STATE OF WISCONSIN

C O U R T  O F  A P P E A L S

DISTRICT III

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Case No. 2014AP1758-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WADE M. RICHEY,

Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN BARRON COUNTY CIRCUIT COURT, THE HONORABLE J. MICHAEL BITNEY PRESIDING

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# BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES



OTHER AUTHORITIES

STATE OF WISCONSIN

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## ISSUES PRESENTED FOR REVIEW

1. Were Richey's hearsay statements to health care providers automatically admissible simply because they were contained in health care records that satisfied the authentication procedural requirements in Wis. Stat. § 908.03(6m)(b)?

The trial court ruled that Richey could not introduce his statements to emergency room personnel that were memorialized in his health care records unless he could identify a hearsay exception rendering the statements admissible.

2. Assuming the trial court erred in excluding hearsay statements contained in Richey's health care records, was the error harmless beyond a reasonable doubt because the substance of the statements came in through other witnesses?

Having found no error, the trial court did not address this question.

3. Did the trial court's post-verdict meeting with the jury entitle Richey to a mistrial, re-polling of the jurors or the trial judge's recusal from sentencing?

The trial court said no.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes the parties' briefs will fully discuss the three issues raised on appeal and therefore does not request oral argument.

If this court's decision provides guidance and/or guidelines for trial courts regarding the propriety of meeting with jurors post-verdict but before sentencing, the State asks that the opinion be published. Otherwise, publication is not warranted.

## SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those set forth in Richey's brief will be presented where necessary in the Argument section.

## ARGUMENT

### I. Richey's compliance with the procedural authentication requirements in Wis. Stat. § 908.03(6m)(b) did not render admissible hearsay statements Richey made to clinic personnel that are contained in his health care records.

#### A. Factual background

Before trial, Richey filed a Notice of Intent to Offer Health Care Records pursuant to Wis. Stat. § 908.03(6m) (39-1). The notice specified that the records were those of "Wade M. Richey from Cumberland Healthcare Medical Clinic for the periods of July 1, 2012 through September 18, 2013" (*id.*). The records attached to the notice, however, pertained only to Richey's treatment at Cumberland on July 13, 2012 (39-4 to 39-12), the date of the crash underlying the criminal charges.

During Richey's direct examination, defense counsel, referring to an emergency room report (112:189-90), asked Richey, "Do you remember telling the doctor in the ER you were belted and your seatbelt didn't work?" (*id.*:190). After Richey replied "Yes, sir," the prosecutor objected on hearsay grounds (*id.*).

A lengthy discussion among the court and both counsel then ensued (*see* 112:190-97). Defense counsel argued that once he had provided notice of his intent to use the records under § 908.03(6m)(b), any statement contained in the records could come in (*id.*:195). As counsel simplistically put it, "once these are in, they're in" (*id.*).

Contrary to defense counsel, the prosecutor contended that when medical records are admitted under the statute, not every out-of-court statement contained within those records would come in (112:192). She explained that statements within the records would have to fit under another hearsay exception to be admissible (*id.*).

The trial court agreed with the prosecutor. The court explained that the purpose of the statute was to "alleviate[] the necessity of calling somebody in as a medical records custodian" (112:194). The court advised defense counsel in general terms what he would have to do in order to place the content of the records before the jury:

> [I]f 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.

(112:194.)

When defense counsel indicated he wanted to use the records during closing argument (112:194-95), the prosecutor said she would object to their admission unless Richey's hearsay statements were first redacted (*id.*:195-96). The trial court then ruled that defense counsel would have to find another hearsay exception to allow Richey to testify about what he said to other people after the accident; § 908.03(6m)[1] alone would not accomplish this purpose (*id.*:197).

On appeal, Richey adheres to the same argument advanced below: he contends that his compliance with the procedural requirements of § 908.03(6m)(b) automatically rendered admissible any and all hearsay contained within his patient health care records. For the following reasons, Richey is wrong, and the trial court was correct to exclude his hearsay statements to personnel at the clinic where he was treated right after the crash.

### B. Standard of review

Whether a statement is admissible under a hearsay exception is a question of law subject to de novo review. *State v. Joyner*, 2002 WI App 250, ¶ 16, 258 Wis. 2d 249, 653 N.W.2d 290.

[1] The trial court misspoke in referencing "908.63(6m)." *See* 112:197.

### C. Patient health care records are a subset of the hearsay exception for records of a regularly conducted activity; therefore, only statements of declarants who are part of the organization that prepared the records qualify for admission under Wis. Stat. § 908.03(6).

In arguing that his compliance with the procedural requirements of § 908.03(6m)(b) automatically entitled him to admit any and all statements contained in his patient health care records, Richey ignores the purpose of the statute and its relationship to the hearsay exception in § 908.03(6) for records of regularly conducted activity.

Section 908.03(6m)(b) makes it unnecessary for a party who intends to introduce patient health care records to produce an authentication witness, where the party has complied with the procedural requirements of the statute. Compliance with those requirements obviates the need to call the custodian of the records or another qualified witness to testify to their authenticity; it does not provide for wholesale admission of all the information contained in the records. Rather, the party offering the records must satisfy § 908.03(6) or some other hearsay exception to gain admissibility of the desired information.

In arguing that his compliance with the procedures set forth in § 908.03(6m)(b)1. and 2. gave him free rein to admit any and all statements contained in his patient health care records, Richey fails to grasp that § 908.03(6m) must be

read in conjunction with § 908.03(6), the hearsay exception for records of regularly conducted activity. As Professor Blinka, a recognized expert on Wisconsin evidence law, has explained,

> This rule is a special application of the exception for records of a regularly conducted activity, Wis. Stat. § 908.03(6). Compliance with the modest procedures set forth in Wis. Stat. § 908.03(6m) obviates the need to lay a foundation for the records through a custodial witness. The special exception applies to the records of a "health care provider," which is defined by subsection (a). . . .
>
> Although it dramatically streamlines the procedural and evidentiary hurdles otherwise necessary to introduce such records, the health care records rule does not eliminate the requirements of Wis. Stat. § 908.03(6). Rather, it permits them to be shown in shorthand form without a foundational witness.
>
> . . . .
>
> Compliance with Wis. Stat. § 908.03(6m) does not ensure admissibility. Health care provider records are subject to all objections that may be lodged against records admitted under Wis. Stat. § 908.03(6). For example, multiple layers of hearsay should be closely scrutinized. Statements by non-employees must be qualified under some other hearsay exception if offered for the truth of the matter asserted.[4]

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[4]Such statements may be admissible under Wis. Stat. § 908.03(4), as pertaining to medical diagnosis or treatment.

7 Daniel D. Blinka, Wisconsin Practice Series: *Wisconsin Evidence,* § 803.6m (3d ed. 2008), at 775-77.

Professor Blinka's understanding of § 908.03(6m) squares with the 1990 Judicial Council Note to § 908.03(6m):

> **JUDICIAL COUNCIL NOTE, 1990:** Subsection (6m) is amended to extend the self-authentication provision to other health care providers in addition to hospitals. *That such records may be authenticated without the testimony of their custodian does not obviate other proper objections to their admissibility.*

158 Wis. 2d at xxix (emphasis added).

The hearsay exception for records of regularly conducted activity found in § 908.03(6) does not extend to all statements found in an organization's records. That subsection provides that the following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

> **(6)** RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity. . . .

Regardless of the number of declarants involved, "*all* of them must have been part of the organization that prepared the record." Blinka, § 803.6, at 767 (footnote omitted). Consequently, statements Richey made to personnel at the

Cumberland clinic do not qualify as records of regularly conducted activity because Richey was not part of the organization that prepared his records.

Although it involved police reports as opposed to hospital records, *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), illustrates why Richey's statements to clinic employees do not come within the hearsay exception for records of regularly conducted activity.

At Mitchell's preliminary hearing, the trial court had relied on § 908.03(6) to admit statements of the alleged victim, Steven Hurst, that were contained in a police report. The statements were admitted for the truth of the matter asserted, i.e., to show that Mitchell did not have consent to drive Hurst's car. *Mitchell*, 84 Wis. 2d at 329-30. The supreme court agreed with the State's concession that the statements attributed to Hurst were not admissible as a record of a regularly conducted activity under § 908.03(6):

> This exception allows the introduction of documents made in the course of a regularly conducted activity, which includes police reports. When the report contains out-of-court assertions by others, an additional level of hearsay is contained in the report and an exception for that hearsay must also be found. Sec. 908.05, Stats. That is, the reports cannot establish more than their maker could if he was testifying in court on their subject matter. Thus, defendant's hearsay objection is not to the details of which the officer had personal knowledge but to the repetition of declarations made by Hurst to the officer over the phone. The business records exception

> does not allow admission of this second level of hearsay.

