STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2015AP968-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

GIANCARLO GIACOMANTONIO,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON OCTOBER 31, 2014, THE HONORABLE JEFFREY A. WAGNER, PRESIDING. MILWAUKEE COUNTY CASE NO. 2013CF4178

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted:

Michael G. Levine, SBN 1050078
Matthew S. Pinix, SBN 1064368*

LAW OFFICES OF ROBERT A. LEVINE
111 E. Wisconsin Ave., Ste. 1710
Milwaukee, WI 53202
Tel.: (414) 271-9585
Fax: (414) 271-8506
mlevine@rlevinelaw.com
www.rlevinelaw.com

*of counsel

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The State admitted into evidence photographs of text messages that were allegedly sent by Giacomantonio to his stepdaughter. Both prior to and during trial, Giacomantonio objected on the ground that the State could not prove the messages' author, and thus could not authenticate them. Additionally, Giacomantonio objected to the photographs as a violation of the best-evidence rule because they were duplicates, not the original writing. *See* Wis. Stat. § 910.02. Finally, Giacomantonio objected on hearsay grounds when a witness was asked to describe to the jury what the text messages read.

The circuit court denied each of Giacomantonio's challenges to the text message evidence. It reasoned, first, that authorship went to weight not admissibility. Second, the court determined that the State did not have to produce the originals because they were destroyed. Finally, the court ruled that the detective's testimony about the contents of the text messages was not offered to prove the truth of the matter asserted.

II. WHETHER THE CIRCUIT COURT'S DENIAL OF GIACOMANTONIO'S PRETRIAL REQUEST FOR A PRELIMINARY, IN CAMERA REVIEW OF THE VICTIM'S PSYCHOLOGICAL TREATMENT RECORDS VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE?

Giacomantonio filed a pretrial motion seeking an in camera review of his stepdaughter's privately held medical records. The circuit court denied that motion, concluding that he had not satisfied his burden to show that those records would contain non-cumulative, relevant information necessary to a determination of guilt or innocence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Giacomantonio would welcome oral argument if it would assist the panel to understand the issues presented or answer any unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Giacomantonio believes the Court's opinion in the instant case will meet the criteria for publication because it addresses a matter of first impression in Wisconsin that is bound to recur in the future. Specifically, the instant appeal questions what is required to authenticate text-message evidence under Wisconsin's evidentiary code, Wis. Stat. § 909.01. That issue has not before been decided in Wisconsin. Furthermore, given the ubiquity of text messaging in our society and the regular occurrence of such evidence in trials of all sorts, the issue of authentication is likely to occur again. Thus, a decision from this Court would assist bench and bar alike to understand what is necessary to ensure authentication—and thus admissibility—of text message evidence. Publication is therefore requested.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

The State charged Giacomantonio with sexual exploitation of a child, Wis. Stat. § 948.05(1)(a) and (2p)(a), and incest with a child, Wis. Stat. § 948.06(1m), alleging that he had engaged in a variety of criminal sexual acts with his minor stepdaughter, K.N.R., from December 2, 2012, to September 6, 2013. (2.)

Pretrial, Giacomantonio moved for an in camera review of the K.N.R.'s counseling records. (6, 7, A-Ap. 3-9.) The circuit court denied that motion (10, A-Ap. 32), and Giacomantonio petitioned this Court for leave to appeal (11). That petition was denied. *See State v. Giacomantonio*, No. 2014AP11-CRLV, slip op. (Wis. Ct. App. Jan. 29, 2014).

Thereafter, Giacomantonio filed a pretrial motion seeking to exclude from evidence certain text messages found on K.N.R.'s cellphone. (20, A-Ap. 33-37.) The circuit court denied that motion, as well. (44:12.)

At trial, Giacomantonio again objected to the text message evidence. (48:25-26, *id.*:51-54.) Those objections were overruled. (*Id.*) The jury found him not guilty of incest and guilty of sexual exploitation. (26, 27.) He was sentenced to eight years of imprisonment, with five years of initial confinement and three years of extended supervision. (52:12.) He appeals. (36.)

II. STATEMENT OF RELEVANT FACTS

During the period of time relevant to this appeal, Giacomantonio was married to M.R. (48:55.) They had then been married for twelve years. (*Id.*:56.) However, by 2013, their relationship had deteriorated. (*Id.*) M.R. questioned why Giacomantonio—a non-

citizen—had not paid her to get married. (*Id.*:66-67.) She accused him of poisoning her food with antifreeze. (*Id.*:64-65.) She claimed that he was violent with her, but never reported it to police. (*Id.*:63-64.) The couple no longer shared a bedroom. (*Id.*:56-57.) Because of all that, M.R. kept trying to make Giacomantonio leave her house, but he had nowhere to go. (*Id.*:60, 64.) So, she exiled him to the basement, allowing him to return to the spare room only when it got too cold. (*Id.*:60.) But still, M.R. said, he would not leave. (*Id.*:64.) Prior to the allegations that began Giacomantonio's criminal prosecution, M.R. discussed with her daughter, K.N.R., how they could go about "getting [him] out of the house," including possibly "get[ting] a restraining order." (49:29-32.)

It was against that background that M.R. appeared at the Whitefish Bay police department in September 2013 and alleged that Giacomantonio was involved in an inappropriate relationship with K.N.R. who was then sixteen-years-old. (48:60-61.) M.R. said that K.N.R.'s therapist had encouraged her to go to the police. (*Id.*:36-37.)

She then presented police with a cellphone and alleged that it contained "some alarming texts." (*Id.*:4, 57-58.) The phone, she said, belonged to K.N.R. (*Id.*:5.) M.R. admitted that she "had gone through [K.N.R.'s] phone" (*id.*:60) before arriving at the police station because she "had a lot of suspicions that [Giacomantonio] had been . . . sexually abusing [K.N.R.]" (*id.*:58). It was undisputed that M.R. had access to the phone's entire contents because "[t]he phone did not have a lock." (*Id.*59.) She later claimed that her unfettered access to the phone allowed her to find text messages confirming her suspicions about Giacomantonio; namely that he was engaged in an inappropriate relationship with K.N.R. (*Id.*:57-58.)

A. The Text-Message Evidence is Entered Over Giacomantonio's Objection.

In response to M.R.'s allegations, a detective searched K.N.R.'s phone at the station. (*Id.*:24-25.) He did not take any precautions to protect the integrity of phone's data (*id.*:42-45), which is commonly done by forensic examiners to ensure that no data is "manipulate[d], destroy[ed], or los[t]" (47:68-69). The detective's search located "text messages in the phone as described by [M.R.] from [Giacomantonio]'s cell phone number, which she gave us, to [K.N.R.]'s cell phone. Which is what we had in possession. With a text saying 'I want my boty [*sic.*].'" (48:25-26, A-Ap. 49-50.) A later search of the phone by the same detective located additional text messages. (*Id.*:26, A-Ap. 50.) