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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP279-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CAROLINE D. PRIETO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER EXCLUDING WITNESSES, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE CHAD G. KERKMAN PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE AND FACTS...........................3

SUMMARY OF ARGUMENT 12

ARGUMENT 14

THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN EXCLUDING ALL BUT ONE OF THE STATE'S WITNESSES AS A SANCTION FOR THE PROSECUTOR'S VIOLATION OF A DISCOVERY ORDER...............................14

A. The State did not violate the criminal discovery statute when it provided its witness list to the defense thirteen days before the scheduled trial date. 15

1. Standard of review......................... 15

2. Thirteen days was within a reasonable time before trial to disclose the State's witnesses........ 15

B. Regardless of whether the State violated the statute or just the trial court's scheduling orders, the circuit court erroneously exercised its discretion in excluding all but one of the State's witnesses as a sanction......... 20

Page

1. Facts underlying the State's violation of the trial court's scheduling orders regarding the exchange of witness lists......... 20

2. Standard of review........................ 22

3. The trial court erroneously exercised its discretion in excluding all but one prosecution witness because Prieto was not prejudiced by the State's discovery violation....... 22

4. The trial court's order excluding all but one of the State's witnesses is tantamount to a dismissal with prejudice, and imposing that severe sanction where the client is blameless is an erroneous exercise of discretion....................................... 33

5. The failure to comply with the trial court's scheduling orders was negligent but not deliberate or willful....................... 36

C. Although some of the arguments advanced in this brief were not raised below, there are good reasons to overlook the State's forfeiture............. 39

CONCLUSION.. 41

Page

CASES

Culp v. Olukoga,
3 N.E.3d 724 (Ohio App. 2013) 32

In re Guardianship of Willa L.,
2011 WI App 160, 338 Wis. 2d 114,
808 N.W.2d 155 39

In re Mental Condition of Billy Jo W.,
182 Wis. 2d 616,
514 N.W.2d 707 (1994) 34

In re Riek,
2013 WI 81, 350 Wis. 2d 684,
834 N.W.2d 384 17

Industrial Roofing Servs., Inc. v. Marquardt,
2007 WI 19, 299 Wis. 2d 81,
726 N.W.2d 898 .... 3, 13, 34, 35

Irby v. State,
60 Wis. 2d 311,
210 N.W.2d 755 (1973) 26, 27

Johnson v. Allis-Chalmers Corp.,
162 Wis. 2d 261,
470 N.W.2d 859 (1991) 34

Kutchera v. State,
69 Wis. 2d 534,
230 N.W.2d 750 (1975) 26, 27, 28

McLellan v. Charly,
2008 WI App 126, 313 Wis. 2d 623,
758 N.W.2d 94 14

Page

Midwest Developers v. Goma Corp.,
121 Wis. 2d 632,
360 N.W.2d 554 (Ct. App. 1984)................................ 22

O'Neil v. Monroe County Circuit Court,
2003 WI App 149, 266 Wis. 2d 155,
667 N.W.2d 774.. 17, 18

People v. Lindquist,
917 P.2d 510 (Or. App. 1996) 31

State v. Caban,
210 Wis. 2d 597,
563 N.W.2d 501 (1997) 13

State v. DeLao,
2002 WI 49, 252 Wis. 2d 289,
643 N.W.2d 480... 23

State v. DeRango,
229 Wis. 2d 1,
599 N.W.2d 27 (Ct. App. 1999).................................... 40

State v. (Kevin) Harris,
2004 WI 64, 272 Wis. 2d 80,
680 N.W.2d 737... 15, 16

State v. (Ronell) Harris,
2008 WI 15, 307 Wis. 2d 555,
745 N.W.2d 397... 16, 17, 25

State v. Heyer,
174 Wis. 2d 164,
496 N.W.2d 779 (Ct. App. 1993)........................... 13, 35

State v. Lock,
2012 WI App 99, 344 Wis. 2d 166,
823 N.W.2d 378... 3, 24

Page

State v. Martinez,
166 Wis. 2d 250,
479 N.W.2d 224 (Ct. App. 1991)............................ 22, 24

State v. Miller,
2004 WI App 117, 274 Wis. 2d 471,
683 N.W.2d 485.. 24

State v. Moran,
2005 WI 115, 284 Wis 2d 24,
700 N.W.2d 884.. 40

State v. Polashek,
2002 WI 74, 253 Wis. 2d 527,
646 N.W.2d 330.. 39

State v. Rice,
2008 WI App 10, 307 Wis. 2d 335,
743 N.W.2d 517.. 24

State v. Wild,
146 Wis. 2d 18,
429 N.W.2d 105 (Ct. App. 1988).................................. 22

Teter v. Deck,
274 P.3d 336 (Wash. 2012).. 31

United States v. Johnson,
228 F.3d 920 (8th Cir. 2000).. 31

Wold v. State,
57 Wis. 2d 344,
204 N.W.2d 482.. 27

Page

STATUTES

Wis. Stat. § 804.12(2)(a) 13, 35

Wis. Stat. § 805.03 .... 13, 35

Wis. Stat. § 948.03(3)(a) 4

Wis. Stat. § 971.23 .... 14, 27

Wis. Stat. § 971.23(1) 17, 20, 22

Wis. Stat. § 971.23(1)(d) 1, 12, 14, 15

Wis. Stat. § 971.23(1)(e) 25

Wis. Stat. § 971.23(1)(h) 17, 25

Wis. Stat. § 971.23(7) (1973) 28

Wis. Stat. § 971.23(7m) 22, 24

Wis. Stat. § 971.23(7m)(a) 23, 26, 28

Wis. Stat. § 971.23(7m)(b) 3, 23, 25, 26

Wis. Stat. § 971.31(5)(b) 16

Wis. Stat. § 974.07(6) 40

OTHER AUTHORITIES

1995 Wis. Act 387 23

STATE OF WISCONSIN

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

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BRIEF OF PLAINTIFF-APPELLANT

ISSUES PRESENTED FOR REVIEW

1. The prosecutor filed the State's witness list thirteen days before the scheduled trial date. Did this disclosure occur "within a reasonable time before trial" as Wis. Stat. § 971.23(1)(d) requires?

Although Prieto argued that the State violated the discovery statute, the trial court based its order excluding witnesses on the prosecutor's violation of the court's scheduling orders regarding the exchange of witness lists.

2. Regardless of whether disclosure of the State's witness list was timely under the discovery statute, the timing of the disclosure violated the trial court's scheduling orders. Did the trial court erroneously exercise its discretion in excluding all of the State's witnesses except its expert as a sanction for this violation, without finding any prejudice to the defense and without first considering any less severe sanctions?

The trial court did not identify any prejudice to Prieto as a result of the prosecutor filing the State's witness list thirteen days before the scheduled trial date. Nor did the trial court consider sanctions less severe than the exclusion of witnesses.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes the briefs will thoroughly set forth the relevant facts and legal authorities necessary to resolve the issues presented. For this reason, the State does not request oral argument.