84 Wis. 2d at 330.

Like the statements Hurst made to police in *Mitchell*, Richey's statements to clinic personnel in the emergency room are out-of-court statements by other than the maker of the record. Just as the business records exception did not allow admission of Hurst's statements to prove nonconsent, here the exception for patient health care records does not allow admission of Richey's statements to prove that he was wearing a seat belt, that the belt broke in the crash, and that his vehicle's brakes didn't work. Rather, as the prosecutor argued (*see* 112:195), Richey's statements at the clinic constituted hearsay within hearsay, requiring Richey to identify another applicable hearsay exception for his statements to be admitted.

*Mitchell* is consistent with the earlier decision of *Noland v. Mutual of Omaha Ins. Co.*, 57 Wis. 2d 633, 205 N.W.2d 388 (1973), a case that involved the business records exception under former Wis. Stat. § 889.25 (1971), the forerunner to current § 908.03(6). As the supreme court in *Noland* explained,

> [T]he memorandum of the physician is admissible as the result of the business records exception . . . to the extent of showing that he made the entry, but the *assertions made by the patient and recorded therein are not admissible for the purpose intended in this action* [i.e., to prove that a patient's medical condition was pre-existing] *unless they are made so by additional exceptions to the hearsay rule.*

57 Wis. 2d at 638-39 (emphasis added).

*Mitchell* and *Noland* support the trial court's ruling that Richey had to find some other hearsay exception to permit admission of his out-of-court statements to Cumberland clinic personnel for the truth of the matter asserted.

Insofar as Richey relies on *Hagenkord v. State*, 100 Wis. 2d 452, 302 N.W.2d 421 (1981), as authority for the view that his statements were admissible under § 908.03(6m), that reliance is misplaced and arises from Richey's failure to distinguish between observations and diagnoses of medical personnel contained in hospital records and statements made by patients and recorded in those records. *Hagenkord* involved the former, e.g., records stating that "a pool of grayish liquid was found in the posterior of the victim's vagina and laboratory reports indicat[ing] that this pool of grayish liquid contained spermatozoa." 100 Wis. 2d at 459. The hospital records in *Hagenkord* did not involve statements by the victim-patient offered for the truth of the matter asserted. Not surprisingly, Hagenkord did not even raise a hearsay objection to the medical records. Rather, on appeal he argued that because the records were never placed before the jury, there was no evidence from which the jury could find that intercourse had taken place. *Id.* at 460.

*Hagenkord* therefore lends no support to Richey's argument.

### D. Even if Richey had not waived the argument that his statements about seat belt usage and brake failure constitute statements made for the purposes of medical diagnosis or treatment, those statements are not admissible under Wis. Stat. § 908.03(4).

Insofar as Richey now contends that his statements recorded in his patient health care records are admissible as statements made for the purposes of medical diagnosis or treatment under § 908.03(4), the time to make that argument was in the trial court. But a review of defense counsel's statements during the discussion about the admissibility of Richey's statements to emergency room personnel reveals that counsel never raised the point even though the trial court practically invited him to do so. *See* 112:196-97.

In the first instance then, the State submits Richey waived the right to now argue on appeal that his statements to emergency room personnel were admissible under § 908.03(4).

Even had Richey advanced this argument below, it would have failed. To qualify for admissibility under the statute, statements must be "reasonably pertinent to diagnosis or treatment." *See* § 908.03(4). While Richey's statement that he "did hit the windshield" (39-5) was reasonably pertinent to his diagnosis or treatment by raising the possibility of a concussion, the following statements Richey made to emergency room personnel were not reasonably pertinent to his diagnosis or treatment:

> 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.

(39-5.)

Although arising from a very different set of facts, *Flores v. State*, 69 S.W.3d 864 (Ark. 2002), helps demonstrate why Richey's statements to emergency room personnel about the circumstances surrounding the crash do not qualify as statements made for purposes of medical diagnosis or treatment.

In *Flores*, the Arkansas Supreme Court held that a mother's statements to a treating physician identifying Flores as the person who threw her child against a wall "had nothing to do with medical treatment and could well have been blame-shifting by someone who was soon to be charged as a co-defendant." 69 S.W.3d at 874. Similarly, Richey's statements about seat belt usage and brake failure had nothing to do with his medical treatment. Those statements therefore are not admissible under § 908.03(4).

For all these reasons, the statements Richey sought to admit were properly excluded at trial.

