

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

**RECEIVED**

**07-16-2015**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

Appeal No. 2015AP000331-CR  
Circuit Court Case No. 2013CM000229

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL SCOTT KLINKENBERG,

Defendant-Appellant.

---

APPEAL FROM THE CIRCUIT COURT FOR MONROE COUNTY, THE  
HONORABLE J. DAVID RICE PRESIDING

---

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

---

DISTRICT ATTORNEY'S OFFICE  
MONROE COUNTY  
By: Kevin D. Croninger  
District Attorney  
State Bar No. 1065704  
COURTHOUSE ROOM 201  
112 SOUTH COURT STREET  
SPARTA WI 54656  
Phone: (608)269-8780  
Fax: (608)269-8919

Attorney for the  
Plaintiff – Respondent

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i, ii

TABLE OF AUTHORITIES .....iii

STATEMENT OF ISSUES .....1, 2

POSITION ON ORAL ARGUMENT AND PUBLICATION .....2

STATEMENT OF FACTS..... 2

ARGUMENT ..... 2

    I.    THE DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL WHICH LED TO A BREAKDOWN IN THE ADVERSERIAL PROCESS. THE DEFENDANT HAS ALSO FAILED TO SHOW THAT THE EVIDENCE AGAINST HIM WAS INSUFFICIENT FOR HIM TO BE CONVICTED OF THE CRIME CHARGED AND THEREFORE THE TRIAL COURT WAS NOT “CLEARLY WRONG” IN DENYING THE DEFENDANT’S MOTION ON THE SUFFICIENCY OF THE EVIDENCE.....2

        A. .RELEVANT CASE LAW AND STATUORY AUTHORITY.....4

        B. .EVEN IF TRIAL COUNSEL’S PERFORMANCE WAS DEFICIENT THERE WAS NO PREJUDICE TO THE DEFENDANT AS ANY DEFICIENCY IN PERFORMANCE DID NOT RESULT IN A BREAKDOWN OF THE ADVERSERIAL PROCESS.....6

            i.    THE DEFENDANT’S CREDIBILITY HAD LITTLE TO NO EFFECT ON THE JURY’S VERDICT THEREFORE ANY DAMAGE TO HIS CREDIBILITY FROM ALLEGED INEFFECTIVE ASSISTANCE DID NOT PREJUDICE THE DEFENDANT AND CERTAINLY DID NOT LEAD TO A BREAKDOWN IN THE ADVERSERIAL PROCESS.....7

ii.	THE DEFENDANT WAS NOT PREJUDICED BY TRIAL COUNSEL’S FAILURE TO INVESTIGATE THE DEFENDANT’S PRIOR CONTACTS WITH DETECTIVE MEYERS NOR WAS HE PREJUDICED BY THE TRIAL COUNSEL’S “OPENING OF THE DOOR” IN RELATION TO THE DEFENDANT’S PRIOR CONTACTS WITH DETECTIVE MEYERS .....	10
iii.	THERE WAS NOT A BREAKDOWN IN THE ADVERSERIAL PROCESS WHEN TRIAL COUNSEL FAILED TO OBJECT TO TESTIMONY FROM OFFICER BRANIGAN RELATED TO HER IDENTIFICATION OF THE DEFENDANT.....	13
II.	THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THE DEFENDANT GUILTY AND THE TRIAL COURT WAS NOT “CLEARLY WRONG” IN DENYING THE DEFENSE’S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL.....	17
III.	CONCLUSION.....	19
	CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8).....	21
	CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) .....	22

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Cases**

*Strickland v. Washington*,  
466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)..... 4, 5

**Wisconsin Cases**

*State v. Pitsch*,  
124 Wis. 2d 628, 369 N.W. 2d 711 (1985)..... 4, 5

*State v. Poellinger*,  
153 Wis. 2d 493, 503-04, 451 N.W.2d 752, 756 (1990).....6

*State v. Johnson*, 55 Wis.2d at 147, 197 N.W.2d 760.....6

*Bautista v. State*, 53 Wis.2d 218, 223, 191 N.W.2d 725 (1971).....6

*State v. Leach*, 124 Wis. 2d 648, 370 N.W. 2d 240 (1985).....6

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

---

Appeal No. 2015AP000331-CR  
Circuit Court Case No. 2013CM000229

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL SCOTT KLINKENBERG,

Defendant-Appellant.

---

APPEAL FROM THE CIRCUIT COURT FOR MONROE COUNTY, THE  
HONORABLE J. DAVID RICE PRESIDING

---

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

---

**STATEMENT OF ISSUES**

1. HAS THE DEFENDANT MET HIS BURDEN OF SHOWING THAT THERE WAS A BREAKDOWN IN THE ADVERSARIAL PROCESS WHICH WOULD LEAD TO AN UNDERMINING OF THE CONFIDENCE IN THE RESULT OF THE TRIAL COURT PROCEEDING DUE TO HIS TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE:

Trial Court's Position: No.

State's Position: No.

2. WAS THE EVIDENCE INSUFFICIENT TO CONVICT THE DEFENDANT BEYOND A REASONABLE DOUBT OF MISDEMEANOR RETAIL THEFT AND WAS THE TRIAL COURT “CLEARLY WRONG” TO DENY A DEFENSE CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE DURING THE TRIAL.

Trial Court’s Position: No.

State’s Position: No.

### **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Neither publication of this court’s opinion nor oral arguments are necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellate procedure, publication of this decision is likely not appropriate under Wis. Stat. §809.23

### **STATEMENT OF FACTS**

The State does not have any substantial disagreement or dispute with the facts as represented by appellant. A review of the transcripts related to the events in the present case essentially support the facts represented by the appellant.

### **ARGUMENT**

- I. **THE DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL WHICH LED TO A BREAKDOWN IN THE ADVERSERIAL PROCESS. THE DEFENDANT HAS ALSO FAILED TO SHOW THAT THE EVIDENCE AGAINST HIM WAS INSUFFICIENT FOR HIM TO BE CONVICTED OF THE CRIME CHARGED AND THEREFORE THE TRIAL COURT WAS NOT “CLEARLY WRONG” IN DENYING THE DEFENDANT’S MOTION ON THE SUFFICIENCY OF THE EVIDENCE.**

The defendant has failed to show his trial counsel's performance was deficient because the defendant has failed to show the performance or lack of performance of his trial counsel led to a breakdown in the adversarial process to such a degree that the result of the proceeding in the present case was rendered unreliable. In this case, the defendant was on video during the commission of his crime of theft from the Sparta Wal-Mart. (33:73, 76-77) Given the evidence against him was strong and he has no other means to attempt to escape responsibility for his criminal behavior, he has turned to blaming his attorney for his conviction. *See Br. Def. App.* The defendant has attempted to point to every minor misstep or mistake of his trial counsel and then argue that those minor missteps or mistakes were catastrophic to his defense. The defendant does all of this while ignoring the fact that he was on video during much of the time he was engaging in the criminal behavior. The defendant claims that these minor mistakes made by his attorney warrant overturning a lawfully achieved verdict. In a final last ditch effort to overturn the lawfully gained conviction for the criminal behavior he engaged in, the defendant also tries to push blame onto the jury and the Trial Court, claiming there was not sufficient evidence to convict him and that the Trial Court was "clearly wrong" to deny the defendant's motion related to insufficiency of the evidence. The defendant makes this claim despite the fact he was on video for much of the criminal activity. Given the defendant was on video for much of the criminal behavior, given any mistake or ineffectiveness did not cause any breakdown in the adversarial process, and given there was more than enough

evidence for the defendant to be found guilty by a reasonable jury, the defendant's appeal should be denied.

**A. RELEVANT CASE LAW AND STATUTORY AUTHORITY**

The Wisconsin Courts have acknowledged that in relation to ineffective assistance of trial counsel claims, the Wisconsin Constitution affords no further protections to defendants than the United States Constitution. *See State v. Pitsch*, 124 Wis. 2d 628, 369 N.W. 2d 711 (1985). Both Federal and State Courts have found that the real question in reviewing the performance of trial counsel is whether there has been a breakdown in the adversarial process to such a degree that the result of the proceeding is unreliable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984) and *Pitsch*, 124 Wis. 2d 628, 369 N.W. 2d 711 (1985). In other words, assuming all the defendant's claims of ineffective assistance are true, did the alleged ineffectiveness prejudice the defendant so severely that the subsequent result cannot be believed to be reliable. *See Strickland*, 466 U.S. 668, 104 S. Ct. 2052 (1984). A Court can and often should make a determination as to prejudice before addressing deficient performance of trial counsel. *Id.* at 697, 2069.