The State asks that the opinion be published to provide guidance to Wisconsin's circuit courts regarding the circumstances under which wholesale exclusion of witnesses is an appropriate sanction for a discovery violation in a

criminal case. The opinion should also be published if it resolves the apparent conflict between Wis. Stat. § 971.23(7m)(b) and cases such as *State v. Lock*, 2012 WI App 99, ¶ 122, 344 Wis. 2d 166, 823 N.W.2d 378, which hold that absent good cause for a discovery violation, the undisclosed evidence must be excluded.

Publication would also be warranted if this court decides whether *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 726 N.W.2d 898, applies in criminal cases.

STATEMENT OF THE CASE AND FACTS

Caroline Prieto was charged in Kenosha County Circuit Court on May 24, 2012, with recklessly causing great bodily harm to an eight-month-old baby, Caleb B., on May 11, 2012 (1). While Caleb was in Prieto's care, he suffered a seizure and became nonresponsive (*id.*:1). Medical personnel discovered he had a brain injury consistent with abusive head trauma (*id.*:2).

On the same date the complaint was filed, the Kenosha County District Attorney filed a "State's Demand for Discovery and Witness List" (3). Paragraph 5 of that document stated: "The defense is advised that the State intends to call the following attached list of witnesses at the trial in the above-entitled matter. If the list is not attached, it will follow shortly." No list was attached, nor was one filed shortly. On May 25, 2012, defense counsel Christopher Rose

filed a Discovery Demand on the Kenosha County District Attorney. In Paragraph 5, he requested "[a] list of all witnesses and their addresses whom the district attorney intends to call at the trial" (164:4).

Following a preliminary hearing on June 12, 2012 (169), Prieto was bound over for trial before the Honorable Anthony G. Milisauskas (*id.*:16). An information charging her with violating Wis. Stat. § 948.03(3)(a) was filed the same day (9).

On July 26, 2012, Attorney Thomas McClure was substituted for Christopher Rose (10). McClure made his first appearance in the case on October 11, 2012 (170:2), and the trial court scheduled a motion hearing for December 11, 2012 (*id.*:4).

Between December 11, 2012, and December 4, 2013, the case was continued several times to allow the defense to obtain and review Caleb's voluminous medical records (171:2; 172:2-3; 173:4-6; 174:2-3).

At the status conference on December 4, 2013 (175), the trial court scheduled the trial for June 23, 2014 (*id.*:4). The court told the parties, "[l]et's have witness lists filed within 60 days of today's date" (*id.*:5). The defense filed its list on February 5, 2014 (18).

On June 4, 2014, the prosecutor requested an adjournment of the June 23 trial date to give her "more time to locate an expert and then determine if I need to obtain another one based on the second notice of [defense] expert

that has been filed" (177:4). Over defense objection (*id.*:5), the trial court adjourned the trial and set August 11, 2014, for a status conference (*id.*:7).

The next status conference was held before the Honorable Chad G. Kerkman on August 15, 2014 (178). Based on the prosecutor's upcoming medical leave and the availability of the defense experts, the court scheduled Prieto's trial for February 9, 2015 (*id.*:2-4). The court also scheduled a status conference for October 17 and a jury status for February 5 (*id.*:4-5). At the close of the hearing, the court told the parties it would "get a Scheduling Order for you" (*id.*:6).

As promised, the court issued a Scheduling Order on August 15, 2014 (25; A-Ap. 165-66). The first paragraph provided that "[t]he date for the mandatory Judicial Pre-Trial Hearing is ______," but the line was left blank (25:1; A-Ap. 165). Handwritten on the first page of the order were dates for a status conference on October 17, 2014; a jury status hearing on February 5, 2015; and a jury trial on February 9, 2015 (*id.*). The second paragraph of the order provided that "the parties shall exchange a list of witnesses and their last known addresses within twenty (20) days following the Judicial Pre-Trial Hearing" (*id.*).

Paragraph 8 of the Scheduling Order provided the following advisory:

> All parties are hereby advised that there shall be strict adherence to this order. Parties and/or counsel who neglect, ignore, or disobey the terms and requirements of this

> scheduling order are subject to sanctions authorized by law pursuant to secs. 802.10(7), 805.03, 814.51, and 972.11(1), Wis. Stats. which include but are not limited to the limitation of presentation of evidence, monetary penalties, imposition of jury and witness fees, contempt citations, waiver of oral argument of legal issues, adjournment of the trial, and dismissal of the action.

(25:2; A-Ap. 166).

On October 6, 2014, Dr. William J. Hayes filed a notice of appearance as co-counsel for Prieto (26). He first appeared in court on October 17, 2014 (179).

At the October 17 hearing, Hayes told the court he had just met the prosecutor, Assistant District Attorney Emily Trigg, that morning and indicated she was due to give birth within the next two weeks (179:2). He represented that the parties agreed that the trial should be taken off the calendar, with the current trial date used as "the last date that the State can give us the reports from their experts to the requisite standard they need to be" (*id.*:3). Trigg said she planned to return from maternity leave "the week before the trial is set" (*id.*:6).

Noting that the trial date was still four months away, the court said it wasn't hearing any reason why the trial couldn't be held then (179:6). After the court remarked, "I haven't heard from the State that they need an adjournment" (*id.*:7), Trigg said she thought the outstanding medical-records issue could be handled by someone in her office during her absence (*id.*:7-8).

Expressing dismay that the case was so old, the trial court denied the request for an adjournment (179:8-9). After a lengthy discussion about Caleb's medical records (*id.*:9-16), the court set December 12 as the last date for the State to name their expert witnesses and provide their reports, and it scheduled a final pretrial hearing for January 22, 2015 (*id.*:19).

Trigg was on maternity leave from October 27, 2014, until January 12, 2015 (180:31; A-Ap. 133). The only document the State filed during her leave was the Notice of Expert and Summary of Expert Testimony, filed December 12, 2014 (60). Trigg's first court appearance in the case following her return was on January 23, 2015 (180; A-Ap. 103-41).

On December 26, 2014, Hayes filed an amended witness list containing forty names and three categories of health care employees who had provided care to Caleb (70).

Toward the close of the hearing on January 23, 2015, Trigg first learned that the State's witness list had not been filed while she was on leave although she had "filled out a form and order for that to be done" (180:34; A-Ap. 136). On the heels of her admission, Hayes told the court "it is my intent to file a motion in limine because she didn't do it. It's 20 days before trial" (180:35; A-Ap. 137).

Following a colloquy with Hayes and Trigg, the court ordered that the State would be barred from calling any witness other than Dr. Swenson:

THE COURT:	I'm looking at the court record on December 4th of 2013. It states, "All witness lists to be filed within 60 days." I filed a Scheduling Order, gave a copy to the parties on August 15, 2014. I believe that Scheduling Order states that witness lists need to be filed within 20 days. I don't know why the State should call any witnesses other than Dr. Swenson. Attorney Trigg, any comments on that?
MS. TRIGG:	None.
THE COURT:	And that's your motion?
MR. HAYES:	That's my motion.
THE COURT:	So ordered. Anything further today?