## II. Any error in excluding Richey's health care records was harmless beyond a reasonable doubt.

Even if the trial court erred in excluding Richey's health care records, any error was harmless beyond a reasonable doubt because there is no reasonable possibility the exclusion of the records contributed to the outcome of the trial. *See*

*State v. Echols*, 2014 WI App 58, ¶ 15, 348 Wis. 2d 81, 831 N.W.2d 768. More specifically, none of the three reasons Richey advances to support his argument that the records' exclusion prejudiced him withstands scrutiny.

First, Richey says that his statements to hospital personnel to the effect that he was belted before the accident and that his brakes didn't work show that his story was consistent and that he was not making it up to avoid trouble. Richey's brief at 15. But that point was already driven home by the testimony of several prosecution witnesses who related Richey's statements at the scene of the crash, before he was transported to the Cumberland clinic for treatment.

Shane Jilek, a deputy with the Barron County Sheriff's Department (111:121), testified that at the crash scene, Richey said that "he wasn't able to stop for the intersection, that the brakes did not work" (*id.*:127). Richey told Jilek that he noticed his brakes weren't working when he was near a barn that Jilek later determined to be about 255 feet from the intersection (*id.*:127-28).

Jilek further testified that Richey reported he had been wearing a seat belt before the crash but that it had fallen off during impact (111:129). The day after the crash, Jilek interviewed Richey over the phone (*id.*:136), During that conversation, Richey again said he had been unable to brake for the intersection so he headed for the ditch (*id.*:137). Richey also repeated that once he struck the ditch embankment, his seatbelt "had flown off" (*id.*:138). During their phone conversation, Richey told Jilek that the brakes were in working order on his way to Barronett, and he had not had

mechanical problems with the brakes prior to the accident (*id.*). On cross-examination, Jilek repeated that Richey had claimed he thought his brakes were in good working order when he drove to Barronett and that he denied having any mechanical problems with them before the accident (111:144-45).

While the phone conversation between Jilek and Richey occurred after his statements to emergency room personnel, Jilek's overall testimony demonstrated that Richey's statements that his brakes had failed remained consistent from the time of the crash through trial.

Jilek was not the only prosecution witness whose testimony supported the consistency of Richey's explanation of how the accident unfolded. Deputy Ryan Hulback, who had contact with Richey at the scene of the crash (111:148), testified that Richey said he discovered his brakes were defective as he started to approach 26½ Avenue (*id.*:150). Richey told Hulback he "attempted to put the brake pedal down" but nothing happened (*id.*). Richey explained to Hulback that he also tried putting the vehicle into reverse and neutral in an attempt to slow or stop it (*id.*). In talking to Hulback, Richey also claimed he had been wearing a seatbelt but that it came off during the accident (*id.*:151).

Jilek's and Hulback's testimony demonstrated that Richey at the first opportunity told investigators he had been wearing a seatbelt that came off during the crash and that his brakes had failed. Consequently, the exclusion of similar statements Richey made to emergency room personnel *after* the statements to Jilek and

Hulback did not prejudice Richey. Richey's first reason for why exclusion of his health care records was not harmless therefore fails.

Richey next claims that exclusion of his health care records prejudiced him because the records do not mention "any signs of impairment" or "any signs of meth usage"; he claims "[t]his was a key fact in the case." Richey's brief at 16.

More correctly, the "key fact" was whether Richey had a detectable amount of a restricted controlled substance – here, methamphetamine – in his blood (114:6). And this "key fact" only affected the first count of the information: causing the death of TS by the operation of a motor vehicle while having a detectable amount of a restricted controlled substance in his blood (*id.*:5).

To convict Richey on count one, the State was not required to show any impairment on his part. The prosecutor stressed this fact repeatedly during closing arguments. First, during her initial closing, the prosecutor told the jury, "He's not charged with driving impaired. There's no allegation of that" (114:18). Next, during her rebuttal closing, the prosecutor responded to defense counsel's argument that there was no evidence Richey was driving while impaired:

> Mr. Heit [defense counsel] urged you to think about the testimony of the troopers and the effect that meth had or the lack thereof of the effect that it had on the defendant and his driving. He urged you to look at it, but there is no reason for you to look at that because he's not charged with operating while impaired. If he had not done well on those field sobriety tests he would be

> charged with operating while impaired. He's not charged for that.
>
> And while it's something for you to consider, you need to remember what the law is. . . .
>
> The law says it is a crime to operate with a detectable amount of meth-amphetamine in your system, regardless of whether or not there is impairment. That's why he's charged. That's what you are to focus on. It doesn't matter whether he was impaired or his ability to drive was impaired because he's not charged with that crime. That's not the issue here.