When reviewing the performance of a trial attorney, a Court must apply a level of scrutiny which is highly deferential to the performance of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984). This high level of deference has been adopted by the Wisconsin Supreme Court. *See*



*State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711, 716 (1985). “It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984)

While the real question is whether there has been a breakdown in the adversarial process to such a degree that the result of the proceeding is unreliable, the Court in *Strickland*, did create a two part test as a guideline in determining whether trial counsel has been ineffective. *See Strickland*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, (1984). This two part test is as follows, “First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687, 2064. Strategic decisions are not too be second guessed, “Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment.” *Strickland v. Washington*, 466 U.S. 668, 681, 104 S. Ct. 2052, 2061, 80 L. Ed. 2d 674 (1984)

When reviewing the verdict of the jury based on a sufficiency of the evidence challenge, evidence must be look at in the light most favorable to the finding of guilt.

The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted....

*State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752, 756 (1990), citing *State v. Johnson*, 55 Wis.2d at 147, 197 N.W.2d 760, quoting *Bautista v. State*, 53 Wis.2d 218, 223, 191 N.W.2d 725 (1971).

Reversal of a Trial Court's decision on a motion related to sufficiency of the evidence is only appropriate if the Trial Court is "clearly wrong." *State v. Leach*, 124 Wis. 2d 648, 370 N.W. 2d 240 (1985).

**B. EVEN IF TRIAL COUNSEL'S PERFORMANCE WAS DEFECIENT THERE WAS NO PREJUDICE TO THE DEFENDANT AS ANY DEFECIENCY IN PERFORMANCE DID NOT RESULT IN A BREAKDOWN OF THE ADVERSERIAL PROCESS**

There was not a breakdown in the adversarial process in the defendant's trial because the alleged prejudice cited by the defendant did not have any effect on the determinations of facts the jury needed to make. Essentially, the issues for the jury in the present case were, 1. Is Daniel Klinkenberg the person on the video and 2. Did the person on the video commit the crime alleged?<sup>1</sup> The defendant essentially

---

<sup>1</sup> Obviously the State acknowledges these were not the direct questions asked to the jury in jury instructions. However, the State asserts these two issues are the two issues which from a practical point of view were in contention.

argues that his trial counsel was ineffective because his trial counsel's failures caused significant damage to the defendant's credibility and the defendant asserts his credibility was essential to his defense. The defendant asserts his credibility was essential to his defense despite there being a video for the jury to judge for themselves whether he was the person committing the crimes. Given the importance and reliability of the video in the present case, any deficient performance by trial counsel did not lead to a breakdown in the adversarial process.

**i. THE DEFENDANT'S CREDIBILITY DID NOT AFFECT THE JURY'S VERDICT THEREFORE ANY DAMAGE TO HIS CREDIBILITY FROM ALLEGED INEFFECTIVE ASSISTANCE DID NOT PREJUDICE THE DEFENDANT AND CERTAINLY DID NOT LEAD TO A BREAKDOWN IN THE ADVERSARIAL PROCESS**

The defendant attempts to draw attention away from the video from the time of the commission of the crime by asserting that separate from the issue for the jury of "Did the person in the video steal anything from Wal-Mart," was an equally important issue of "Is the defendant credible." *See Br. Def. App.* The defendant claims that this is an equally important issue because his defense was "I didn't do it," and his credibility was essential to that defense. *See id.* However, given the existence of the video in the present case, the defendant over exaggerates the importance of his credibility to his defense. While the State would acknowledge credibility is part of any defense of "I didn't do it," when there is a video showing the defendant during the commission of the crime, the defense of "that's not me on

the video,” is probably not the most effective strategy. However, such poor strategy does not constitute ineffective assistance of counsel.

