STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP002675-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA J. FELTZ,

Defendant-Appellant.

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On Notice of Appeal From a Judgment of Conviction and
From a Postconviction Order Denying Relief,
Entered in Milwaukee County Circuit Court,
the Honorable Ellen R. Brostrom, Presiding.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## TABLE OF CONTENTS

## CASES CITED

## CONSTITUTIONAL PROVISIONS AND STATUTES CITED

**OTHER AUTHORITIES CITED**

## ISSUES PRESENTED

1. Was the evidence presented at trial insufficient to prove the repeated sexual assault of a child beyond a reasonable doubt for the time period alleged in Count 2?

The circuit court found the evidence sufficient to support conviction on Count 2.

2. Did the investigating police officer's testimony that the alleged victim appeared to be telling the truth constitute impermissible opinion testimony in violation of ***State v. Haseltine***[1], and was trial counsel ineffective for eliciting it?

The circuit court found that the officer's testimony did not violate ***Haseltine*** because it explained her investigative process and not whether she believed the alleged victim was telling the truth at trial. The court also found that, even if counsel were deficient in eliciting this testimony, no prejudice occurred.

3. Did the prosecutor violate Mr. Feltz's due process right to a fair trial by improperly arguing that the alleged victim's "Christian school" attendance made her more credible, and was trial counsel ineffective in acquiescing to an equally problematic version of the argument that characterized the school as one "where moral guidance is provided," and for failing to move for a mistrial?

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[1] ***State v. Haseltine*****,** 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

The circuit court found that the prosecutor's modified argument was not improper, as it connected the alleged victim's "moral education" to her oath to tell the truth and did not unfairly bolster her credibility. The court also found that counsel was not ineffective because he objected to the initial argument, and the modified argument did not prejudice Mr. Feltz.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court's decision can likely be made on the briefs, but counsel welcomes oral argument on any or all of the issues presented in this case, if helpful to the court. As two of the issues raised may provide guidance to circuit courts and litigants in future trials on the parameters of opinion, testimony and arguments on witness credibility, publication is requested.

## STATEMENT OF THE CASE AND FACTS

In May 2012, the Milwaukee County District Attorney's office charged 21-year-old Joshua Feltz (d.o.b. 6/21/1990) with one count of repeated sexual assault of Tamara S. (d.o.b. 5/6/1997), contrary to Wis. Stat. §948.025(1)(a)(2003-04). The complaint alleged that on numerous occasions between March 1, 2004 to March 1, 2006, Joshua Feltz (who was then between 13 to 15 years old), sexually assaulted Tamara S. (then between 6 and 8 years old), inside a "playhouse" in Tamara S.'s yard and in a bedroom at Joshua's grandparents' house in the City of Milwaukee. (2).

After a preliminary hearing, the court bound him over for trial, and the State filed an information charging the same count, to which he entered a not guilty plea. (57; 6).

In September 2012, the State filed an amended criminal complaint and information that extended the time frame, and separated the single count into two separate counts of repeated sexual assault of a child. (12; 13). Count 1 alleged at least three assaults between May 6, 2003 and May 5, 2004, and Count 2 alleged at least three assaults between May 6, 2004 and May 5, 2006. (12; 13). Mr. Feltz pled not guilty (61), and a jury trial was subsequently held on June 24-27, 2013, before the Honorable Ellen R. Brostrom. (65; 66; 67; 68; 69; 70; 71).

At trial, the jury heard testimony from 16-year-old Tamara, who was adopted at age two by Dawn S. and lived with two older adoptive brothers on North 54th Street near Villard in Milwaukee. After Dawn S. died in July 2010, Tamara moved in with her aunt and uncle, who became her legal guardians. (65:77-78,80-81; 67:68-70). In May 2011, Tamara told her aunt that she had been sexually abused when she was around six years old. (66:106-107; 67:47,72). More than four months later, in late September 2011, Tamara and her aunt went to police, where Tamara gave a statement to Milwaukee Police Officer Jody Young regarding the allegations. (66:108-109; 67:16,58,74; 68:7-9).

At trial, Tamara identified Joshua Feltz as the boy she knew as "Josh," whose grandparents lived next door to her old house on 54th Street. (66:81-84). She testified that when she was six years old and in the first grade, she played "truth or dare" in a playhouse in her yard with Josh and his sister. (66:84-85). She testified that Josh "dared" her to take off her clothes, and when she did, he began to touch her upper body

and thighs, that he asked her to give him a "blow job," and that she massaged his penis, which he put in her mouth, and then ejaculated on her chest. (66:85-88). Tamara testified that the three children played tag, and that afterward, they went back into the playhouse, where Josh made her give him another blow job, and again ejaculated on her chest and her face. Afterward, on another dare, Josh put his penis in her vagina, and he also put his finger inside her vagina. (66:88-90).

Tamara estimated that after that first time, "something happened" in the playhouse more than five times, but she was unsure whether it happened more than 10 times. (66:96). Tamara believed that the last time that "something happened," she was "maybe seven or eight" and still living in the house on 54th Street. (66:96). She testified that when these "other times" happened, there was a "pattern" of "blow job, fingering, and then oral sex," which Tamara described as Josh putting his penis inside her body. (66:97). Tamara testified that the "same thing" of "blow job, fingering, oral sex" also happened in Josh's grandparents' house next door, in an upstairs bedroom. She testified that Josh put his penis into her "butt" between two and three times, in the upstairs bedroom and in the playhouse. (66:99-104). She also testified that when she had to go to the bathroom, Josh told her to stay, and that on one occasion he drank her urine as she peed, and that she urinated during sexual intercourse more than once. (67:7-12).