(114:44.)

While the State was not required to show impairment to convict Richey on count one, the lack of impairment admittedly had some relationship to the affirmative defense that TS's death would have occurred even if Richey had been exercising due care and had not had a detectable amount of methamphetamine in his blood (*see* 114:6). But because the State challenged the affirmative defense on the basis that Richey could not prove he had been exercising due care, and not on his failure to prove lack of impairment (*see* 114:25-27), the absence of the health care records had very little bearing on the affirmative defense.

In addition, as the discussion in Richey's brief at pages 16-17 establishes, two of the prosecution's law enforcement witnesses – Trooper Prohovnik and Deputy Hulback – testified that Richey showed no signs of impairment immediately after the crash.

Finally, Richey is wrong in contending that his health care records would have helped show that his positive blood test for methamphetamine was a false positive (*see* Richey's brief at 18). Nothing in the records (39-4 to 39-12) supports the defense expert's opinion that the test result was a false positive (112:147) or undermines the State expert's testimony that the test result was due to the presence of methamphetamine and not a false positive caused by Richey's use of an inhaler or cold medicine (*see generally id.*:110-18).

Richey's second reason why exclusion of the records harmed him does not withstand scrutiny.

Richey's third claimed reason why exclusion of the records was prejudicial is that had they been admitted at trial, he could have used the records at sentencing to support his denial of having used meth. Richey's brief at 19. This assertion deserves short shrift.

Because the rules of evidence do not apply at sentencing, *see* Wis. Stat. § 911.01(4)(c), Richey could have introduced and used the records at the sentencing hearing despite their exclusion at trial.

In summary, any error in excluding Richey's health care records was harmless because there is no reasonable possibility that admission of the records would have changed the outcome of the trial.

## III. The trial judge's post-verdict meeting with jurors was not improper and did not entitle Richey to a mistrial or repolling of the jury; nor was the judge required to recuse himself from sentencing Richey as a result of the meeting.

After the verdicts had been returned and accepted, the trial judge offered to meet with jurors in the deliberation room (114:55). Defense counsel neither objected nor asked to be present for the meeting.

Nearly two months later, Juror Diane Fisk wrote a letter to the judge, voicing the view that it was unjust to convict Richey of vehicular homicide while having a detectable amount of methamphetamine in his blood because he suffered no impairment, and the test result could have been a false positive (87). Based on Juror Fisk's statement thanking the judge for offering jurors the chance to share their thoughts before sentencing, Richey filed a motion seeking a mistrial, repolling of the jury or recusal of the judge from sentencing (88).

The trial court heard and denied the motion on April 30, 2014, just prior to sentencing Richey (116:2-13). Richey now claims he should receive a new trial based on the judge's meeting with the jury. Richey's brief at 39. For a variety of reasons, Richey is wrong.

### A. Because there is no evidence of extraneous prejudicial information reaching the jury, Wis. Stat. § 906.06(2) bars Richey from using the letter to impeach the guilty verdict on count one.

At the outset, the State maintains that on its face, § 906.06(2) prevents this court from granting Richey a new trial based on Juror Fisk's April 16, 2014 letter to the trial judge (87). That section provides as follows:

> **906.06 Competency of juror as witness**.
>
> . . . .
>
> **(2)** INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

Nothing in Juror Fisk's letter suggests that any extraneous information was brought to the jury's attention during deliberations. Rather, her letter merely expressed her disagreement with the law and revealed that jurors tried to find a way around it.

Not surprisingly, Richey does not address the obvious conflict between the prohibition in § 906.06(2) and his request for a new trial based in large part on the juror's letter. The closest Richey comes to acknowledging this conflict is in the Conclusion to his brief, where he cites *After Hour Welding v. Laneil Management Co.*, 108 Wis. 2d 734, 324 N.W.2d 686 (1982), a case in which the supreme court applied § 906.06(2). *See id.* at 738 et seq. But Richey fails to explain how the mental processes Juror Fisk revealed in her letter to the judge nearly two months post-trial can escape § 906.06(2)'s prohibition, given that no extraneous prejudicial information was involved.

This is the first reason to reject Richey's argument.