The defendant likely would have gained more ground had he asserted a defense of “that’s me on the video but I didn’t steal anything.” The defendant seems to acknowledge as much. In his brief, the defendant acknowledges that most difficult issue for the jury was likely not “Is the defendant the person on the video?”, but rather, did the person on the video actually steal anything from the Sparta Wal-Mart? Yet the defendant fails to acknowledge that the real damage to his credibility was done not by anything his trial counsel did or did not do, but rather was done by the defendant taking the stand and denying he was the person in the video. The defendant damaged his own credibility to such a degree that any alleged ineffective assistance by his trial counsel was negligible and certainly did not cause a breakdown in the adversarial process.

The defendant attempts to avoid responsibility for damaging his own credibility by claiming that an area where his credibility was damaged by ineffective assistance was related to whether or not he had prior contact with Detective Meyers. *See Br. Def. App* The defendant claims this damage was so detrimental that it led to a breakdown in the adversarial process and that this result cannot be trusted. *See id.* The defendant further argues that this damage could have been avoided had trial counsel properly coached the defendant on how to testify and had not asked questions which allowed the State to impeach the defendant about his unreliable memory of contact with Detective Meyers. *See id.*

Again, as argued above, the State presented video evidence of the person engaged in the theft from the Sparta Wal-Mart, defendant's credibility in the present case was not essential to determination of fact by the jury. Rather, the jury was shown a video, observed the defendant in Court and determined he was the person in the video who had committed the crime charged. The defendant then took the stand and claimed the person in the video was not him. Therefore, any failure to prevent damage to the defendant's credibility (i.e. failure to properly coach the defendant as to his testimony, failure to investigate defendant's prior contacts with Detective Meyers, asking questions that opened the door to discussion of the defendant's prior contacts with Detective Meyers and Detective Tester), did not prejudice the defendant. As most criminal trial attorneys would likely recognize, when the State has strong evidence in its case in chief (evidence like the defendant on video during the commission of the crime), relying on the testimony and credibility of the defendant to overcome such a strong presentation is a fool's errand. That is not what trial counsel did here, likely because trial counsel was experienced (having litigated twenty to twenty-five jury trials) (50:26). None of the alleged deficiencies in trial counsel's performance caused breakdown in the adversarial process but rather simply amount to inconsequential side notes to the important facts in the case, (the defendant being on video during the commission of the crime). Any criticism of trial counsel's performance or preparation simply amounts to "second guessing" by the defendant and his appellate counsel. Courts have addressed such second guessing and indicate that such second guessing is not

a basis for determining a defendant's trial counsel was ineffective. Given the defendant has failed to show that any damage to his credibility caused by ineffective assistance of counsel caused a breakdown in the adversary process such that the result should not be trusted, the defendant's appeal should be denied.

**ii. THE DEFENDANT WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO INVESTIGATE THE DEFENDANT'S PRIOR CONTACTS WITH DETECTIVE MEYERS NOR WAS HE PREJUDICED BY TRIAL COUNSEL'S "OPENING OF THE DOOR" IN RELATION TO THE DEFENDANT'S PRIOR CONTACTS WITH DETECTIVE MEYERS.**

There was no breakdown in the adversarial process even if trial counsel should have investigated the prior contacts the defendant had with Detective Meyers and avoided "opening the door" to the introduction of the evidence of prior contacts with Detective Meyers. There was no breakdown because these failures should not lead to questioning of the reliability of the outcome of the case as they did not affect in any way the issues that were in question in the case.

The defendant claims trial counsel was ineffective because he failed to investigate the prior contacts and because of his failure to investigate, he asked a question that "opened the door" to the defendant being questioned about prior contacts with Detective Meyers. The defendant was not prejudiced by this alleged ineffectiveness because the defendant was on video during the commission of the crime and by the time this alleged ineffectiveness had occurred, the defendant had already destroyed his own credibility by claiming he was not the person on the video.