(180:35; A-Ap 137.)

Before the hearing adjourned, Trigg sought to clarify that "the only witness I would be able to call would be Dr. Swenson" (180:38; A-Ap. 140). When the court replied "Yes," Trigg moved to dismiss, but the trial court denied her motion (*id.*).

Three days later – on January 26, 2015 – Trigg filed a witness list containing thirteen names, as well as the generic category, "[a]ny witness listed by the defense" (107). Except for the State's expert, Dr. Swenson, and three law enforcement officers, the witnesses Trigg named also appeared on the witness list the defense had filed February 5, 2014 (*compare* 107 *with* 18). And although the defense did not mention Officers Hofmann and Londo or Detective DenHartog by name on its original list, the three

witnesses were implicitly included in Paragraph 7 of the amended notice of lay witnesses the defense filed on December 26, 2014:

> All police officers and Sheriff's deputies who were in any way involved in the investigation of this matter, and may have been identified in police reports/records turned over to the Defendant in the discovery process.

(70:2.)[1]

On January 29, 2015, Trigg filed a motion and brief asking the court to reconsider its order excluding the State's witnesses and denying the State's motion to dismiss (123; 124; A-Ap. 167, 168-71). The basis for the motion was that the State had since filed its witness list, and Prieto could not show any prejudice as a result of the belated filing because the State's list contained only witnesses who were both named in discovery and appeared on the defense's witness list (124:1-2; A-Ap. 168-69). Hayes opposed the motion for reconsideration (129) and moved to strike the State's witness list (125; A-Ap. 172-73).

At a telephonic hearing on January 30, 2015, the court lambasted the State for filing a motion to reconsider when it "failed to oppose a motion to not be able to call witnesses"

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[1] Reports prepared by Hofmann, Londo and DenHartog were included in the discovery provided to the defense (*see* 59:exhibits 3, 4, 10, 13). In addition, Hofmann was identified in the complaint as a responding officer who interviewed Prieto at the scene (1:1-2). DenHartog was also mentioned at the preliminary hearing as having interviewed Caleb's mother and spoken to persons at Victory Baptist Church (169:12).

during the last court appearance (181:5; A-Ap. 146). The court asked Trigg why she bothered to file a motion for reconsideration when she didn't bother arguing against the motion to exclude State witnesses during the last hearing (*id.*). Trigg explained that until she had filed a witness list, she was unable to argue that the defense would not be prejudiced by her late filing because all of her witnesses were either in the discovery or appeared on the defense list (*id.*:5-6; A-Ap. 146-47).

The court asked Trigg why she didn't file a list back in 2013, when the predecessor judge ordered the State to do so (181:6; A-Ap. 147). Trigg replied, "I don't know if I just misremembered or didn't look closely enough" (181:6-7; A-Ap. 147-48). The court said it would hear the motion for reconsideration on February 5, 2015, the date set for jury status, but warned that "I'm not likely to change my mind" (181:7; A-Ap. 148). Trigg advised the court that at the hearing, she planned to present testimony on the "public interest prong that courts consider when the State makes a motion to dismiss the case" (181:10; A-Ap. 151).

At the jury status hearing on February 5, 2015, the court reiterated that the State "has chosen not to argue against a sanction of prohibiting the State from calling witnesses" (182:5; A-Ap. 158), an apparent reference to the prosecutor's silence when the court ordered exclusion of all witnesses other than Dr. Swenson. The court again remarked that the State had twice failed to file a witness list

when ordered to do so (182:5-6; A-Ap. 158-59). Trigg again explained that when the court excluded the witnesses, she was unaware that the witness list had not been filed (182:7; A-Ap. 160). She argued that the failure was unintentional:

> [B]efore I was on leave I had prepared the witness list to be filed in my absence. That did not happen. I do not have an explanation for that. But it was not an intentional violation of the court order.

(*id.*:8; A-Ap. 161).

Trigg restated the explanation she had provided during the telephonic hearing: she did not object at first because there was no basis for arguing lack of prejudice to the defense until she had filed the State's witness list and discovered that all of her witnesses were either on the defense listed or named in discovery (182:8; A-Ap. 161).

Calling Trigg "disingenuous" (182:8; A-Ap. 161), the court said that she either knew or should have known that she had not filed a witness list (182:8-9; A-Ap. 161-62). Without explicitly saying so, the court denied her motion to reconsider (*id.*).

On February 5, 2015, Deputy District Attorney Michael Graveley filed a motion to stay the trial to allow the State time to evaluate whether to appeal from the trial court's order excluding the State's witnesses other than Dr. Swenson (135). The trial court denied the motion the same day (139).

On February 6, 2015, the trial court entered an eight-part order, Paragraph 3 of which barred the State from

calling any witness other than Dr. Swenson at trial (144:1; A-Ap. 101). The State filed an appeal from this portion of the order (167).[2] This court granted a motion to stay Prieto's trial pending the appeal (145).

SUMMARY OF ARGUMENT

The trial court erroneously exercised its discretion in excluding all but one of the State's witnesses from testifying as a sanction for the prosecutor submitting the State's witness list thirteen days before trial, in violation of the court's scheduling order.

Because every witness on the State's list was included in the defense's previously filed witness list and named in discovery, Prieto was not prejudiced by the timing of the State's disclosure. Nor did disclosure of the list thirteen days before trial violate the criminal discovery statute because thirteen days was "within a reasonable time before trial," as Wis. Stat. § 971.23(1)(d) requires. Because Prieto suffered no prejudice, the trial court should have considered less serious sanctions than the wholesale exclusion of the State's witnesses.

[2] On February 20, 2015, the State filed an Amended Notice of Appeal (168), addressed to both the order excluding its witnesses and the order limiting Dr. Swenson's expert testimony to the medical reports the State had provided to the defense. The State has since decided not to pursue an appeal from the latter order.

Under *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 726 N.W.2d 898, a trial court should not dismiss a case with prejudice based on attorney misconduct where the client is blameless. Here, exclusion of all but one prosecution witness amounts to a dismissal with prejudice given that the State, had it proceeded to trial with just its expert witness, could not have survived a motion to dismiss at the close of its case. Because the State's client – the public – was blameless with regard to the discovery violation, under *Marquardt* the trial court erroneously exercised its discretion in excluding all prosecution witnesses but for the State's expert. While *Marquardt* was a civil case, it involved Wis. Stat. §§ 804.12(2)(a) and 805.03, and those statutes apply in criminal cases. *See State v. Heyer*, 174 Wis. 2d 164, 171-72 and n.4, 496 N.W.2d 779 (Ct. App. 1993).

Although some of the arguments summarized above were not advanced in the trial court, this court should decline to impose a waiver bar to raising them for the first time on appeal. The rule of waiver is one of judicial administration and does not limit this court's power to address issues not raised in circuit court. *State v. Caban*, 210 Wis. 2d 597, 609, 563 N.W.2d 501 (1997). Given that this is a pretrial appeal, finality is not a concern and does not favor a waiver finding. In light of the significant public interests at

stake in this appeal, this court should address and resolve all of the arguments raised despite the State's failure to present them to the circuit court.

