoon, I have read, heard, and considered both the PSI prepared by the department..." (R.116,p.43).

> everyone involved. I know that you've rendered your decisions in a conscientious and thoughtful manner. I will meet with you shortly back in the jury deliberation room.(R.114, p.55).

Neither party objected at that time. On April 24, 2014, defense counsel received a copy of a letter that one of the jurors had filed with the court on April 21st.(R.87;App.31). That letter said, in part:

> "Thank you for offering us, the Jurors the opportunity to share our thoughts and/or concerns with you prior to the sentencing date. My intent in writing this letter is to express why I feel this young man is being unfairly charged on the Count 1 charge: Homicide by vehicle use - Controlled Substance.
> . . . . .
>
> I understand the prosecutions job is to search out cause and justice for the victim and their family and I fully respect that. I also feel the prosecution had sound evidence and should hold the defendant accountable for his criminal negligence in driving with minors unbelted. What I did not feel was at all fair to the defendant and his case was the way question #3 in Count 1 charge was stated: "Did the defendant have methamphetamine in his system" That was clearly written to be a "yes" or "no" answer. This, I felt was railroading the Jurors into the answer the prosecution wanted. I felt in doing this, it left no room or regard for the fact that a). The trace amount of methamphetamine found in his system, could have quite possibly been a false-positive test result of some over the counter medication. b). Regardless of the actual test results origin, it caused absolutely no impairment and therefore should have been completely irrelevant to this case. These points are what the jurors solely deliberated on trying to find a way around the guilty verdict.
>
> I sincerely hope you will take these concerns into consideration when sentencing this young man. I do not know Mr. Richey or his family, but I do know an injustice when I see it.

Thanks again for your time and consideration."(R.87).

Juror Fisk's statement that the court had extended the jurors an opportunity to share their thoughts prior to sentencing caused defense counsel to believe that sentencing was discussed in some fashion with the judge, outside the presence of counsel or the defendant. It also raised the question as to the verdict itself, expressing reasonable doubt by Juror Fisk and possibly others, and disclosing jury deliberations. As a result, defense counsel filed a Motion for Mistrial or in the Alternative a New Polling of the Jury and for Recusal of the Trial Court.(R.88).

If, as Juror Fisk stated, the court offered the jurors the opportunity to share their thoughts and/or concerns, it would appear that the court had, in effect, continued or re-opened polling. Having invited further comment the substance of those comments cannot be ignored especially where, as here, they address deliberations and implicate concerns as to reasonable doubt and dissent.

If there is juror dissent at the time a verdict is rendered, the court can order a new trial:

> Wisconsin Supreme Court decisions have assumed that the right to trial by jury guaranteed in the state constitution includes the right to a unanimous verdict in criminal trials. ***Holland v. State***, 91 Wis.2d 134, 138, 280 N.W.2d 288, 290 (1979) cert. denied, 445 U.S. 931, 100 S.Ct. 1320, 63 L.Ed.2d 764 (1980). If the integrity of the jury trial is to be preserved, a juror with reasonable doubts about a defendant's guilt cannot

> agree to a guilty verdict in violation of his conscience and sense of right. ***State v. Austin***, 6 Wis. 203, 205-06 (1858). Consequently, at any time before a verdict is received and properly recorded, a juror may dissent although previously agreeing. ***Id. State v. Cartagena***, 140 Wis. 2d 59, 61, 409 N.W.2d 386 (Ct.App. 1987)

The court had accepted the jury's verdict but, upon continued discussions with the jurors, apparently invited, at least in the mind of one juror, comment on the jury's thoughts and opinions as to guilt and expressed dissent. The judge had, in effect, extended polling.

As Mr. Richey's counsel pointed out at the hearing on the motion for relief:

> So when we see this thank you for offering us, the jurors, the opportunity to share our thoughts, we don't know where that comes from. Is that coming from the Court? Is this coming from the juror on its own? Is it coming from you talking to them after the verdict came back? Or was there a letter written? You know, in that part we're confused....And we'd like to know what's going on there, because even the Court, seeing the demeanor of the jurors after a jury verdict is back or talking to them and getting their thoughts, you know, is something that's outside of the process. So that I guess is the most troubling part of this.(R.116,p.4).

The judge, acknowledging that the letter may raise some legitimate concern by the defense, described his actions:

> I will then tell you that I went back to the jury room after the jury had been discharged and after their verdicts had been accepted and the judgments of conviction had been entered and, again, I thanked them for their service. I did not engage in ex parte communications with them, but I can see where Mr. Heit would be concerned about that because of the wording of Ms. Fisk's letter. What happened was this, after I thanked the jury for their service and assured them

that I would have respectfully received whatever verdicts they entered because they were done so conscientiously, there were some jurors that asked what was going to happen now. And I told them that a presentence investigation would be done and that Mr. Richey would be sentenced approximately 30 to 60 days from the time that the jury trial had concluded. There was a question about whether or not the jurors could attend the trial -- or, strike that, whether the jurors could attend Mr. Richey's sentencing. And I said that they were free to do that if they wished because it was an open court. It was not closed session. Anyone could attend the sentencing of the defendant because he's an adult, not a juvenile.

They then asked -- or one of them asked, and I'm not sure if it was Ms. Fisk, I tend to believe it probably was but I don't recall these people by name, if they could submit something to the Court on behalf of the defendant at the time of sentencing or prior to sentencing. And I told them that the Court would receive information that would be relevant from any party with regards to sentencing and that I would certainly convey that to counsel and we would then have a discussion as to whether or not that would be an item that would be properly considerable by the Court at the time of sentencing. That has led to her letter in which she indicates at the very beginning of the letter which she filed or submitted two months after the verdict had been received thanking me for the opportunity to share their thoughts and concerns. That was the only -- that was the only thing that was ever said by any of the jurors was this letter from Ms. Fisk. No one else in the entire panel, including her, made any comments to the Court in the jury deliberation room following the jury trial about what should be done with Mr. Richey, what type of sentence should be imposed upon him. They simply asked what the process was going to be from there on out, whether or not they could attend the sentencing, and whether or not they could submit anything prior to sentencing.

If you look at the first paragraph of her letter, it says thank you for offering us the opportunity to share our thoughts and concerns. It gives rise to Mr. Heit's understandable concern, did that involve a dialog right then and there about what should be done with Mr. Richey at sentencing. It did not. So as far as I'm

> concerned, I did not engage in ex parte communications. (R.116,p.8-10;App.24-26).

Clearly the judge invited a continued dialogue/communication which, even he admits, prompted the letter and counsel's concern. After having discovered the reasonable doubt through the continued dialogue, or polling, in the form of Juror Fisk's comment that "the trace amount of methamphetamine found in his system, could have quite possibly been a false-positive test result of some over the counter medication," and the lack of unanimity that this was a point the jurors deliberated on trying to find a way around the guilty verdict, it cannot be ignored. Nor can it just be "assumed" to be juror's remorse as the State argued.

> The jurors were polled each one by one following the verdict including Miss -- Miss Fisk, F-I-S-K, who through her tears said this was her verdict. If you read the letter she wrote to the Court, it says she basically didn't like the law but that does not mean that the jury did not come to the correct verdict based on the facts and the law that they were given. That is the job of the jury. It is not the job of the jury to be influential in sentencing. As this Court knows, the three ***McCleary*** factors are the gravity of the offense, the need to protect the public, and the seriousness of the offense. It does not include what the jurors may or may not want for sentencing, so I do believe that her letter to you is more of a juror remorse. And it was her verdict on the day of the trial, and I would ask you to deny the defendant's motions.(R.116,p.3).

But *is* that what juror Fisk meant? The letter doesn't indicate these are thoughts new to her since the deliberations. Instead, the letter clearly indicates that

these concerns existed and were a focus of the jury's deliberations. As opposed to post-verdict remorse, the letter clearly raises the specter of reasonable doubt when Juror Fisk opines, "the trace amount of methamphetamine found in his system, could have quite possible been a false-positive test result of some over the counter medication."(R.87;App.31). This doubt cuts to the very heart of the defense -- which was that there was no meth in Mr. Richey's system but, instead, a false positive from the timed breakdown of over the counter cold medications.