The defendant was also not prejudiced by the introduction of evidence of his prior contacts with Detective Meyers because prior contacts with Detective Meyers were not an issue for the jury to decide. The jury was not deciding whether the defendant had been investigated by Detective Mark Meyers in the past, nor were they deciding if the defendant was a credible person or had a good memory. Essentially, the issues for the jury in the present case were, 1. Is Daniel Klinkenberg the person on the video and 2. Did the person on the video commit the crime alleged?<sup>2</sup> The defendant's credibility during his testimony would have no effect on what the jurors can see plainly in Court, that being the video of the suspect and the defendant present in person in Court. Therefore, as argued above, the defendant's credibility was not really at issue in relation to whether or not he was the person on the video, as the jury was going to be able to view the video and look at the defendant in Court and decide for themselves whether he was the person in the video, thus his credibility was inconsequential. Additionally, any damage to said credibility did not cause a breakdown in the adversarial process because it could not have possibly been essential to the defense. Furthermore, the jury did not hear that Detective Meyers had previously investigated the defendant until after the video had been shown and until after the defendant had taken to the stand and denied he was the person in the video. *See (33:76-79, 121-131, 137-161)* By that point in time, the defendant's credibility was already destroyed and there was nothing his trial counsel could do to either save it or damage it further.

---

<sup>2</sup> See footnote 1 above.

Therefore, even if trial counsel was ineffective for failing to properly investigate prior contacts between the defendant and Detective Meyers, these failures did not affect the adversarial process to the point that the outcome should be questioned and the defendant's appeal should be denied.

The defendant attempts to argue that his credibility was essential to the adversarial process functioning properly. The defendant attempts to argue that the jury's determination of facts in the present case hinged largely on whether or not they found him credible and that his credibility is an essential element of his defense because his defense was "I didn't do it." *See. Br. Def. Appellant.* This claim is simply unsupportable because of the nature of the evidence the state presented. This is not a case where the State was attempting to prove the commission of a crime only with the testimony of witnesses and there was essentially a "battle of competing statements between State and Defense witnesses" (had it been, the State would concede that the defendant's credibility was essential to the adversarial process). Rather in this case, the State had video evidence of the person the State was alleging to have committed the crime. Prior to the defendant's testimony, the jury had already seen the video and a paused section of the video with the alleged perpetrator. (33:123-126). The jury had also had opportunity to hear testimony from two sworn law enforcement officers that they had identified the defendant (who was present in the courtroom) as the person in the video. (33:76, 125-126). Assuming the jurors were paying attention when the video was displayed and the officers were making in Court identifications, the



Jurors were at that point able to make a determination as to whether the defendant was the person in the video. The defendant's testimony about who was in the video was not going to make a difference in any juror's determination of who was in the video. The fact of the matter is that the defendant was the person in the video stealing from the Sparta Wal-Mart. The defendant could have been the most credible person in the world on the stand claiming it was not him, but the video does not lie. With the video being presented, whether or not the defendant was credible in other areas of his testimony was of no consequence to the determination of facts by the jury. Given, it was of no consequence, to the jury there can be no prejudice to the defendant and without prejudice there cannot be a breakdown in the adversarial process. Without a breakdown in the adversarial process, the defendant's claim of ineffective assistance cannot be sustained and his appeal should be denied.

**iii. THERE WAS NOT A BREAKDOWN IN THE ADVERSARIAL PROCESS WHEN TRIAL COUNSEL FAILED TO OBJECT TO TESTIMONY FROM OFFICER BRANIGAN RELATED TO HER IDENTIFICATION OF THE DEFENDANT**

There was not a breakdown in the adversarial process when trial counsel failed to object to Officer Branigan's identification of the defendant, because the defendant was going to be identified anyway, and any confirmation bias which was achieved by having the defendant identified twice could also have been achieved by Detective Meyers identifying the defendant more than once.

Additionally, even if the Court had struck Officer Branigan's testimony about Detective Meyers telling her the defendant's name, Officer Branigan would likely have been able to testify that she reviewed the video and was able to determine that the person in the video was the same person as the person sitting in the courtroom.

The defendant argues that trial counsel should have objected when the State asked Officer Jenna Branigan about who the individual was on the tape. The defendant argues that failure to do so prejudiced the outcome of the trial, because it allowed the State to essentially use a psychological trick to bolster the State's argument that the defendant was the person on the video. *See Br. Def. App. Pg 31*. The State asserts that while an objection may have been advisable, when reviewing the testimony out of context, when looking at the totality of the circumstances, such an objection could have prejudiced the defendant as much as failing to object. This is because information about how Officer Branigan came to know who the defendant was, was essential to undercutting her identification of him. Therefore, the failure to object is at the very worst a failed trial strategy and most certainly did not cause any prejudice to the defendant.