ARGUMENT

THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN EXCLUDING ALL BUT ONE OF THE STATE'S WITNESSES AS A SANCTION FOR THE PROSECUTOR'S VIOLATION OF A DISCOVERY ORDER.

In barring the State from calling any witness other than Dr. Swenson, the trial court did not find that the State had violated the criminal discovery statute, Wis. Stat. § 971.23. Rather, the court based its ruling on the prosecutor's violation of the court's scheduling orders (*see* 144; A-Ap. 101-102).

Nevertheless, the State as a threshold matter will establish that the prosecutor did not violate the discovery statute. The State does so in recognition of the rule that Prieto as the respondent on appeal can argue for affirmance of the trial court's order on any alternative ground. *See McLellan v. Charly*, 2008 WI App 126, ¶ 18 n.2, 313 Wis. 2d 623, 758 N.W.2d 94. Given that trial defense counsel in opposing the State's motions for reconsideration argued that the prosecutor had violated § 971.23(1)(d) (*see* 129:2), Prieto's appellate attorney may resurrect the claim of a statutory violation as an alternative ground to uphold the

trial court's order. Rather than waiting to see if Prieto reprises that claim, the State chooses to address – and hopefully defeat – that argument in its brief-in-chief.

A. The State did not violate the criminal discovery statute when it provided its witness list to the defense thirteen days before the scheduled trial date.

1. Standard of review

Whether the State violated its discovery obligations "requires the interpretation and application of the discovery statute to a given set of facts and presents a question of law subject to independent appellate review." *State v. (Kevin) Harris*, 2004 WI 64, ¶ 25, 272 Wis. 2d 80, 680 N.W.2d 737.

2. Thirteen days was within a reasonable time before trial to disclose the State's witnesses.

Wisconsin Statute § 971.23(1)(d) provides that upon demand, the district attorney shall "within a reasonable time before trial" disclose "[a] list of all witnesses and their addresses whom the district attorney intends to call at the trial." This statute was triggered when Prieto's original attorney, Christopher Rose, filed a discovery demand on the Kenosha County District Attorney's Office on May 25, 2012

(164:1-2), the day after the complaint was issued.[3] Paragraph 5 demanded disclosure of "[a] list of all witnesses and their addresses whom the district attorney intends to call at the trial" (*id.*:4).

As the supreme court observed in *Kevin Harris*, 272 Wis. 2d 80, ¶ 35, the statute does not define what constitutes a "reasonable time before trial," and no case establishes "a per se rule for what is 'reasonable' under the statute." *Harris* holds that "for evidence to be disclosed 'within a reasonable time before trial' for purposes of § 971.23, it must be disclosed within a sufficient time for its effective use." *Id.* ¶ 37.

Apart from that definition, cases finding a particular disclosure timely or untimely provide some limited guidance in determining whether the statute has been violated in a particular case.

For example, in *State v. (Ronell) Harris*, 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397, the court found that disclosure on the day of trial of reports regarding the State's unsuccessful attempt to lift identifiable fingerprints from a plastic baggie was not "within a reasonable time before trial"

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[3] This motion was made prematurely because Wis. Stat. § 971.31(5)(b) provides that in felony actions, motions under § 971.23 "shall not be made at a preliminary examination and not until an information has been filed." The information was not filed until June 12, 2012 (9), eighteen days after the defense demanded discovery pursuant to § 971.23(1) (*see* 164:3).

The State's discovery demand, filed May 24, 2012 (3), was also premature.

under § 971.23(1). *Id.* ¶ 35. There defense counsel argued that the State's untimely disclosure of the fingerprint reports disrupted his trial strategy. *Id.* ¶ 20. Based on the information the prosecutor had timely disclosed, that strategy was to demonstrate "that the investigation was shoddy" by cross-examining State witnesses about whether they had submitted various items for fingerprint-testing. *Id.* Although the court did not explicitly say so, it implicitly found that trial-day disclosure of the reports did not give the defense sufficient time to effectively use the evidence.

Contrary to the result reached in *Harris*, the supreme court in an attorney disciplinary proceeding recently held that the prosecutor's "disclosure of essentially duplicative information four days in advance of an apparently routine marijuana possession case" did not violate Wis. Stat. § 971.23(1)(h).[4] *In re Riek*, 2013 WI 81, ¶ 44-45, 350 Wis. 2d 684, 834 N.W.2d 384. Because the defense had long had in its possession information that duplicated the information in the statement Riek disclosed four days before trial, her disclosure occurred within a sufficient time for the defense's effective use of the evidence.

Although the prosecutor's violation of the discovery statute was not directly at issue in *O'Neil v. Monroe County Circuit Court*, 2003 WI App 149, 266 Wis. 2d 155, 667

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[4] Wisconsin Stat. § 971.23(1)(h) requires the State to disclose "[a]ny exculpatory evidence" within a reasonable time before trial.

N.W.2d 774, this court strongly suggested that the disclosure of the State's witness list on December 27, 2001, for a trial starting January 3, 2002, was not within a reasonable time before trial, given the holidays and the prosecutor's knowledge that defense counsel was on vacation when he disclosed his witnesses. *Id.* ¶ 3. When O'Neil first saw on the day before trial that the alleged victim's father was on the State's list, she realized that she needed to obtain an expert witness to testify about the onset of menstruation. *Id.* ¶ 4. Under those circumstances, six days before trial was not a sufficient time for effective use of the evidence, i.e., the State's witness list.

Far from establishing a bright-line rule for what "a reasonable time before trial" means, the above cases demonstrate that timing is not the only determinant of reasonableness. Rather, the critical inquiry is whether the disclosure was timed so that the defense could effectively use the evidence, whether it be a fingerprint report, a witness statement, or a witness list.

Here, there were no surprise witnesses on the list the State provided nearly two weeks before trial. The first two witnesses named are the parents of the alleged victim (1:2; 107). The third and fourth witnesses, August and Michele Schmidt, live next door to Prieto (*see* 1:1; 70:2). The fifth witness, Daniel Duncan (107), is pastor of Victory Baptist Church and was named in a police report the defense planned to use as a trial exhibit (59:exhibit 10). Lila Boyd,

the sixth witness (107), is the secretary and nursery coordinator at Victory Baptist (59:exhibit 10), where Prieto left Caleb in the nursery while she cleaned the church on the day of the charged crime (1:2). The seventh witness is the State's named expert, Dr. Alice Swenson (107). Witnesses eight and nine, Doctors Feldman and Brown (*id.*), are doctors who provided care to Caleb (70:3, 5). Witness ten is Detective Duffy (107), who interviewed Prieto the day of the incident (1:2) and was the sole witness at the preliminary hearing (169). The last three witnesses – Detective DenHartog and Officers Hofmann and Londo (107) – are law enforcement officers whose reports were furnished to the defense in discovery and submitted as defense exhibits (59:exhibits 4, 10, 13).