Tamara could not recall exactly how many times "something sexual happened" when she and Josh were at his grandparents' house or in the playhouse. (67:57-58,60). She agreed, however, that "things happen[ed]" "at least six times" in the playhouse and "at least six times" at the grandparents' house. (67:64-65). She was also unable to remember over

what period of time the sexual contact occurred, and was "not sure" when it stopped, although she thought it ended sometime when she was in second grade. (67:13-14). Tamara agreed that the first time something happened in the playhouse was "between the summer before first grade and the summer after first grade," and that it was possible that she was seven years old during the first contact, and that nothing ever happened when she was only six years old. (67:32-34,46,59,65). She testified that "other things happened in that same time frame," and that "these things" continued to happen more than one time when she was in second grade and the summer after second grade, both in the playhouse and at the grandparents' house. (67:30-31,65). She recalled that Josh's grandparents moved away when she was in the third grade. (67:29,57). Tamara told the jury that she currently attended high school at Union Grove Christian School, and that she had attended Northwest Lutheran School for kindergarten and first grade. (66:79-80; 67:32-33).

The State also called Milwaukee Police Officer Jody Young, who testified regarding her investigation in this case. (68:4-46;70:33-48). Officer Young told the jury that that she had been a police officer for 22 years, and that she had 14 years of experience investigating sexual assault crimes for the Sensitive Crimes Division, which is a "specialty unit" within the police department. She testified that she received special training in the "Step Wise" guidelines for interviewing children, including explaining the importance of telling the truth. (68:4-7). During trial counsel's cross-examination of Officer Young regarding her interview of Tamara S., Officer Young testified repeatedly that she believed that Tamara S. was telling the truth:

> Q [by defense counsel, Attorney Wasielewski]: You said another explanation might be that the accuser

doesn't appreciate the relevance of what they're bringing forward or understanding that it's wrong. You used the word disclose, and so does Ms. Falk in asking you questions rather than accuse. Does that mean that you presume that what you're hearing from an accuser is something that happened, actually happened so that it's being disclosed rather may or may not be true?

A: Could you rephrase that?

Q: Does the word disclosure suggest that an event is being revealed that actually happened as opposed to events?

ATTORNEY FALK [the prosecutor]: To that question I'm going to object. I think it's argumentative.

THE COURT: Overruled. Do you have the question?

THE WITNESS: I believe so. I asked – I ask – When I talk to somebody, I ask questions because, you know, we're seeking the truth. That's what we're trying to get out of this –

BY ATTORNEY WASIELEWSKI:

Q: So is there a point in your investigation when you stop and say, could this – this information be false, inaccurate?

ATTORNEY FALK: I'm going to object to that question, first of all, because he interrupted her answer; and, secondly, because I think it is argumentative.

THE COURT: Overruled. It's cross-examination. But sustained as to interrupting. If you were not done, go ahead.

BY ATTORNEY WASIELEWSKI:

Q: I apologize if you weren't done. I did not intend to interrupt you.

A: It's okay. I'm sorry. Can you repeat that again?

Q: I think the first question was about the word disclosure and whether that isn't is a word that implies not just an accusation, but the revelation of fact?

A: When I interview victims, I explain that they're – you know, it's very important everything they tell is the truth. There are consequences to lying to the police. She gave me the information.

When she was done giving me the information, if I had questioned anything in what she said, that's part of my interview process. But when I'm done with my interview and I collected the information, *it appeared that she was being truthful when –*

ATTORNEY WASIELEWSKI: I'm going to object to –

THE COURT: Overruled. Counsel, you asked the question. Go ahead.

THE WITNESS: *It did appear that she was being truthful,* but when I'm done with it, I don't say, you know, for example, are you sure you're telling me the truth? I don't do that.

I get a feel for people when I'm talking to them, and *the information she was giving to me appeared to be truthful.*

. . .

REDIRECT EXAMINATION BY ATTORNEY FALK:

Q: In this particular case with Ms. S[ ], did you do what you usually do, which is inform her at the outset that it is important to tell the truth?

A: Yes, ma'am.

Q: Based on your hour to two hours with Ms. S[ ] and your face-to-face observation of her during this entire time, did you ever get the impression that she did not think it was important for her to tell you the truth?

A: No.

Q: You also described that you typically also advise everybody that you talk to who are victims that there are consequences for lying. Like you could be charged with a crime. You could go to jail. Correct?

A: Correct.

Q: Did you do that in this case?

A: Yes, I did.

(68:39-42; App. 104-107)(emphasis added).

Trial counsel moved for a mistrial based upon Officer Young's testimony that she believed Tamara S. was truthful, asserting that his cross-examination involved questions regarding the terminology used and did not ask for the officer's opinion regarding truthfulness. (68:49; App. 108). The court denied the motion, finding that it was defense counsel's "dangerous" cross-examination that elicited the officer's truthfulness response:

THE COURT: I would deny the mistrial. I think your questions absolutely sort of boxed her in. You know, it would have been a [sic] presume an acceptable answer that she didn't believe the victim and, therefore, took various action, but you were not preparing to get the opposite answer which was, in fact, the truthful answer.

I frankly thought your questions were dangerous. I thought that they actually elicited the kind

> of response we ultimately got. She did attempt to answer numerous ways from a more process-based standpoint, but you kept asking and kept asking. Eventually you got kind of the obvious truthful answer.
>
> In addition, to the extent that that created any prejudice against Mr. Feltz, it certainly one ioda [sic] of evidence among lots and lots of evidence, and certainly no grounds for mistrial.

(68:49-50; App. 108-109).

The defense called Joshua Feltz's sister, mother, and grandparents to testify. (68:52-66; 69:4-96). Joshua also testified in his own defense, denying any sexual contact with Tamara S. (69:101-137; 70:29-32).

Trial counsel subsequently proposed a jury instruction addressing Officer Young's opinion testimony regarding Tamara S.'s truthfulness. (70:3;26). The prosecutor objected to its wording, noting that the issue of truthfulness was for the jury to decide and that, "this was an issue that was completely created by the Defense in continuing to press the issue with Officer Young." (70:15-16). The court offered a modified instruction[2], to which the parties agreed, and the court subsequently instructed the jury as follows:

> Officer Jody Young testified that she concluded that Tamara S[ ] seemed truthful during Officer Young's investigation. Regardless of Officer Young's impression of Ms. S[ ], truthfulness or untruthfulness of any witness is a matter solely for you, the jury, to determine.