The State asserts the way the questions were posed to and answered by Officer Branigan are of note and thus has reproduced a portion of that transcript from the trial here:

*Q Is the subject depicted in those videos present in the courtroom today?*

A Yes, he is.

Q Can you point to him and tell us what he's wearing, please?

A He's sitting right there (indicating). He's wearing a blue and white striped shirt

Q Over khaki trousers?

A Yes.

Q And how do you know that person?

A From the video and from Detective Meyer's identification.

(33:76-77)

The State asserts the failure to object to this line of questioning caused no prejudice to the defendant because if trial counsel had objected, artful questioning from the State may have led to the admission of the identification anyway. The State would concede as did trial counsel, that an objection at the point the question "And how do you know that person?" was asked may have been advisable. However, it becomes quite difficult to imagine how failing to do so caused any prejudice to Mr. Klinkenberg. After all, the jury could view the video and look at the defendant in Court and decide for themselves whether he was the person on the video.

The defendant further appears to argue that the failure to object essentially allowed the State to present cumulative evidence, which essentially caused a psychological trick to be played on the jury. The State asserts the State was going

to be able to use this alleged “trick” anyway. If trial counsel had objected and that objection was sustained, the State could have simply asked a few questions that likely would have led to Officer Branigan making an in an court identification of the defendant as the person who was in the video. Even if the State had not been able to introduce the identification through Officer Branigan, the State likely would have been able to obtain repetitive testimony from Detective Meyers on the identity of the person in the video, thus accomplishing the same “trick” as when Officer Branigan testified about the identity of the defendant. Acknowledging the risks in speculation and how distasteful such speculation often is to appellate courts, the State asserts when the defendant makes such a claim it is important to point out that the lack of objection was likely equally beneficial to the defense as an objection would have been. The lack of objection was likely equally beneficial because it allowed trial counsel the opportunity to attack the weakest point of Officer Branigan’s identification of the defendant, that being that she did not know his name until Detective Meyers told her his name. Given the lack of objection was likely just as beneficial as an objection would have been, this was a strategic decision made by trial counsel and does not constitute ineffective assistance.

The defendant was not prejudiced by any alleged failure of his trial counsel to object to Officer Branigan’s identification of the defendant because any such objection could have possibly damaged the defense more than a lack of objection, and Officer Branigan or Detective Meyers were going to be able to testify in a repetitive nature about who the person on the video was. Therefore, any alleged

ineffectiveness was trial strategy that did not prejudice the defendant in any way and most certainly did not result in a breakdown of the adversarial process thus the defendant's appeal should be denied.

**II. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THE DEFENDANT GUILTY AND THE TRIAL COURT WAS NOT "CLEARLY WRONG" IN DENYING THE DEFENSE'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL.**

The evidence presented at trial was sufficient for a reasonable jury to find the defendant guilty, therefore the Trial Court was not "clearly wrong" in denying the defense's challenge to the sufficiency of the evidence presented at trial. The defendant attempts to point to several factual lapses that he believes support his position that the evidence was sufficient. The State asserts each of these alleged factual lapses were not needed for the State to meet its burden of proof, so while the facts cited by the defendant may have been relevant, they were not necessary and the State was not required to introduce them in order to gain a conviction of the defendant.

The first lapse the defendant points to is that there was a vague original report to law enforcement that the evidence presented at trial referenced slightly different property. The State asserts that discrepancy in what is originally reported stolen and what is presented as stolen at trial does not go to the sufficiency of the evidence. The State and victims are allowed to present any

evidence related to the crime charged as long as there is sufficient notice to the defendant the evidence does not run contrary to any other rules of evidence or rulings made by the Trial Court. A strategic decision on what things to introduce into evidence (i.e. how much of what was stolen should be introduced) is up to the State and does not indicate a lack of sufficient evidence.