Defense counsel has not alleged he was surprised by disclosure of any of the named witnesses nor could he legitimately do so. After all, nine of the thirteen State witnesses appeared on the original defense witness list filed February 5, 2014 (18), and on the defense's amended list (70), while Dr. Swenson was the State's named expert (60). The remaining three witnesses on the State's list fall within Paragraph 7 of the defense's amended witness list because they are "police officers and Sheriff's deputies who were in any way involved in the investigation of this matter" (70:2).

Under these circumstances, the State's list was provided to the defense within a sufficient time before trial to allow the defense to use it effectively. Under these

circumstances, thirteen days was "within a reasonable time before trial" under § 971.23(1), so the timing of the disclosure did not violate the discovery statute.

B. Regardless of whether the State violated the statute or just the trial court's scheduling orders, the circuit court erroneously exercised its discretion in excluding all but one of the State's witnesses as a sanction.

1. Facts underlying the State's violation of the trial court's scheduling orders regarding the exchange of witness lists.

While the State maintains that there was no statutory discovery violation, the State concedes that the prosecutor violated the trial court's scheduling orders with respect to disclosure of the State's witness list.

At the status conference before the original trial judge on December 4, 2013, the court ordered that witness lists be filed "within 60 days of today's date" (175:5), i.e., by February 3, 2014. Although that order apparently was not reduced to writing (other than as an entry on CCAP), the defense substantially complied, filing its witness list on February 5, 2014 (18). The State neither filed a witness list prior to the then-scheduled trial date of June 23, 2014 (*see* 175:4), nor requested an extension of time to do so. On June 4, 2014, the court adjourned the June 23 trial at the prosecutor's request (177:4, 6-7). Postponement of the trial cancelled any negative effect the State's noncompliance with

the original witness-list requirement may otherwise have had.

At a status conference on August 15, 2014 (178), the successor judge set a trial date of February 9 (*id.*:4), and indicated he would issue a Scheduling Order (*id.*:6). The Scheduling Order, filed that same day, included the following directive:

> 2) If the matter is scheduled for jury trial, the parties shall exchange a list of witnesses and their last known addresses within twenty (20) days following the Judicial Pre-Trial Hearing.

(25:1; A-Ap. 165.)

The line for the date of the Judicial Pre-Trial Hearing was left blank (25:1; A-Ap. 165). Handwritten on the Order were a status conference on October 17, 2014; a jury status hearing on February 5, 2015; and a jury trial on February 9, 2015 (*id.*). By process of elimination, the status conference of October 17, 2014, must have been regarded as the "Judicial Pre-Trial Hearing" although it was not designated as such on the front of the transcript (*see* 179:1) or on the face of the Scheduling Order (*see* 25; A-Ap. 165). Assuming the October 17 proceeding was the judicial pre-trial hearing, witness lists were to be exchanged by November 6, 2014, i.e., within twenty days of that hearing. The State admittedly did not comply with this deadline. Instead, the State filed its list on January 26, 2015 (107). This filing came three days after the prosecutor assigned to the case discovered shortly after

returning from maternity leave that the witness list had not been filed in her absence as she had directed (*see* 180:34; A-Ap. 136). The State's list contained thirteen names, including its expert witness, Dr. Alice Swenson, and the catchall category "[a]ny witness listed by the defense" (107).

2. Standard of review.

The imposition of a sanction for a discovery violation is addressed to the discretion of the trial court. *State v. Martinez*, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991), citing *Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 643, 360 N.W.2d 554 (Ct. App. 1984); *State v. Wild*, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988).

3. The trial court erroneously exercised its discretion in excluding all but one prosecution witness because Prieto was not prejudiced by the State's discovery violation.

Assuming this court finds that disclosure of the State's witness list violated § 971.23(1) because thirteen days was not "within a reasonable time before trial," the discovery statute allows sanctions less severe than wholesale exclusion of the evidence that was untimely disclosed, and the trial court should have considered imposing those less severe sanctions before excluding all prosecution witnesses other than Dr. Swenson.

Sanctions for violating the discovery statute are addressed in Wis. Stat. § 971.23(7m):

971.23 Discovery and inspection.

. . . .

(7m) SANCTIONS FOR FAILURE TO COMPLY.

(a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

(b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

At first glance, the opening sentence of sub. (7m)(a) appears to require the exclusion of witnesses for a statutory discovery violation unless the noncompliant party shows good cause for failure to comply. Subsection (7m)(b) overrides that seemingly mandatory language, however, because it provides that "[i]n addition to or *in lieu of*" the sanction specified in sub. (7m)(a), the court can instruct the jury that the offending party violated its discovery obligation.

Although sub. (7m)(b) was created by 1995 Wis. Act 387, § 21,[5] cases decided since its enactment seemingly overlook its existence. For example, in *State v. DeLao*, 2002 WI 49, ¶ 51, 252 Wis. 2d 289, 643 N.W.2d 480, the supreme court declared that "[a]bsent a showing of good cause, the

[5] The act took effect January 1, 1997. 1995 Wis. Act 387, § 37.

evidence the State failed to disclose must be excluded. Wis. Stat. § 971.23(7m).” The *DeLao* court did not acknowledge the existence of sub. (7m)(b) at all. Since then, this court has repeatedly cited *DeLao* for the proposition that absent good cause for a discovery violation, the undisclosed evidence must be excluded. *See*, *e.g.*, *State v. Lock*, 2012 WI App 99, ¶ 122, 344 Wis. 2d 166, 823 N.W.2d 378; *State v. Rice*, 2008 WI App 10, ¶ 14, 307 Wis. 2d 335, 743 N.W.2d 517; *State v. Miller*, 2004 WI App 117, ¶ 9, 274 Wis. 2d 471, 683 N.W.2d 485.

In contrast to the quoted language from *DeLao* and this court's cases adopting it, the supreme court in *Ronell Harris* recognized that even when the State fails to show good cause for a discovery violation,[6] exclusion of the evidence at issue is not required.

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[6] The State is not arguing that there was good cause for filing the witness list thirteen days before the February 9, 2015, trial.

Although the State contends that the prosecutor's violation of the scheduling orders was negligent rather than deliberate, negligence does not translate to good cause:

> Nor are we prepared to say that negligence or lack of bad faith constitutes "good cause" as a matter of law for all cases under sec. 971.23(7), Stats., as the trial court's decision might suggest. While an assessment of the state's conduct in such terms may be relevant to the question of "good cause," it is not necessarily controlling. . . [W]hether the state has met its burden to establish "good cause" must depend on the specific facts of the case. Even if the facts could be read to support the trial court's "negligence/no bad faith" conclusion, this still begs the question of "good cause" under the statute.

State v. Martinez, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991).