(25:7; 71:5).

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[2]According to the record, the court utilized the word "wholly" rather than "solely" when reading its modified instruction to the parties. (70:16-17). This variation does not appear to have any legal significance.

The prosecutor also orally moved to amend the time frames for the two charges, to modify Count 1 to May 6, 2003 through September 1, 2004 [which included the summer months both before and after Tamara S. was in first grade], and Count 2 to September 2, 2004 through May 5, 2006 [which included Tamara S.'s second and third grade years], to conform to the testimony. (70:9-13). The court granted this request, and utilized these amended time frames when instructing the jury. (70:13-14,51).

In closing, the prosecutor argued that Joshua Feltz took advantage of the younger Tamara S. in order to exercise power and control over his chaotic life and to sexually gratify himself, asserting that the case "really comes down to assessing her [Tamara's] credibility," noting that she "talked for hours with us under oath," and urging the jury to find that, "Tamara S.[ ] is telling the truth." (71:9-12). Defense counsel focused upon the implausibility of the "pattern" of sexual contact described by Tamara S. (71:27-32). In rebuttal, the prosecutor asserted:

> ATTORNEY FALK [the prosecutor]: So Tamara is just making this all up. Let's go with that. Let's analyze that.
>
> That would mean that she would have some reason to make up a very, very, very detailed story about acts that she could barely speak about, which is a mighty odd thing to decide to do. I think I'll make something up that I can't actually say these words very well and that are mortally embarrassing to have to say that you did, and that –
>
> You know, we're talking about a girl who is at a Christian school, went to a Christian school –
>
> ATTORNEY WASIELEWSKI: Objection. Objection.

ATTORNEY FALK: -- obviously takes –

THE COURT: We can have a side bar.

(Discussion at side bar off the record)

ATTORNEY FALK: I'll just rephrase that.

She goes to a school where moral guidance is provided and has done so for her life.

She takes the oath seriously in front of you. She understands that this is a big deal for this man who she has no apparent ax to grind against ….

(71:34-35; App. 110-111).

The circuit court subsequently summarized the unrecorded side bar for the record:

> The other side bar we had was an objection during rebuttal argument. Mr. Wasielewski objected, that he felt Ms. Falk was going to say because Ms. S[ ] is a student at Christian schools, therefore, she would not lie, and you know, I'm not sure the exact law on that.
>
> Clearly, one cannot make decisions about who is going to be on a jury whether the – a defendant is guilty or not guilty based on race, religion, et cetera. I agreed with Mr. Wasielewski. Thought it was a little – instructed she could change she goes to school that provides moral guidance. That alleviates the religious affiliations concern, and that's what she did. And it wasn't that she was going to say, and, therefore, she's telling the truth. It was she was going to argue in this she would take this oath seriously and this process seriously, and so that's how we proceeded.

(71:44; App. 112).

During deliberations, the jury submitted a question inquiring why the offenses were split into two counts. (27). With the parties' agreement, the court responded that the multiple charges were permitted by law, and the jury was not to give any weight to the number of counts charged. (71:48-51).

The jury returned guilty verdicts on both counts. (28; 29; 71:51-53). The court imposed and stayed a prison term of six years initial confinement and 10 years extended supervision, placing Mr. Feltz on eight-year concurrent probation terms, with 21 days condition time annually. (72:34-40).

Trial counsel timely filed a notice of intent to pursue postconviction relief on Mr. Feltz's behalf. (38). Mr. Feltz filed a Rule 809.30 postconviction motion, arguing that the evidence was insufficient to convict him on Count 2; that Officer Young's testimony regarding Tamara S.'s truthfulness was improper opinion testimony under ***Haseltine***; that the prosecutor's closing argument linking Tamara S.'s parochial school education with her credibility denied his due process right to a fair trial, and that trial counsel was ineffective. (45). The circuit court ordered briefing, and denied the motion in a written order, without a hearing. (51; 52; 53; App. 101-103).

On the sufficiency claim, the circuit court adopted the State's analysis as its decision, which relied on Tamara S.'s initial description of the "pattern" of acts as sufficient evidence for Count 2. (51:8-9; 53:1-2; App. 101-102). Regarding Officer Young's testimony regarding Tamara S.'s truthfulness, the circuit court found that the officer's statements did not violate ***Haseltine*** because it was "offered to explain her investigative process and not whether she believed the victim was telling the truth at trial." The court

also relied on its curative instruction in finding that Mr. Feltz was not prejudiced by the officer's testimony. (53:2; App. 102). With regard to the prosecutor's closing argument linking Tamara S.'s parochial schooling to her credibility, the court found that "it would be improper for a prosecutor to argue to the jury to believe or disbelieve a witness because of his or her religious affiliation" and that trial counsel properly objected to the prosecutor's argument. (53:2-3; App. 102-103). The court found, however, that the prosecutor's rephrased "moral guidance" education argument did not unfairly bolster the alleged victim's credibility:

> … The prosecutor's statement that the victim goes to a school where moral guidance is provided says nothing about the victim's beliefs or opinions on matters of religion. It is a comment on moral principles, and a basic moral principle which everyone understands is the importance of telling the truth. The prosecutor's rebuttal argument was intended to connect the victim's moral education to the oath she gave in court to argue that the victim meant it when she said she would tell the truth.

(53:2; App. 102).

Mr. Feltz appeals from the judgment of conviction and the circuit court's postconviction order denying relief. (54:1). Additional relevant facts as necessary are referenced below.

## ARGUMENT

I. The Evidence Presented at Trial Was Insufficient to Prove the Second Count of Repeated Sexual Assault of a Child Beyond a Reasonable Doubt.