Likewise, Juror Fisk's letter indicates that she believed that the accident would have occurred in the absence of meth, again a defense to the homicide charge and a central part of the case. She states, "...there was absolutely no impairment whatsoever." "...[T]he defendant [should be held] accountable for his criminal negligence in driving with the minors unbelted." She did not say he should be accountable for the condition of the vehicle, or the way he was driving or the meth.(R.87;App.31). Thus it appears she accepted the defense that the accident that day was an accident and would have happened regardless of the meth. The criminal negligence wasn't the cause of the accident, it was the fact that the minors were unbelted.

This sheds substantial doubt on the verdict and convictions for the particular crimes.

Also, Juror Fisk's letter goes to the very heart of the crime charged. The jury was instructed, per WIS JI-Criminal 1187 that, "Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of methamphetamine in his blood." (R.114,p.6). Juror Fisk reports that not only could the trace amount have been a false positive, but that it caused no impairment, and she implies that the death would have occurred even if he had not had the detection of meth in his blood because the minors were unbelted.(R.87;App.31). Recall that the amount in his blood, and its source, was in dispute and there was competing expert testimony. See *supra*, Section II, pg.16-18.

Juror Fisk provided substantive comments about the jury's deliberations when she stated, "These points are what the jurors solely deliberated on trying to find a way around the guilty verdict."(R.87;App.31) And she provided her comments specifically for the purpose of hoping to influence sentencing stating, "I sincerely hope you will take these concerns into consideration when sentencing this young man."(R.87;App.31).

Although the timing of Juror Fisk's letter is different, her expression of reasonable doubt and apparent dissent from the verdict having been invited by court questioning brings this case in line with ***Rothbauer v. State***, 22 Wis. 468 (1868):

> The judgment must be reversed for the reason that the verdict was improperly received. When the jury returned into court, one of them asked if it would be proper for him to make a statement, and, on being told by the judge that he could do so, he said that "he had assented to the verdict, but it had been his conviction, and still was his conviction, that the verdict should be for manslaughter in the first degree, and not for murder; and that he had reluctantly assented to the verdict for the sake of an agreement." The juror then sat down, and the foreman, upon being asked if they had agreed upon a verdict, said they had, and delivered it to the court. The prisoner's counsel objected to its reception; but his objection was overruled. The verdict was then read to the jury, and the prisoner's counsel requested that they might be polled. They all assented without qualification, except the one who had before made the statement above quoted, and he replied, "I assent to it as I [470] stated before." The court again asked him, "Is this your verdict?" and he answered, "I assent to the verdict." It is obvious from the statements of the juror, that he was not convinced that the prisoner was guilty of murder. He said explicitly that it was his conviction then, that he ought not to be convicted of that offense. He stated this twice. And there was nothing in his final statement, that he assented to the verdict, which at all retracted or modified what he had previously said. He had before said that he assented to the verdict for the sake of an agreement. And after having said that so plainly and so often, his last statement can only be understood as having been made subject to the explanation already given.
>
> Such a verdict ought not to be received. If a juror says that he thinks the prisoner is not guilty, but assents to the verdict for the sake of an agreement, that is not a proper verdict. The assent must be an

> assent of the mind to the fact found by the verdict. The case is fully within the principle of ***The State v. Austin***, 6 Wis. 205.

Likewise, in ***State v. Austin***, 6 Wis. 205 (1858), in holding that when a juror dissents from the verdict on being polled, the Judge should send the jury out again to agree upon a verdict the Wisconsin Supreme Court opined:

> Under the present administration of justice in this country, it is impossible to over estimate the importance of preserving the trial by jury in all its purity and integrity. The life, liberty, reputation and property of our citizens are constantly committed to the decisions of a jury. Hence the necessity for the great vigilance and care which are exercised by courts of justice to secure a free, voluntary, conscientious and unanimous verdict. While a juror has reasonable doubts of the guilt of a defendant in a criminal case, he cannot, without doing great violence to his conscience and his sense of right, agree upon a verdict of conviction. There can be no question but a jury, when they come into court to deliver their verdict, to which they may have previously agreed, may dissent from it, or change it, at any time before it is received and properly recorded. And although a juror may have agreed upon and signed a verdict as a matter of accommodation, or from some other motive, yet, if he expresses his dissatisfaction with it when he comes into court, or, when a poll is taken, states that he cannot conscientiously assent to it, the court should respect his scruples and refuse to receive a verdict not freely and unanimously concurred in. There ought not to be anything in the conduct of the court toward the jury which would appear like pressing them to give up rational doubts, or disregard difficulties which may arise in their minds upon the evidence of the case. In the case under consideration, it appears to be evident that one of the jury entertained doubts of the defendant's guilt, and made known that fact to the court when the poll was taken. It is true that, after some conversation with the court, he was made to reply in the affirmative, in answer to the question as to whether that was still his verdict, yet it was under circumstances which showed clearly that he entertained

