

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2015AP000272
Manitowoc County Circuit Court Case No. 2013TR002929**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB A. MARTINEZ,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION
BEFORE THE HONORABLE GARY L. BENDIX, JUDGE
MANITOWOC COUNTY CIRCUIT COURT**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT JACOB A. MARTINEZ**

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B.A.C. v. T.L.G., 135 Wis.2d 290, 400 N.W.2d 48.
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State v. McCoy, 47 Wis.2d 781, 177 N.W.2d 819
(1970) 3

ARGUMENT

The State correctly asserts that the requirement for admissibility of evidence is that the testimony must be sufficient to show that it was improbable that the original item had been exchanged, contaminated or tampered with. *B.A.C. v. T.L.G.*, 135 Wis.2d 290, 400 N.W.2d 48. (Ct. App. 1986). The State also points to *State v. McCoy* for the proposition that not all persons who touch the evidence need to be called as a witness. *State v. McCoy*, 47 Wis. 2d 781, 177 N.W.2d 819 (1970).

However, in *McCoy*, the proof of the chain of custody was significantly greater than that here. In *McCoy*, the State called the nurse who positively identified the evidence that she received, she identified the packing, personal seals and the date she put on the seals. The officer who received the evidence from the nurse also testified. Finally, the forensic scientist from the State Laboratory, who analyzed the evidence, also testified that the items that she received were in sealed condition when they were received by the crime lab. *Id.* at 528-531 and 56-58.

Unlike, *McCoy*, here the State proffered no evidence regarding the person who received the samples, checked them in, or provided the samples with a tracking number. There was

no evidence proffered that the samples were in sealed, good condition when received by the State Laboratory of Hygiene. In fact, the analyst who did testify had not even touched the sample until May 16, 2013, two months and six days after the sample was collected. (R28:55/Reply App.1). Because of this, the analyst acknowledged that he did not check the sample to assure it was in good condition when received and that it was properly labelled or assigned the proper tracking number. At a very minimum, the State should have called the witness who initially received the sample at the State Laboratory of Hygiene.

Thus, the State has failed to establish that it was improbable that the original item had been exchanged, contaminated or tampered with. Because of this, the Court erred in admitting the sample.

CONCLUSION

Because of the above, the Court should vacate the conviction.

Dated this 26th day of May, 2015.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 9 pages. The word count is 1240.

Dated this 26th day of May, 2015.

Respectfully Submitted

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**CERTIFICATION OF COMPLIANCE WITH 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 s. 809.19(12).

I further certify that:

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

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

Dated this 26th day of May, 2015

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 26th day of May, 2015.

Respectfully submitted,

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APPENDIX