A. Introduction and standard of review.

A conviction that is based upon insufficient evidence cannot constitutionally stand. ***Jackson v. Virginia***, 443 U.S. 307 (1979). The due process clause of the United States and Wisconsin constitutions provide individuals with protection from conviction in a criminal case except "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 365 (1970); *accord* ***State v. (Bonnie) Smith,*** 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). The evidence must be "sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 502, 451 N.W.2d 752 (1990).

In Wisconsin, a criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether he specifically raised the issue at trial. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate court does not substitute its judgment for the fact-finder, but instead asks whether the evidence, viewed in the light most favorable to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***Hayes***, 2004 WI 80, ¶56. If the reviewing court concludes the evidence was insufficient, the conviction must be reversed, with a remand to the circuit court for entry of a judgment of acquittal. ***State v. Wulff***, 207

Wis. 2d 143, 145, 557 N.W.2d 813 (1997) (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)).

B. The evidence was insufficient to prove beyond a reasonable doubt that at least three sexual acts occurred between September 2, 2004 and May 5, 2006, the time frame alleged in Count 2.

While the State initially charged Joshua Feltz with one count of repeated sexual assault of a child for the time period between March 1, 2004 to March 1, 2006, prior to trial, the prosecutor filed an amended criminal complaint and information that extended the time frame and separated the single count into two separate counts of repeated sexual assault of a child. (2; 12; 13). Count 1 alleged at least three assaults between May 6, 2003 and May 5, 2004, and Count 2 alleged at least three assaults between May 6, 2004 and May 5, 2006. Then, at the close of evidence at trial, the court granted the prosecutor's motion to amend the time frames for the two charges, to modify Count 1 to May 6, 2003 through September 1, 2004 [which included the summer months both before and after Tamara S. was in first grade], and Count 2 to September 2, 2004 through May 5, 2006 [which included Tamara S.'s second and third grade years]. (70:9-13). The court instructed the jury based on these amended time frames. (70:13-14,51).

The evidence presented at trial, however, was insufficient to prove beyond a reasonable doubt that Joshua Feltz was guilty of the repeated sexual assault charge in Count 2, as amended. For that charge, under Wis. Stat. §948.025(1)(2003-04), the State was required to prove that between September 2, 2004 and May 5, 2006, Joshua Feltz committed at least three sexual assaults of Tamara S. that were violations of Wis. Stat. §948.02(1)(2003-04), which, at

the time of the charged offense, required sexual contact or sexual intercourse with a person under the age of 13. *See* Wis. JI-Criminal 2107.

In her testimony, Tamara S. recounted that the first sexual contact occurred during a "truth or dare" game with Joshua and his sister in the playhouse. (66:83-96). Her testimony regarding this first occasion specifically described more than three incidents of sexual contact, including touching of her nipples, buttocks, and vagina, two "blow jobs," and penis to vagina intercourse. (66:86-96). While she initially testified that this first contact occurred in the summer when she was six years old and "going into" first grade, Tamara S. subsequently acknowledged that it was possible that the first contact happened when she was seven years old and had already completed first grade, and that nothing occurred when she was six. (66:84; 67:13,33-34,59). Thus, after the close of evidence, the court granted the State's motion to amend the information to adjust the time frame in Count 1 to May 6, 2003 through September 1, 2004, reflecting the time period before, during and after when Tamara S. would have been in first grade and was six to seven years old, and modified Count 2 to September 2, 2004 through May 5, 2006, which reflected the second and third grade years, when she would have been seven to eight years old. (67:28; 70:9-13).

With regard to Count 2, however, the testimony was insufficient to establish that at least three sexual assaults occurred during the time period between September 2, 2004, through May 5, 2006, when Tamara S. was in second and third grade. While it is undisputed that Tamara S. was under 13 years of age during that time, the evidence presented regarding what occurred after the initial contact, and when it occurred, was considerably more vague, and failed to

establish that at least three sexual assaults took place during the Count 2 time period. Tamara S. testified that after that first time, "something happened" in the playhouse "more than five" times, and that it typically consisted of a "pattern" of "blow job, fingering, and then oral sex,[3]" and that penis to anus intercourse also occurred. (66:96,103-104). She testified that these acts also occurred at Joshua's grandparents' house. (66:99-104). Tamara S. subsequently testified that she was unable to recall whether "things happened" more often in the playhouse or the grandparents' house, and she could not recall how many times "something happened" in either place. (67:57, 60).

With regard to the time frame over which the acts occurred, Tamara S. testified:

> Q [the prosecutor]: Once these things started, and you told us yesterday that the first time happened when you were six and you were in the first grade, over what period of time did they continue to happen?
>
> A: [Tamara S.]: I don't remember.
>
> Q: About how old were you when it ended? When it stopped?
>
> A: I'm not sure.
>
> Q: Did these things happen when you were in the second grade?
>
> A: I think so.
>
> Q: And did they happen when you were in the third grade?
>
> A: I don't think so.

[3] Tamara S. defined "oral sex" as penis to vagina intercourse. (66:97).

> Q: So you think they ended sometime during the time that you were in the second grade?
>
> A: Yes.
>
> Q: When you were in the second grade, did you – at the end of that school year, was that when you turned eight?
>
> A: No, I don't think so.

(67:13-14).

Tamara S. subsequently agreed that "these things" continued to happen to her, and that they happened more than one time in both the playhouse and the grandparents' house, while she was in second grade. (67:30-31). She testified that the last time she saw Josh was in "third grade, maybe," at which point his grandparents moved away from the house next door. (67:23,29,57).

Other than a generalized reference to "these things" occurring in both locations while she was in second grade, however, Tamara S.'s testimony failed to indicate what specific acts occurred during the time period from September 2, 2004 and May 5, 2006, when she would have been in the second and third grade. In order to find a defendant guilty of repeated sexual assault, jurors are required to unanimously agree that at least three sexual assaults occurred within the specified time period, even though they need not agree on which acts constitute the required three. Wis. Stat. §948.025(2)(a); *See* Wis. JI-Crim. 2107.