> those doubts still, and was opposed to finding the defendant guilty. We think that, when the juror stated to the court that he had doubts of the defendant's guilt, the verdict should not have been received, but the jury should have been sent out to reconsider their verdict. That appears to us to be the only safe and proper practice.

Here the judge went to speak with the jurors in the jury room after the verdict had been accepted in open court but before the juror's were dismissed and while the case was in recess pending sentencing.(R.114,p.58). The trial court was of the opinion that because the verdict had been read in open court, the jury polled, and the verdict accepted, that was the end of it. Any later misgivings or concerns expressed to him, even if invited by him prior to sentencing, did not re-open polling or could not taint the verdict.

Defendant, however, maintains that Juror Fisk's dissent was not "after the fact." Instead, the unusual process of this case whereby the judge went into the jury room, and where as part of that meeting jurors asked if they could submit information regarding the sentencing and the court indicated that they could, and Juror Fisk then prefaced her letter by "thank you for offering us, the Jurors the opportunity to share out thoughts and/or concerns with you prior to the sentencing date" amounted to continued polling.(R.87;App.31). Juror Fisk's comments provided as a

result of the judge's discussion with jurors is particularly indicative of dissent with the verdict given her actions during "formal" polling. While claiming juror remorse, the prosecution has indicted that upon the polling Juror Fisk was crying and it was through her tears that she said this was her verdict.(R.116,p.3). The continued dialogue post-verdict in the jury room, the invitation to submit comments, and the submission of those comments were akin to continued (or holding open) polling.

Upon receipt of Juror Fisk's letter which was part of that process, she made clear that she had reasonable doubt and certainly that she doubted her verdict. Under such circumstances the verdict is not proper. Having met with the jurors which apparently invited the comments, the court cannot now ignore those comments.

> In the present case, the trial court did not make a determination that the juror's answer to the poll question was ambiguous or ambivalent. When the court offered voir dire, however, it was bound by the results of that questioning. Although the court did not make a formal fact finding that the juror had changed his mind, the judge acknowledged during argument of counsel that the juror dissented to the verdict during the voir dire. The juror's dissent before the verdict was accepted invalidated the sealed verdict. Because the jury had separated, they could not resume deliberations. Koch v. State, 126 Wis. 470, 483, 106 N.W. 531, 535-36 (1906); see State v. Halmo, 125 Wis. 2d 369, 373, 371 N.W.2d 424, 426 (Ct. App. 1985). The trial court had no alternative but to order a new trial. ***State v. Cartegena***, 140 Wis.2d 59, 53, 409 N.W.2d 386 (1987).

The court referred to the dialogue with the juror during polling as voir dire. "When the court offered voir dire it was bound by the results of that questioning." Likewise, appellant contends when the court offered continued dialogue with the jury, it was bound by the results of that dialogue.

A defendant is entitled to a unanimous verdict and the trial court should question a juror who, during the polling, creates some doubt as to his or her vote. ***State v. Dukes***, 2007 WI App 175, ¶33-44, 303 Wis.2d 208, 736 N.W.2d 515.