The prosecutor in *Ronell Harris* violated § 971.23(1)(e) and (h) by failing to disclose two reports documenting the State's unsuccessful attempt to obtain fingerprints from a plastic baggie containing cocaine. The trial court denied Harris's request to exclude any fingerprint evidence as a sanction for the prosecutor's violation, partially because the court viewed suppression as too harsh a penalty. *Ronell Harris*, 307 Wis. 2d 555, ¶ 97. Defense counsel then asked the court to gently admonish the State in front of the jury, but the court refused. Instead, the court apologized to the jury for taking so long; explained that defense counsel was right to object; and said that the problem had been resolved. The court did not mention the State's failure to comply with its discovery obligations. *Id.* ¶ 102.

On appeal, the supreme court found that the State did not show good cause for its discovery violation and agreed with Harris that the trial court had imposed an inadequate sanction. *Id.* ¶ 36. The court held that the circuit court erroneously exercised its discretion "in failing to advise the jury that the State had failed to make timely disclosure of the reports to the defendant under the criminal discovery statute," as § 971.23(7m)(b) provides. *Id.* ¶ 106. The court did not say that the trial court should have excluded the fingerprint evidence, however.

Ronell Harris illustrates that even where the State fails to show good cause for a discovery violation, exclusion

of the evidence is not mandatory, the "shall" in § 971.23(7m)(a) notwithstanding. Rather, sub. (7m)(b) provides that in appropriate cases, an instruction informing the jury of the State's dereliction of its discovery obligation can substitute for exclusion of the witness or evidence.

If this court finds that the State violated the discovery statute, and failed to show good cause for the violation, the statute does not require exclusion of the State's witnesses. Rather, consistent with *Ronell Harris*, the trial court could advise the jury of the State's discovery violation, as § 971.23(7m)(a) permits. This less severe sanction accords with earlier supreme court cases that support the proposition that exclusion of evidence is not an appropriate sanction for a discovery violation where the defendant is not prejudiced. Chief among these cases are *Irby v. State*, 60 Wis. 2d 311, 210 N.W.2d 755 (1973),[7] and *Kutchera v. State*, 69 Wis. 2d 534, 230 N.W.2d 750 (1975).

Although factually far removed from Prieto's situation because it involved a claim that the State should have been required to trim its list from 97 witnesses to a more realistic number, *Irby* contains the following language supporting the principle that exclusion of witnesses is not an appropriate sanction for a discovery violation where the defendant is not prejudiced:

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[7] The prosecutor invoked *Irby* to support her motion for reconsideration (124:1; A-Ap. 168).

> [W]hen an error is claimed amounting to noncompliance with or abuse of the witness-list requirement, the error or abuse . . . may be cured by the court granting the other party a continuance so he can adequately prepare for trial . . . or by recessing for a period sufficient to allow counsel to interview the witness . . . *The granting of a continuance or recess is to be favored over striking the witness*. . . . In order to qualify for a continuance or recess, *most courts require the continuance be requested in a timely fashion and that the defendant be surprised and prejudiced by the testimony*.

Irby, 60 Wis. 2d at 321-22 (emphasis added).

More on point than *Irby* is *Kutchera*, 69 Wis. 2d at 542-43, where the supreme court found no reversible error in allowing testimony from three prosecution witnesses omitted from the State's witness list, without a showing that there was good cause for the omission. Instead, noting that the three unnamed witnesses testified for limited purposes, the court focused on the lack of prejudice to the defense:

> [D]efense counsel never stated that he was either surprised or prejudiced by the state calling these witnesses at trial without listing them. Because no such showing was even attempted here, we conclude it was not prejudicial error for the trial court to allow these three witnesses to testify.

The *Kutchera* court cited with approval the following language from *Wold v. State*, 57 Wis. 2d 344, 351, 204 N.W.2d 482:[8]

> Perhaps not all evidence which should be disclosed to the defendant need be excluded. The harm may be slight and avoided by a short adjournment to allow the defendant to

[8] Because Wold was tried prior to enactment of the Criminal Code revision, Wis. Stat. § 971.23 did not apply to him.

> investigate or acquire rebutting evidence. The penalty for breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant.

Kutchera, 69 Wis. 2d at 542-43.

When *Kutchera* was decided, Wis. Stat. § 971.23(7) (1973), contained the following language, identical to that found in current § 971.23(7m)(a): "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance." Despite the absence of statutory language requiring the opposing party to demonstrate prejudice in order to gain exclusion of the evidence, *Kutchera* held that the trial court had properly allowed three unlisted witnesses to testify because the defendant never attempted to show prejudice.

Like the situation in *Kutchera*, Prieto never attempted to show how she would be prejudiced were the persons on the State's witness list allowed to testify at the trial scheduled for February 9, 2015. In the memorandum opposing the State's motions for reconsideration (129), Prieto claimed she would be prejudiced by the prosecutor's failure to disclose the opinions of its medical experts and reports regarding the voice-stress tests administered to Caleb's parents (*id.*:9-10). But she made no claim that the defense would be harmed by allowing any of the State's thirteen named witnesses to testify.

Nor did the defense allege any prejudice during the pretrial hearings at which the State's failure to file a witness list within the time ordered by the court was discussed.

The first time the trial court and the prosecutor learned of the State's failure to provide a witness list was during the motion hearing on January 23, 2015 (180; A-Ap. 103-41). As the hearing was winding down, the trial court asked, "Am I missing something? Did you not file a witness list yet?" 180:34; A-Ap. 136. Before Trigg could respond, defense counsel Hayes interjected, "She has not." *Id.* Blindsided by the news, Trigg explained that she had "filled out a form and order for that to be done," adding that "[a]pparently that was something else that was not done in my absence" (*id.*).

When Hayes said he intended to file a motion in limine "because she didn't do it," the trial court, after referencing the scheduling orders, declared, "I don't know why the State should call any witnesses other than Dr. Swenson. Attorney Trigg, any comments on that?" (180:35; A-Ap. 137). Trigg replied "None" (*id.*).

The trial court then summarily decided that the State could only call Dr. Swenson, imposing exclusion as a sanction without requiring Hayes to articulate his motion or the grounds therefor:

THE COURT: And that's your motion?

MR. HAYES: That's my motion.

THE COURT: So ordered. Anything further today?

(180:35; A-Ap. 137.)

Three days later, Trigg filed the State's witness list (107), and three days after that she moved the trial court to reconsider its order excluding the State's witnesses (123; A-Ap. 167).

At the January 30, 2015, telephonic conference convened at the defense's request (*see* 181:2; A-Ap. 143), the trial court said it would hear the State's motion for reconsideration of the order excluding witnesses on February 5, 2015 (181:7; A-Ap. 148). At that hearing (182; A-Ap. 154-64), the trial court and Trigg did most of the talking (*see id.*); defense counsel said he would rely on the memorandum he had already filed (182:5; A-Ap. 158). Neither in that memorandum (129), nor at the hearing (182; A-Ap. 154-64), did Hayes identify any prejudice Prieto would suffer as a result of the State filing its witness list thirteen days before trial.