Here, Tamara S.'s broad and uncertain testimony failed to establish what, when, where, and how the alleged sexual assaults occurred between September 2, 2004 and May 5, 2006, leaving the jury to speculate about the specific acts, their number and frequency, and the location where they

occurred during the time frame charged in Count 2. That the jury was left to speculate whether at least three acts occurred during the Count 2 time frame is supported by the question it submitted during its deliberations, which asked why two counts were charged. (71:48-51).

As the evidence at trial was insufficient to establish that Joshua Feltz had sexual contact or sexual intercourse with Tamara S. on at least three occasions between September 2, 2004 and May 5, 2006, as required by Wis. Stat. §948.025(1)(a)(2003-04), this court should reverse and remand with instructions that a judgment of acquittal be entered.

II. Testimony From the State's Investigating Police Officer That Tamara S. Appeared to Be Truthful Was Impermissible Opinion Testimony, and Trial Counsel Was Ineffective For Eliciting It Through His Cross-Examination.

A. Officer Young's testimony that Tamara S. appeared to be truthful violated ***Haseltine***'s prohibition against testimony about another witness's truthfulness.

1. Introduction and standard of review.

"[T]he jury is the lie detector in the courtroom." ***Haseltine***, 120 Wis. 2d at 96. The determination of the credibility of witnesses is left to the jury, and it is well established that no trial witness, expert or otherwise, may give an opinion that another witness is telling the truth. ***State v. Romero***, 147 Wis. 2d 264, 278-79, 432 N.W.2d 899 (1988); ***State v. Haseltine,*** 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984); ***State v. Krueger***, 2008 WI App 162, ¶17, 314 Wis. 2d 605, 762 N.W.2d 114. With regard to

sexual assault allegations, an "expert witness must not be allowed to convey to the jury his or her own beliefs as to the veracity of the complainant with respect to the assault." ***State v. Jensen***, 147 Wis. 2d 240, 256-57, 432 N.W.2d 913 (1988)(citing ***Romero, Id.***).

Whether a witness improperly testified as to the credibility of another witness is a question of law that this Court independently reviews. ***Krueger***, 314 Wis. 2d 605, ¶7; ***State v. Tutlewski***, 231 Wis. 2d 379, 386, 605 N.W.2d 561 (Ct. App. 1999).

2. Officer Young's testimony that Tamara S. appeared truthful was impermissible opinion testimony.

During cross-examination of Officer Young, trial counsel questioned her regarding her use of the term "disclosure" in testifying about Tamara's statement, which counsel suggested implied that it was something that "actually happened," rather than something that "may or may not be true." (68:39-40; App. 104-105). In response, Officer Young repeatedly testified that she believed that Tamara S. was truthful:

> A: When I interview victims, I explain that they're – you know, it's very important everything they tell is the truth. There are consequences to lying to the police. She gave me the information.
>
> When she was done giving me the information, if I had questioned anything in what she said, that's part of my interview process. But when I'm done with my interview and I collected the information, *it appeared that she was being truthful* when –
>
> ATTORNEY WASIELEWSKI: I'm going to object to –

> THE COURT: Overruled. Counsel, you asked the question. Go ahead.
>
> THE WITNESS: *It did appear that she was being truthful,* but when I'm done with it, I don't say, you know, for example, are you sure you're telling me the truth? I don't do that.
>
> I get a feel for people when I'm talking to them, and *the information she was giving to me appeared to be truthful*.

(68: 40-41; App. 105-106)(emphasis added).

Officer Young's testimony that the information provided to her by Tamara S. was truthful was impermissible opinion testimony under ***Haseltine***. In ***Haseltine***, this court addressed the use of expert testimony involving allegations of sexual assault. At Haseltine's trial for sexual assault of his daughter, the State presented a psychiatrist's testimony concerning the behavior pattern of incest victims, and the psychiatrist was permitted to give his opinion that there "was no doubt whatsoever" that the daughter was an incest victim. ***Haseltine***, 120 Wis. 2d at 93, 95. This court held that this testimony "goes too far … The opinion that [the defendant's] daughter was an incest victim is an opinion that she was telling the truth." ***Haseltine***, 120 Wis. 2d at 95-96. This court noted that jurors ordinarily determine witness credibility without expert assistance, and that no witness should be permitted to give an opinion that another mentally and physically competent witness is telling the truth. ***Haseltine*** at 96 (quoting ***United States v. Barnard***, 490 F.2d 907,912 (9th Cir. 1973)); ***Jensen***, 147 Wis. 2d at 249; ***Krueger,*** 314 Wis. 2d 605, ¶9.

In ***State v. Romero*****,** the Supreme Court specifically applied the ***Haseltine*** prohibition on testimony regarding a

witness's truthfulness to the testimony of a police officer. As in Mr. Feltz's case, the sole issue in ***Romero*** was whether the complainant was telling the truth. There, a police officer also testified regarding his experience in sexual assault investigations, offering his opinion that the alleged victim was being "totally truthful." ***Romero*****,** 147 Wis. 2d at 268-69. The Supreme Court found this opinion testimony violated ***Haseltine*** by usurping the jury's role in deciding witness credibility, concluding that there was a "significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime." ***Romero***, 147 Wis. 2d at 278-79.

Similarly, in ***Krueger***, a social worker testified that the child victim must have experienced the alleged sexual contact with Krueger because she was not highly sophisticated and would not have been able to maintain consistency throughout her interview "unless it was something she experienced." ***Krueger***, 314 Wis. 2d 605, ¶¶2-5,15-16. This court held that this was "tantamount to an opinion that the complainant had been assaulted – that she was telling the truth. As in ***Haseltine***, this testimony simply went too far, and its effect was to usurp the role of the jury in determining credibility." ***Krueger*** at ¶16 (citing ***Haseltine***, 120 Wis. 2d at 96; ***Romero***, 147 Wis. 2d at 278, and ***Tutlewski***, 231 Wis. 2d at 389-90).