That the verdict had been returned does not excuse communication by the judge with the jury. The District of Columbia Court of Appeals considered a similar situation in ***Harris v. United States***, 738 A.2d 269, 276-78 (D.C. 1999), and found error in the court's communication with the jurors:

> Harris further argues that this case should be remanded for re-sentencing because the trial court initiated and engaged in prohibited ex parte communications with jurors after they had rendered a verdict, and then considered and relied upon these communications in its determination of Harris' sentence, in violation of the ABA Code of Judicial Conduct. Although we agree that the trial judge engaged in improper ex parte communications about the proceeding in violation of Canon 3(A)(4), we are satisfied that the violation was harmless.
>
> After the jury had rendered its verdict, Judge Dixon in open court invited the jurors to come speak with him in the jury room if they had any questions or concerns

they wanted to raise about the process they had just gone through, stating:

> [I]f for any reason there is any question that any of you have that you would like to ask me or if there's anything you'd like to tell me or if you'd like to complain about the waiting time or complain about the lack of amenities in the jury room or anything that you wish to see me about, I'll make myself available to you in a few moments in the jury room, if you have any reason you want to talk to me.
>
> Sometimes jurors have questions I can answer, and I will, and sometimes they have questions that I can't answer because they're either inappropriate or I don't know the answer. In those cases, I'll tell you it's not appropriate for me to answer or I don't know the answer.
>
> If you have no reason to see me, you don't have to wait. It will only be me, and I'm making myself available because in the past, we've been told by jurors, "I wish I had a chance to tell the Judge some particular matter before departing." So if you'd like to wait about two or three minutes in the jury room, and I'll make myself available to you.

Subsequently, at sentencing on May 5, 1993, following allocution and before the court imposed sentence, Judge Dixon advised the parties that although he had reached his own conclusions after and during the course of the trial, he thought it would be helpful to relate to both counsel the substance of his post-trial discussions with the jurors. Judge Dixon informed counsel that he had been told that, from the beginning of deliberations, one juror had declared to the others that under no circumstances would he ever return a verdict of first-degree murder, which effectively had left the jury with the choice of being hung or returning some other type of a verdict. Given those options, and not wanting Harris back on the street, the jury informed Judge Dixon at the post-verdict meeting, they had compromised on the lesser-included offense of second-degree murder. Judge Dixon then opined to counsel that he had not been surprised that a number of jurors favored conviction for first-degree murder as

"the evidence supported the fact that this was just an unfortunate, cold-blooded killing."

Judge Dixon made clear prior to imposing sentence that he based his sentencing decision on what he considered to be the tragic circumstances of the killing, commenting:

> [I]t is really disappointing to see what has happened to the young men in our community, how this attitude of machoism has gotten to the point of an extreme whereby the retaliation for any type of infraction is to an [sic] assault them with a firearm. And that's what you did. On your way to the school you got into this argument on a bus, stepped off the bus and put a gun to that young man's head, waited at least a second or two and then pulled the trigger, not considering what the consequences were going to be to you or the young man. It's—It's really unfortunate, Mr. Harris.

Based on the court's comments, Harris moved for recusal, arguing that the court's conversation with the jurors had affected its sentencing decision and that it at least created the appearance of impropriety. In response, Judge Dixon emphatically stated: "No, sir. No, sir; it has not affected my decision making." Judge Dixon assured both counsel that he would not consider the contact as he made his sentencing deliberations, emphasizing that the conversation with the jurors had "not affected [his] decision making." He then denied Harris' motion for recusal and imposed sentence.

Canon 3(A)(4) of the ABA Model Code of Judicial Conduct provides in relevant part:

> A judge should accord to every person who is legally interested in a proceeding, or his [or her] lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

Ex parte communications are "those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter" and are prohibited in order to "ensure that 'every person who is legally interested in a proceeding [is given the] full right to be heard according to law.' " Jeffrey M.

Shaman et al., Judicial Conduct and Ethics 149 (2d ed.1995)(quoting ABA Model Code of Judicial Conduct Canon 3 A(4)(1972)).13

In addition, Canon 3(C)(1) of the ABA Model Code of Judicial Conduct requires judges to disqualify themselves from a proceeding in which their impartiality "might reasonably be questioned." These prohibitions together serve "to prevent the 'actual or apparent partiality [which] undermines the confidence in the judiciary ... essential to the successful functioning of our democratic form of government.' " ***Foster***, supra note 12, 615 A.2d at 216 (quoting ***Belton v. United States***, 581 A.2d 1205, 1214 (D.C.1990) (internal quotations omitted)).