Pursuant to *Irby* and *Kutchera*, the trial court should not have imposed the drastic sanction of excluding the State's witnesses without a showing that disclosure of the witness list thirteen days before trial prejudiced Prieto. As is apparent from section A.2. of the Argument, a showing of prejudice was virtually impossible, given that twelve of the State's thirteen named witnesses were also included on the defense's previously filed witness list, either by name or implicitly, by inclusion in the category "police officers and

Sheriff's deputies who were in any way involved in the investigation of this matter" (70:2). Although the remaining State witness, Dr. Swenson, was not on the defense list, she had already been noticed as the State's expert.

Our supreme court is not alone in requiring a showing of prejudice to justify such a serious sanction as exclusion of witnesses. For example, in *United States v. Johnson*, 228 F.3d 920 (8th Cir. 2000), the court found that the district court had abused its discretion in barring the government's expert witness from testifying as a sanction for the government's failure to disclose the witness until six days pretrial. The Eighth Circuit found an abuse of discretion because the district court struck the expert's testimony "without identifying or establishing any basis for prejudice." *Id.* at 926.

Similarly, the Oregon court in *People v. Lindquist*, 917 P.2d 510, 513 (Or. App. 1996), declared that "[p]reclusion of a witness is a proper sanction only when the other party has been prejudiced and preclusion would serve the purpose of the discovery statute."

More recently, the Washington Supreme Court in *Teter v. Deck*, 274 P.3d 336, 341 (Wash. 2012), held that substantial prejudice to the opponent's ability to prepare for trial is one of the three showings necessary for a trial court to impose the most severe sanctions, including exclusion of witnesses, for a discovery violation.

Likewise, the Ohio court in *Culp v. Olukoga*, 3 N.E.3d 724, 737 (Ohio App. 2013), emphasized that "'[t]he existence and effect of prejudice resulting from noncompliance with the disclosure rules is of primary concern'" in deciding whether to exclude evidence as a sanction for a discovery violation.

Here, Prieto did not argue that she was prejudiced due to the prosecutor's violation of the scheduling order, nor did the trial court identify any prejudice to the defense resulting from the State filing its witness list thirteen days before trial. Under Paragraph 8 of the August 15, 2014, Scheduling Order, the trial court had several options other than exclusion of the witnesses available to it:

> All parties are hereby advised that there shall be strict adherence to this order. Parties and/or counsel who neglect, ignore, or disobey the terms and requirements of this scheduling order are subject to sanctions authorized by law pursuant to secs. 802.10(7), 805.03, 814.51, and 972.11(1), Wis. Stats. which include but are not limited to the limitation of presentation of evidence, monetary penalties, imposition of jury and witness fees, contempt citations, waiver of oral argument of legal issues, adjournment of the trial, and dismissal of the action.

(25:2; A-Ap. 166).

Without considering the possibility of imposing monetary penalties or issuing contempt citations, the trial court immediately seized on wholesale exclusion of the State's witnesses as a sanction for the State's violation of the scheduling order. Because defense counsel made no attempt to show that Prieto was prejudiced by the timing of the

State's disclosure of its witness list, and the trial court did not find that she was, the court erroneously exercised its discretion when it excluded all of the State's witnesses except Dr. Swenson from testifying at trial.

In addition, as the State will explain below, exclusion of its witnesses was an erroneous exercise of discretion because the State's client – the public – did not shoulder any blame for the discovery violation.

4. The trial court's order excluding all but one of the State's witnesses is tantamount to a dismissal with prejudice, and imposing that severe sanction where the client is blameless is an erroneous exercise of discretion.

Although the trial court did not dismiss the case, but instead ordered exclusion of all State witnesses except Dr. Swenson, under the circumstances this sanction amounted to a dismissal with prejudice. Had this court not stayed Prieto's trial pending appeal, the State would have been limited to presenting just its expert to the jury. Because Dr. Swenson had no personal knowledge of the events surrounding Caleb's injuries, the State would have been unable to present sufficient evidence to allow the case to go to the jury. Rather, the trial court would have had no choice but to grant a defense motion to dismiss following Dr. Swenson's testimony. Therefore, although the sanction the trial court imposed is the exclusion of witnesses, this sanction amounts to a dismissal with prejudice because

jeopardy will attach once the jury is sworn, and the court will have to dismiss based on insufficient evidence if the State's case consists solely of Dr. Swenson.

In *Marquardt*, 299 Wis. 2d 81, ¶ 61, the supreme court held that "it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless." In so holding, the court declared it was overruling *Johnson v. Allis-Chalmers Corp.*, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), "[t]o the extent that *Johnson* can be interpreted as concluding that the client's conduct is irrelevant or that a dismissal with prejudice is warranted even when the client is blameless." *Marquardt*, 299 Wis. 2d 81, ¶ 61.

Our supreme court has acknowledged that "in every criminal case the prosecutor represents the public." *In re Mental Condition of Billy Jo W.*, 182 Wis. 2d 616, 648, 514 N.W.2d 707 (1994). The public includes all members of the community, including the alleged victim and his family.

Pursuant to the court's reasoning in *Marquardt*, any negligence or misconduct on the part of the prosecutor or other members of the district attorney's office should not be imputed to the public, and a sanction that effectively constitutes a dismissal with prejudice is an erroneous exercise of discretion where the public is blameless. Although *Marquardt* has not yet been applied in any

criminal cases, *Marquardt*'s reasoning logically should extend to the criminal realm.

Significantly, *Marquardt* involved the application of Wis. Stat. §§ 804.12(2)(a) and 805.03 (*see* 299 Wis. 2d 81, ¶ 43), and this court in *State v. Heyer*, 174 Wis. 2d 164, 171-72 and n.4, 496 N.W.2d 779 (Ct. App. 1993), found those statutes applicable in criminal cases. Consistent with *Heyer*, the trial court in its Scheduling Order of August 15, 2014, included § 805.03 as one source of potential sanctions for violations of the Order (25:2; A-Ap. 166).

There is even more reason why the negligence of counsel for the State should not be imputed to the client in a criminal case. In a civil case, the client is commonly a private party with narrow interests. In contrast, the public as the client in a criminal case has a broad-based interest in seeing that defendants are held responsible for their wrongdoing and that its tax dollars are used toward that end. And while the segment of the public that has voting rights can elect their local district attorney, they have no choice in selecting the attorney assigned to prosecute a particular case. In contrast, a civil litigant usually has discretion in choosing an attorney to represent the litigant's interests. This distinction provides additional support for extending *Marquardt* to criminal cases.

5. The failure to comply with the trial court's scheduling orders was negligent but not deliberate or willful.

Although the State is not arguing that there was good cause for the prosecutor's discovery violation (*see* n.5, *supra*), the State maintains that noncompliance with the December 4, 2013, and August 15, 2014, scheduling orders regarding exchange of witness lists was merely negligent and in no way deliberate or willful.

When Judge Kerkman quizzed Trigg on why she had failed to comply with Judge Milisauskas's December 4, 2013, directive to file a witness list within sixty days (181:6; A-Ap. 147), she replied, "I don't know if I just misremembered or didn't look closely enough" (181:6-7; A-Ap. 147-48). Insofar as Judge Kerkman remarked that the State "chose not to file a witness list" in compliance with the 2013 scheduling order (182:6; A-Ap. 159), the suggestion that Trigg purposely failed to comply with the predecessor judge's order is not borne out by the record.