### B. The judge's post-verdict meeting with jurors was not improper and did not result in an improper ex parte contact.

Contrary to Richey's contention, there was nothing improper about Judge Bitney offering to meet with jurors after Richey's trial had ended. Not only did neither party object when the judge announced his plan; a model jury instruction contemplates this very possibility.

The instruction, Wis. JI-Criminal 525A (2010), "Instruction After Verdict Received – Alternative Form," provides as follows:

> If any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room.

Given the existence of this instruction, the State doubts there was anything "unusual" (*see* Richey's brief at 29) about the judge meeting with jurors after the verdicts were received.

Nor did the judge's meeting with jurors result in an ex parte communication, as that term is normally understood. Black's Law Dictionary (14th ed. 2009), provides the following definition of "ex parte":

> Done or made at the instance and for the benefit of one party only; and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usu. for temporary or emergency relief . . . .

*Id.* at 657.

The meeting was not instigated by either party, nor was its purpose to benefit one side over the other. The judge announced his intention in open court, and neither party saw fit to object. Unlike the situation in *Harris v. United States*, 738 A.2d 269 (D.C. Cir. 1999), a case Richey quotes extensively at 31-34 of his brief, here there was no exchange of information between the jury and judge at their meeting that touched on the merits of the case.

In *Harris*, the trial judge at his post-verdict meeting with jurors inadvertently discovered that one juror at the start of deliberations had declared that under no circumstances would he convict Harris of first-degree murder, leaving the jury with the options of being hung or rendering another verdict. 738 A.2d at 276-77. The jury informed the judge that this declaration caused them to reach a compromise verdict on the lesser-

included crime of second-degree murder. *Id.* at 277. The judge therefore learned before sentencing that the majority of jurors believed Harris had engaged in more serious wrongdoing than the verdict indicated. This knowledge could have adversely affected Harris's sentence.

Nothing even remotely similar to the situation in *Harris* occurred during Judge Bitney's post-verdict meeting with jurors. And, rather than having a possibly adverse effect on Richey's sentence, Juror Fisk's letter could only have helped Richey's cause because it voiced the juror's concern that Richey had been treated unfairly.

Like *Harris*, the remaining cases on which Richey relies are so factually dissimilar from what occurred here that they offer scant support for his novel position. In *The State v. Austin*, 6 Wis. 205 (1858), the juror in question dissented from the verdict during the original polling, before the verdict was received. *Id.* at 204-06. Likewise, in *Rothbauer v. The State*, 22 Wis. 468 (1868), a juror repeatedly indicated that he assented to the verdict only "for the sake of an agreement" before the verdict was received. *Id.* at 448. In stark contrast to what happened in *Austin* and *Rothbauer*, neither Juror Fisk nor any other juror expressed any equivocation or hesitation about her verdicts before the trial court received them.

The more recent case of *State v. Dukes*, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515, is distinguishable from Richey's case for the same reason, i.e., the juror's equivocation surfaced during the polling in open court before the verdicts were accepted. *Id.* at ¶¶ 10, 35-41.

Richey's reliance on *People v. Nan Lu*, 2012 WL 385598 (Mich. Ct. App. Feb. 7, 2012), is equally misplaced because, just as in *Harris*, the *Lu* judge and jury exchanged communications bearing on the merits of the case.

In *Lu*,[2] the trial judge used his post-verdict meeting with jurors as a substitute for an evidentiary hearing on the question whether Lu was prejudiced when several jurors during deliberations saw a video in which Lu had been shackled before being led from the courtroom. *Lu*, 2012 WL 385598, *1. Under what the court characterized as "these unique circumstances in an obviously close case," it found that Lu's presence at an evidentiary hearing "may have yielded information directly bearing on whether the shackling influenced the verdict." *Id.* *8. The court concluded that Lu's absence when the judge questioned the jury about the effect of the shackling raised a reasonable possibility of prejudice. *Id.*

In summary, the State maintains that Judge Bitney's meeting with jurors was proper and did not result in any ex parte communications. Even if Juror Fisk's post-trial letter could properly be considered, Richey is not entitled to any relief on his claim.

[2] A copy of the decision in *Nan Lu* appears in Richey's appendix at App. 33-39.

## CONCLUSION

For all of the foregoing reasons, this court should affirm the judgment of the circuit court.

Dated this 7th day of January, 2015.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5112 words.

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Marguerite M. Moeller
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 7th day of January, 2015.

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Marguerite M. Moeller
Assistant Attorney General