When Judge Dixon made his invitation to the jurors to communicate any questions or concerns they might have had about their jury experience following the rendering of the verdict, he did so in open court and without objection from either counsel. Judge Dixon's invitation to the jurors was for the purpose of seeking input from jurors about potential areas of improvement in the court system. However, despite his caveat to the jurors that there might be some questions which he could not appropriately answer, during his subsequent meeting with the jurors, conducted out of the presence of both Harris and his attorney, Judge Dixon nevertheless learned that one juror had indicated early on in the deliberations that he would not return a verdict for first-degree murder while armed, and that the jurors had reached a compromise verdict for second-degree murder while armed because they had not wanted Harris to go free. Accordingly, while it is clear from the record that Judge Dixon did not intend to elicit substantive comments about the jury's deliberations and, indeed, cautioned the jury that it would be inappropriate for him to address some of their concerns, we are constrained to conclude that, despite his good intentions, the judge inadvertently initiated and subsequently engaged in prohibited ex parte communications about Harris' pending case during his post-verdict meeting with the jurors, thereby violating Canon 3(A)(4). Cf. ***In re W.T.L.***, supra note 13, 656 A.2d at 1129 (concluding that trial judge engaged in improper ex parte communications about appellant during his "commendable" attempt to engage juvenile during juvenile's disposition hearing).

The ***Harris*** court concluded that the judge erred in meeting with the jurors post verdict but pre-sentencing, but held that such error was harmless. Here, Judge Bitney denied that the meeting was in error at all. Thus, he misapplied the law and therefore failed to reasonably exercise its discretion. If the trial court's exercise of discretion is based upon a misapplication of the law, or the application of a wrong legal standard, the trial court's exercise of discretion will be deemed erroneous. ***State v. Tarantino***, 157 Wis.2d 199, 207-08, 458 N.W.2d 582(Ct.App.1990). The question wasn't whether it was error to meet with the jurors or not, it was error. The court's analysis then, should have been whether the error was prejudicial or not. And while he may have implicitly found that it was not prejudicial that finding is questioned given that he did not understand there to be an error in the first place. The burden of proving no prejudice is on the beneficiary of the error, here the state. ***State v. Billings***, 110 Wis.2d 661, 667, 329 N.W.2d 192 (1983).

To the extent that Juror Fisk's letter expressed reasonable doubt as to the presence of a controlled substance and whether the accident would have occurred anyway, the effect on sentencing was not the critical inquiry. The point was the verdict itself was flawed, and

thus the conviction itself, which was surely prejudicial to Mr. Richey.

Moreover, while Judge Bitney indicated that he would not be prejudiced by his communications with the jurors, other courts have held that such post-verdict communications to be plain error even if non-prejudicial and even if defense counsel did not object. See for example, ***People v. Nan Lu***, 300854, 2012 WL 385598 (Mich.Ct.App. Feb. 7, 2012) appeal denied, 491 Mich. 945, 815 N.W.2d 432 (2012) [unpublished case thus not cited for precedential, but persuasive, value](App.32-39):

> Defendant maintains that by informally speaking with the jurors after they had rendered their verdict, the trial court violated his Sixth Amendment right to be present during all critical stages of his trial. A criminal defendant enjoys a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." ***Snyder v. Massachusetts***, 291 U.S. 97, 105–106, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds in* ***Malloy v. Hogan***, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Although a defendant need not be present during every interaction between a judge and juror, "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." ***Rushen v. Spain***, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Citing ***Snyder***, the Michigan Supreme Court observed in ***People v. Mallory***, 421 Mich. 229, 247, 365 N.W.2d 673 (1984):
>
> > A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of

> the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected.
>
> Preliminarily, we note that when the trial judge announced his intention to speak with the jurors, neither counsel offered any objection. Accordingly, we review this constitutional claim for plain error affecting defendant's substantial rights. ***People v. Carines***, 460 Mich. 750, 763-764, 597 N.W.2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." ***Id***. (internal quotation marks and citations omitted).
>
> This case demonstrates the grave risks that may attend ex parte communications between a judge and jury, even after a verdict has been rendered....The record in this case indicates that even before speaking with the jury, the trial court knew of the jury's exposure to defendant's shackling. At oral argument the prosecutor admitted as much. The trial court's discussion with the jury concerning possible prejudice flowing from their observation of the shackling "pertain[ed] to the case" despite that the verdict had been rendered. Under these circumstances, the trial court's ex parte, unrecorded inquiry of the jurors concerning the shackling constituted plain error.