The defendant next attempts to argue that a lack of testimony about serial number or store inventory number means there was insufficient evidence. Once again, this argument does not hold any muster. Kelli Magnus, the Wal-Mart Asset Protection employee, testified that the items were taken. She also testified that she was able to find the suspect who took them by watching videos from December 24, 2012. (33:95-109). What would a serial number or store inventory number add to the evidence and what purpose would it serve? Would it convince the jury that Wal Mart sold these types of products? This seems unnecessary and unlikely. As with the decision on which stolen items to present to the jury, how much detail information on a theft is presented is a decision that is up to the State. Just because every single possible detail was not presented most certainly does not mean the evidence was insufficient, rather it simply means the State did not want to bore the jurors with details that in the end did not matter.

The defendant next argues that there is insufficient evidence because there was no testimony about the items being discovered missing, the items were

never discovered to have been pawned or resold, and no explanation for the gap in the discovery of the missing items. Once again, these are not facts the State needs to prove to gain a conviction. How a person discovers that something was stolen is not an element of theft, proving or showing that the items was resold is not an element of theft, (and in fact, in many cases, stolen items are never recovered) and failing to notice that something is missing is irrelevant to the elements the State must prove to gain a conviction for theft.

The fact of the matter is that the State presented evidence, via the testimony of Kelli Magnus and via the presentation of surveillance video of the commission of the crime, which showed that on December 24, 2012, items were stolen from the Sparta Wal-Mart. *See id.* This presentation of evidence further showed that Ms. Magnus was able to identify on video the person who stole these items. *Id.* This video and a report was then forwarded to the Sparta Police Department who had officer(s) who could identify the person who had engaged in the theft of the items, and that person was the defendant. This presentation of evidence was more than enough for a reasonable jury to find the defendant guilty and also therefore was enough to dictate that the Trial Court was not “clearly wrong” when denying the defendant’s motion on the sufficiency of the evidence.

#### **IV. Conclusion**

The State presented video evidence of the defendant during the commission of the crime charged. The defendant then took the stand and claimed he was not

the person in the video. After his conviction, he now tries to blame his Trial Counsel for the outcome. He has no one to blame but himself. Nothing his Trial Counsel did or could have done could have saved the damage he did to his own credibility by denying he was the person on the video. The defendant also tries to blame his Trial Counsel because of a failed objection to his identification by Officer Branigan. This identification likely would have come into evidence anyway, and even if it had not, he still would have been identified in Court by Detective Meyers as being the person in the video. Therefore, even if his Trial Counsel was ineffective, there was no breakdown in the adversarial process as any ineffectiveness did not cause any further prejudice to the defendant. Thus, the defendant's appeal related to ineffective assistance of counsel should be denied.

The defendant then attempts to avoid the outcome of his lawfully gained conviction by claiming the evidence presented was insufficient to convict him of the crime charged. To make this argument, the defendant provides a laundry list of things the State could have presented in evidence, none of which the State was required to present. Both the Judge and the jury in the Trial Court believed the evidence was sufficient and the defendant has pointed to no factor that would undermine the belief of both the Judge and the jury in the Trial Court, therefore the defendant's appeal should be denied.



STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

---

Appeal No. 2015AP000331-CR  
Circuit Court Case No. 2013CM000229

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Daniel Scott Klinkenberg ,

Defendant-Appellant.

---

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

---

I hereby certify that this brief conforms to the best of my ability to the rules contained in s. 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 or footnotes, leading of minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 20 pages, 5,120 words.

Dated this 13<sup>th</sup> day of July, 2015.

Respectfully submitted,

---

Kevin D. Croninger  
State Bar No. 1065704  
District Attorney  
Monroe County District Attorney's Office  
112 South Court Street  
Sparta, WI 54656  
Telephone: (608) 269-8780  
Fax: (608) 269-8919

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

---

Appeal No. 2015AP000331-CR  
Circuit Court Case No. 2013CM000229

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Daniel Scott Klinkenberg,

Defendant-Appellant.

---

CERTIFICATE 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 13<sup>th</sup> day of July, 2015.

Respectfully submitted,

---

Kevin D. Croninger  
State Bar No. 1065704  
District Attorney  
Monroe County District Attorney's Office  
112 South Court Street  
Sparta, WI 54656  
Telephone: (608) 269-8780