Here, the circuit court's postconviction decision concluded that Officer Young's testimony did not violate ***Haseltine*** because the statements were "more contextual in nature," and "offered to explain her investigative process and not whether she believed the victim was telling the truth at trial." (53:2; App. 102). Contrary to this determination, however, as in ***Haseltine***, ***Romero***, and ***Krueger***, Officer Young's repeated testimony that Tamara S. "appeared to be

truthful" during the investigative interview was tantamount to an opinion that she was telling the truth. This testimony similarly went too far, invading the province of the jury and usurping its role in determining the credibility of witnesses. ***Krueger*** at ¶16; ***Haseltine,*** 120 Wis. 2d at 96; ***Romero***, 147 Wis. 2d at 278; ***Tutlewski***, 231 Wis. 2d at 389-90.

Moreover, Officer Young's truthfulness testimony was clearly helpful to the State, and equally damaging to Mr. Feltz, as there was no evidence of guilt in this case beyond Tamara S.'s testimony. As the prosecutor argued, the jury's determination of whether Joshua Feltz committed the acts alleged rose and fell upon Tamara S.'s credibility. (71:12). And, as the Supreme Court concluded in ***Romero***, the officer's opinion testimony created a significant possibility that the jury simply deferred to this experienced police witness's investigative skill in evaluating the truthfulness of the alleged victim. ***Romero***, 147 Wis. 2d at 278-79. This is particularly true given Officer Young's testimony that she had 14 years of experience in a specialty unit investigating sexual assault crimes, and had received special training on interview techniques. (68:4-7). Officer Young's testimony that Tamara S. appeared truthful in her interview was improper opinion testimony under ***Haseltine***, and should not have been admitted.

B. To the extent that trial counsel's questioning elicited Officer Young's improper opinion testimony regarding Tamara S.'s truthfulness, his performance constitutes ineffective assistance of counsel.

1. Introduction and standard of review.

To prove ineffective assistance of counsel, a defendant must show that counsel's action or inaction constituted

deficient performance, and that the deficiency caused him prejudice. Deficient performance is conduct that falls below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984); ***Krueger*****,** 314 Wis. 2d 605, ¶7. To satisfy the prejudice aspect of ***Strickland,*** the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland, Id.*** The critical focus is not on the outcome of the trial, but on "the reliability of the proceedings." ***Krueger*****,** ***Id.*** (quoting ***State v. Pitsch***, 124 Wis. 2d 629, 642, 369 N.W.2d 711 (1985)).

The determination of deficient performance and prejudice both present mixed questions of fact and law. This court will uphold the trial court's findings of fact regarding counsel's actions unless they are clearly erroneous, but the determination of whether trial counsel's performance was deficient or prejudicial is a question of law for *de novo* review. ***State v. Snider***, 2003 WI App 172, ¶20, 266 Wis. 2d 830, 668 N.W.2d 784.

2. Trial counsel's risky approach to cross-examining Officer Young elicited the truthfulness testimony and was therefore deficient.

Officer Young's testimony regarding Tamara S.'s truthfulness occurred during trial counsel cross-examination. Thus, to the extent that trial counsel elicited the improper testimony in violation of ***Haseltine***, counsel performed ineffectively, and deprived Mr. Feltz of his constitutional right to the effective assistance of counsel. The circuit court

did not hold a ***Machner***[4] hearing on the postconviction motion, and thus there was no testimony or findings of fact regarding trial counsel's actions. Therefore, whether counsel's cross-examination of Officer Young constituted deficient performance is subject to *de novo* review by this court. ***Snider***, 266 Wis. 2d 830, ¶20.

The sole issue for the jury's determination in this case was the credibility of Tamara S.'s allegations against Joshua Feltz, and both the prosecutor and defense counsel focused upon this crucial issue in presenting and arguing their case. It was critical for the defense that the jury conclude that Tamara S. was not credible in her allegations against Joshua Feltz. As recognized both by the circuit court and the prosecutor, however, trial counsel's cross-examination of Officer Young regarding her use of the term "disclosure" prompted the officer to testify that she believed Tamara S. was truthful during their interview. (68:49-50; App. 108-109; 70:15-16). Trial counsel's relentless pursuit of this doomed cross-examination constitutes deficient performance.

Notably, in overruling trial counsel's objection to Officer Young's truthfulness testimony, the circuit court noted, "Counsel, you asked the question." (68:40-41; App. 105-106). And, when subsequently denying the defense's mistrial motion, the court again pointed out trial counsel's role in eliciting the truthfulness testimony, characterizing the cross-examination as "dangerous," and "absolutely sort of boxed her in," and "actually elicited the kind of response we ultimately got." (68:49-50; App. 108-109). The prosecutor agreed, noting that "this was an issue that was completely created by the Defense continuing to press the issue with Officer Young." (70:15-16). Finally, counsel himself

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

acknowledged that, to the extent that his cross-examination elicited Officer Young's testimony regarding Tamara S.'s truthfulness, his performance was deficient. (70:16-17). Thus, the record amply supports a conclusion that trial counsel performed deficiently by eliciting Officer Young's testimony regarding Tamara S.'s truthfulness.

3. Trial counsel's deficient performance prejudiced Joshua Feltz.

As in ***Haseltine*** and ***Krueger,*** here Tamara S.'s account of the sexual assaults was not corroborated by independent evidence, and her credibility was the sole issue for the jury's determination. While the circuit court found that Officer Young's truthfulness testimony was merely "one ioda [sic] of evidence among lots and lots of evidence," and no grounds for a mistrial (68:49-50; App. 108-109), this conclusion is contradicted by the record. Here, Officer Young's opinion regarding Tamara S.'s truthfulness, given Young's testimony regarding her experience in interviewing sexual assault victims, produced an aura of reliability, and created "too great a possibility that the jury abdicated its fact-finding role" to the police witness expert and did not independently determine Tamara S.'s credibility. ***Haseltine***, 120 Wis. 2d at 96; ***Krueger***, 314 Wis. 2d at 620. Further, Officer Young's testimony that Tamara S. appeared truthful was not isolated, as she repeated this statement three times. (68:40-41; App. 105-106). Importantly, this testimony went to the crux of the issue the jury was required to determine – whether Tamara S. was believable. Thus, the improper truthfulness testimony was extremely damaging to Mr. Feltz, and prejudiced his defense as, but for counsel's inept cross-examination, the jury would not have heard Officer Young's repeated assertions that she believed Tamara S.'s accusations.