When Judge Milisauskas on December 4, 2013, orally ordered the parties to file witness lists "within 60 days of today's date" (175:5), Trigg was not present. Rather, a different prosecutor was substituting for her (*id.*:1). Following the hearing, the court's order was not reduced to writing, and the transcript of the hearing was not prepared and filed until March 11, 2015 (*id.*:6). While the stand-in prosecutor should have told Trigg when the list was due, the record is silent regarding whether that happened. Likewise,

although Trigg could have obtained this information from CCAP entries, the record does not reveal whether she did.

When Trigg was called to account for why she failed to comply with the 2013 scheduling order, she almost certainly did not recall that she had not been in court when the order was orally delivered more than a year earlier. By the time of the January 23, 2015, hearing, it is doubtful whether she could have reconstructed what had happened between the December 4, 2013, hearing and the adjournment of the June 23, 2014, trial that explained her failure to file a witness list over a year earlier. On this set of facts, her noncompliance can hardly be deemed deliberate or willful.

The unintentional nature of Trigg's noncompliance with the August 15, 2014, order requiring exchange of witness lists twenty days after the judicial pretrial hearing is even more evident.

Trigg's last court appearance in the case during 2014 was on October 17, 2014 (179:1; 180:2; A-Ap. 104). She went on maternity leave from October 27, 2014, until January 12, 2015 (180:31; A-Ap. 133). The attorney assigned to handle the case while Trigg was on leave apparently did not take any action in response to documents the defense filed during her absence (180:32; A-Ap. 134). In the course of this eleven-week period, defense counsel filed dozens of motions, letters, reports and other documents (*see* 49-51; 55A-59; 61-106); the State did not respond to any of them. From what the record shows, the only action the special prosecutor undertook was

examining the orders the defense submitted for Judge Kerkman's signature in late October (*see* 53 and 54) and having a paralegal inform the judge the State had no objection to him signing the orders (*see* 52).

During Trigg's eleven-week absence, the only document the State filed was the Notice of Expert Testimony submitted by a paralegal on Trigg's behalf.[9] Trigg's first appearance on the case in 2015 was on January 23 (180; A-Ap. 103-41). Earlier that week, she had been trying a different case (180:33; A-Ap. 135). Until her first court appearance following her return from leave, Trigg was unaware that the State's witness list had not been filed (180:34-35; A-Ap. 136-37); she had completed a form and order for that to be done (180:34; A-Ap. 136).

Under these circumstances, the State's violation of the August 15, 2014, scheduling order was not due to any intentional conduct on Trigg's part. Rather, it appears to have resulted from negligence on the part of the attorney who was assigned to handle the case during her absence although the record is somewhat murky on this point. Had the special prosecutor been reading the numerous defense motions that were filed while Trigg was on leave, presumably he would have noticed that in a filing on December 26, 2014, defense counsel represented that the

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[9] Because Trigg was out of the office and authorized a paralegal to sign the document on her behalf, defense counsel later argued that the document was invalid (*see* 180:4-5; A-Ap. 106-107).

State had not yet served and filed a witness list (70:5:¶ 44). At that point, there was still a month and a half to go before trial.

In light of the facts recounted above, the State does not believe the trial court was justified in calling Trigg "disingenuous" for saying she did not know the State's witness list had not been filed (182:18; A-Ap. 161). While the district attorney's office was negligent in failing to comply with the trial court's scheduling order, the record does not support the conclusion that the discovery violation was deliberate or willful. This is yet another reason that excluding all but one State witness was an erroneous exercise of the trial court's discretion.

C. Although some of the arguments advanced in this brief were not raised below, there are good reasons to overlook the State's forfeiture.

The State recognizes that some of the arguments advanced above, including the argument that exclusion of the State's witnesses was erroneous under *Marquardt*, were not raised below, so that this court could dispose of them on the basis of forfeiture. *See State v. Polashek*, 2002 WI 74, ¶ 25, 253 Wis. 2d 527, 646 N.W.2d 330 (general rule is that issues not raised in circuit court are deemed waived). Despite its failure to present all of its arguments to the circuit court, the State asks this court to consider any forfeited arguments in the exercise of its discretion. *See In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 23, 338 Wis.

2d 114, 808 N.W.2d 155 ("we have the discretion to address arguments raised for the first time on appeal").

Both the supreme court and this court have exercised their discretion to consider a forfeited issue when it is of sufficient public interest to merit a decision. *See State v. Moran*, 2005 WI 115, ¶ 31, 284 Wis 2d 24, 700 N.W.2d 884 (interpretation of Wis. Stat. § 974.07(6)); *State v. DeRango*, 229 Wis. 2d 1, 33-34, 599 N.W.2d 27 (Ct. App. 1999) (alleged violation of defendant's state constitutional right to unanimous verdict).

Like the forfeited issues addressed in *Moran* and *DeRango*, whether *Marquardt*'s holding that a case should not be dismissed with prejudice where the client is blameless should extend to criminal cases is an issue of sufficient public interest to merit a decision. Given the crushing workload of district attorneys' offices statewide, future violations of scheduling orders are certain to occur. Circuit court judges addressing such violations should know whether dismissal with prejudice is an available sanction in those cases.

Finally, the fact this is a pretrial appeal provides an additional reason for this court to exercise its discretion to address all of the State's arguments, whether or not they were raised below. Unlike the situation in the vast majority of criminal appeals, the interest of finality that counsels against considering new arguments on appeal is not present here.

CONCLUSION

For all of the above reasons, this court should reverse the order of the circuit court excluding all State witnesses, except Dr. Swenson, and remand to that court for further proceedings.

Dated this 10th day of June, 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 9,441 words.

____

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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 10th day of June, 2015.

____

Marguerite M. Moeller
Assistant Attorney General

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP279-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CAROLINE D. PRIETO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER EXCLUDING WITNESSES, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE CHAD G. KERKMAN PRESIDING

APPENDIX OF PLAINTIFF-APPELLANT

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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 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 10th day of June, 2015.

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Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

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

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

Dated this 10th day of June, 2015.

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Marguerite M. Moeller
Assistant Attorney General

TABLE OF CONTENTS FOR APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT STATE OF WISCONSIN

Description of Document — Page(s)

Kenosha County Circuit Court order entered February 6, 2015, preventing the State from calling any witness other than Dr. Alice Swenson (Document No. 144) 101-102

Transcript of Motion Hearing of January 23, 2015 (Document No. 180) 103-141

Transcript of Telephone Conference of January 30, 2015 (Document No. 181) 142-153

Transcript of Jury Status Hearing of February 5, 2015 (Document No. 182) 154-164

Scheduling Order of August 15, 2014 (Document No. 25) 165-166

State's motion to reconsider order excluding witnesses (Document No. 123) 167

State's brief in support of motion for reconsideration (Document No. 124) 168-171

Defense motion to strike State's witness list (Document No. 125) 172-173