The comments from the juror's in the jury room, even if it were that they felt compelled, one way or the other, to be heard at sentencing, "pertained to the case." Some indication with regard to body language or tone must have accompanied that request. Was Ms. Fisk still crying as the prosecutor recounted but the judge didn't recall? Juror Fisk's letter "pertained to the case" as it expressed doubt as to whether there was meth in Mr. Richey's system, where

he was impaired, and whether the accident would have happened even in the absence of meth in his system. All of which went directly to the defense. Knowing these concerns, what effect did they have on the judge at sentencing?

If the medical record had been admitted (as they should have been), what impact would that have on the judge in sentencing? As set forth in Section II, *supra*, they went to the very issues on which Juror Fisk was expressing doubt and which were the points "the jurors solely deliberated." (R.87;App.31). The errors were cumulative -- not admitting the medical records and continuing a discourse with the jurors which ultimately called the verdict into question and highlighted the prejudicial effect of excluding the medical records. It is the State's burden to prove that the errors are, in their cumulative effect, harmless and not prejudicial. ***State v. Harris***, 2008 WI 15, ¶113, 307 Wis. 2d 555, 745 N.W.2d 397.

CONCLUSION

It is a touchstone of the integrity of the judicial system that "While the rule against impeachment of a jury verdict is strong and necessary, it is not written in stone nor is it a door incapable of being opened. It competes with the desire and duty of the judicial system to avoid injustice and to redress the grievances of private

litigants" ***After Hour Welding, Inc. v. Laneil Mgmt. Co.***, 108 Wis. 2d 734, 737-38, 324 N.W.2d 686 (1982).

Normally, exploring juror deliberation and thought process is not permitted. In ***After Hours*** the court noted: "The concern for fairness to the parties and monitoring the integrity of the judicial system leads us to conclude that a trial court may, in appropriate circumstances, consider allegations that extraneous prejudicial remarks were made to jurors which were not a part of the judicially guarded evidence they received. The court must not inquire into the jurors' mental processes, including the effect such remarks had. The matter must be resolved in favor of maintaining juror secrecy and not intruding into the mental processes of the jurors." Here such information was obtained by the court, perhaps unwittingly and with good intentions, but nonetheless it is now part of the case. Based on communications the judge had with the jurors, one juror believed the judge to have invited further information. Upon receipt of that information we now know that there was reasonable doubt and the court's error in excluding medical records may have further caused reasonable doubt. The verdict has now been tainted and it cannot stand in light of the doubt cast upon it. A new trial is warranted.

Dated this 3rd day of October, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced font.

The length of this brief is 39 pages.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this supplemental brief, excluding the appendix, which complies with the requirements of §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 October, 2014.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis.Stats. §809.19(2)(a)and that contains:

1. a table of contents;

2. the findings or opinion of the circuit court;

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; and

4. a copy of any unpublished opinion cited under §809.23(3)(b), and although unpublished opinions of Michigan appellate courts are not binding precedent in Michigan, they can be cited. See Michigan Court Rule **7.215**; also ***In re Application of Indiana Michigan Power Co***, 275 Mich. App. 369, 380; 738 N.W.2d 289 (2007), holding they may be considered instructive or persuasive.

I hereby 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 the 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 3rd day of October, 2014.

HERRICK & HART, S.C.

By: _____

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on October 3, 2014, pursuant to Wis. Stats. §809.80(3)(b), Defendant-Appellant's Brief was delivered to FedEx, a third-party commercial carrier, for delivery to the Clerk of the Court of Appeals, Attorney Tara Jenswold, Wisconsin Department of Justice, and Attorney Angela L. Beranek, Barron County District Attorneys Office, within three calendar days. I further certify that Defendant-Appellant's Brief was correctly addressed.

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Dated this 3rd day of October, 2014.

HERRICK & HART, S.C.

By: _____
Beth R. Johnson
Legal Assistant