Finally, at the conclusion of the case, the circuit court instructed the jury that Officer Young had testified regarding her conclusion that Tamara S. was truthful, but told jurors to decide the truthfulness or untruthfulness of witnesses "[r]egardless of Officer Young's impression of Ms. S[ ]." (70:16-17). However, the court had overruled trial counsel's objection to this testimony and failed to strike the testimony or tell the jury to disregard it. *Cf.,* ***Genova v. State***, 91 Wis. 2d 595, 621-22, 283 NW.2d 483 (1979)(instruction sufficient to cure prejudice, where court struck improper question and advised jury to disregard it); ***State v. Sigarroa***, 269 Wis. 2d 234, ¶¶23-27, 674 N.W.2d 894 (Ct. App. 2004)(court's immediate striking of improper testimony and admonishment to jury to disregard it, coupled with the court's closing instruction to ignore stricken testimony, was sufficiently curative). Jurors were, therefore, free to consider Officer Young's opinion testimony regarding Tamara S.'s truthfulness, despite the court's closing instruction. As a result, the instruction was insufficient to erase the prejudice caused by Officer Young's repeated testimony regarding Tamara S.'s truthfulness. This is particularly true when this error is coupled with the prosecutor's attempt to further bolster Tamara S.'s credibility based upon her parochial school education, as challenged in Section III below.

As there is a reasonable probability sufficient to undermine confidence in the outcome of Mr. Feltz's case, prejudice has been established. ***Strickland,*** 466 U.S. at 694; ***Krueger*****,** 314 Wis. 2d 605, ¶7. Counsel's performance deprived Mr. Feltz of his constitutional right to the effective assistance of counsel, and a new trial should be ordered.

III. The Prosecutor Improperly Linked Tamara S.'s Parochial School Education to Her Credibility, and Trial Counsel Was Ineffective In Acquiescing to a Variation Of That Argument and Failing to Move For a Mistrial.

A. Introduction and standard of review.

A prosecutor's interest as a representative of the State is "not [to] win a case, but [to see] that justice shall be done." ***State v. (Steven) Smith***, 2003 WI App 234, ¶24, 268 Wis. 2d 138, 671 N.W.2d 854 (quoting ***Viereck v. United States***, 318 U.S. 236, 248 (1943)). A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors. ***State v. Braden,*** 2002 WI App. 292, 258 Wis. 2d 982, ¶13, 654 N.W.2d 95; ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784. (1979). However, argument on matters not in evidence is improper. ***Smith,*** 268 Wis. 2d 138, ¶23; ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). The prosecutor may also not suggest that the jury consider factors other than the evidence in arriving at its verdict. ***State v. Jorgenson***, 2008 WI 60, ¶40, 310 Wis. 2d 138, 754 N.W.2d 77 (citations omitted); ***Draize***, 88 Wis. 2d at 454.

A prosecutor's closing argument is improper when it so infects the trial with unfairness as to make the conviction a denial of due process. ***State v. Wolff,*** 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citing ***Donnelly v. DeChristoforo***, 416 U.S. 637, 643 (1974)). Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the entire trial. ***Smith,*** 268 Wis. 2d 138, ¶23 (citing ***Wolff,*** 171 Wis. 2d 161, 167-68).

B. The prosecutor improperly bolstered Tamara S.'s credibility by arguing that her parochial school education made her take the oath to tell the truth more seriously.

Here, the prosecutor focused her rebuttal argument on "analyzing" Tamara S.'s credibility in an attempt to refute trial counsel's argument that Tamara S.'s assertions were not believable. (71:26-40). In doing so, the prosecutor improperly asserted that Tamara S.'s parochial school education made her more credible, specifically referencing her attendance at a "Christian school," which prompted an objection from trial counsel. (71:34-35; App. 110-111). After a sidebar, the prosecutor "rephrased" her argument to characterize Tamara S.'s attendance at "a school where moral guidance is provided and has done so for her life," asserting that this meant that, "She takes the oath seriously in front of you." (71:35; App. 111).

Wis. Stat. §906.10 prohibits evidence of a witness's beliefs or opinions on religious matters for the purpose of showing that the witness's credibility is either enhanced or impaired. This rule precludes any inference that links religious beliefs with credibility. 3B Wis. Prac., Civil Rules Handbook §906.10:1 (Grenig, Jay; Blinka, Daniel)(2013 ed.), and is consistent with Article I, sec. 19 of the Wisconsin Constitution, which guarantees competency of a witness regardless of religious beliefs.

The circuit court's subsequent summary of the sidebar suggested that trial counsel agreed with the court's proposal that the prosecutor recharacterize her reference to Tamara S.'s school to one "where moral guidance is provided," which, according to the court, would "alleviate[ ] the religious affiliation concern." (71:44; App. 112). While the court

apparently believed that the modification from "Christian school" to "a school where moral guidance is provided" would "alleviate the religious affiliations concern," this misses the point, as Wis. Stat. §906.10 categorically prohibits the use of religious beliefs or opinions, regardless of any specific reference to a particular "affiliation." Thus, changing the term "Christian" to a more generic phrase of "moral guidance" failed to cure the prosecutor's improper use of Tamara S.'s parochial school education to bolster her credibility, as both assertions specifically linked her attendance at a religious school with the likelihood that she would tell the truth under oath. Thus, both the "Christian school" and "school where moral guidance is provided" arguments violated Wis. Stat. §906.10's prohibition on the use of religious beliefs to enhance or impair a witness's credibility.

In its postconviction decision, while finding that Wis. Stat. §906.10 was inapplicable because closing arguments are not "evidence," the circuit court acknowledged that it was improper for the prosecutor to argue that a jury should believe or disbelieve a witness based on religious affiliation, finding that counsel properly objected to the prosecutor's argument here. (53:3; App. 103). However, the court found that the modification to "a school where moral guidance is provided" did not implicate any religious beliefs or opinions, but was merely a "comment on moral principles and a basic moral principle which everyone understands is the importance of telling the truth." (53:3; App. 103). The court therefore found that the prosecutor "intended to connect the victim's moral education to the oath she gave in court to argue that the victim meant it when she said she would tell the truth." (53:3; App. 103).

The court's postconviction determination is problematic on several fronts. As an initial matter, there was no evidentiary basis for the prosecutor's claim that Tamara S. attended "a school where moral guidance is provided and has done so for her life," as 16-year-old Tamara S. testified only that she currently attended Union Grove Christian School, and had attended Northwest Lutheran School in kindergarten and first grade. (66:79-80; 67:32-33). Consequently, as there was no testimony indicating what schools Tamara S. attended from second grade through her current high school, there was no evidentiary basis for the prosecutor's claim regarding lifelong attendance at parochial schools or schools where "moral guidance is provided." Moreover, there was no testimony whatsoever that any of the schools Tamara S. attended provided any "moral"[5] guidance, lessons, or instruction, or that Tamara S. learned, understood, and applied any such "moral" guidance.

In her rebuttal before the jury, the prosecutor used her "Christian school" and "moral education" argument to improperly suggest that jurors arrive at their verdict by considering factors other than the evidence – specifically, Tamara S.'s "lifelong" education at a "Christian school" that the prosecutor asserted provided "moral guidance" -- in a brazen attempt to bolster Tamara S.'s credibility. This she could not do. ***Smith,*** 268 Wis. 2d 138, ¶23; ***Draize***, 88 Wis. 2d at 454.

While a prosecutor may strike "hard blows" during closing arguments, it is her duty to refrain from using

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[5] As defined by Merriam-Webster, the term "moral" means "of or relating to principles of right and wrong in behavior: ethical; expressing or teaching a conception of right behavior." http://www.merriam-webster.com/dictionary/moral (last visited February 13, 2015).

improper methods. ***State v. Weiss,*** 312 Wis. 2d 382, ¶¶1,10, 752 N.W.2d 372 (Ct. App. 2008)(citing ***Berger v. United States*****,** 295 U.S. 78, 88 (1935)). As the United States Supreme Court has held, a prosecutor:

> . . . may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none …
>
> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.

***Berger,*** 295 U.S. at 88-89.

The outcome of this case rose and fell on the credibility of Tamara S. Thus, "[t]he slightest wisp of influence could have directed the course of the jury's determination." ***Smith***, 268 Wis. 2d 138, ¶22. The prosecutor's rebuttal argument was the final word the jury heard from the parties, and her improper suggestion that the jury should consider Tamara S.'s religious schooling in determining her credibility went too far, affecting the fairness of the trial and denying Mr. Feltz his constitutional due process right to a fair trial. This court should reverse and order a new trial.

C. Any acquiescence by trial counsel to the prosecutor's modified parochial school argument and his failure to move for a mistrial constitutes ineffective assistance of counsel.

The circuit court's summary of the sidebar after trial counsel's objection to the prosecutor's "Christian school" argument suggests that trial counsel acquiesced to the modification to "moral guidance." (71:44; App. 112). Such acquiescence, however, constitutes ineffective assistance of counsel. *See* ***Strickland, supra***. Trial counsel's failure to further object to the prosecutor's argument that Tamara S. was more credible because she attended "a school where moral guidance is provided" was deficient performance, as it allowed the prosecutor to perpetuate the improper use of Tamara S.'s parochial school attendance in order to enhance her credibility. *See* ***Strickland,*** 466 U.S. at 694. And, as argued above, because Tamara S.'s account of the sexual assaults was not corroborated by independent evidence, her credibility was the sole issue for the jury's determination. The prosecutor's improper linkage of Tamara S.'s parochial school attendance to her credibility went to the heart of this issue, and aggravated the error of Officer Young's impermissible opinion testimony regarding Tamara S.'s truthfulness, as argued in Section II above. Like Officer Young's testimony, the prosecutor's improper argument similarly bolstered Tamara S.'s credibility, and was therefore harmful to the defense, prejudicing Mr. Feltz.

In addition, counsel's failure to move for a mistrial based upon the prosecutor's improper argument also constitutes ineffective assistance of counsel. A motion for mistrial is warranted when the basis for the request is sufficiently prejudicial to warrant a new trial. ***State v. Adams,*** 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998);

***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). Here, as argued above, the prosecutor's improper argument bolstered Tamara S.'s credibility with the jury. Given counsel's objection to the "Christian school" argument, counsel obviously had concerns about the propriety of this argument and its impact on the jury's determination of Tamara S.'s credibility. Counsel's failure to subsequently move for a mistrial, based both on the prosecutor's "Christian school" and "moral guidance" arguments was deficient, and prejudiced Mr. Feltz. *See* ***Strickland, supra***. A new trial is warranted.

## CONCLUSION

Mr. Feltz requests that this court find the evidence as to Count 2 insufficient, as argued in Section I, and reverse this conviction, with a remand to the circuit court with directions that a judgment of acquittal be entered as to that count. In addition, on the issues raised in Sections II and III, Mr. Feltz requests a new trial, or asks that this court order a remand, with directions that a ***Machner*** hearing be held.

Dated this 16th day of February, 2015.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. §809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,528 words.

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §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. §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 16th day of February, 2015.

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# CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names 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 16th day of February, 2015.

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# APPENDIX

# I N D E X
# T O
# A P P E N D I X

Page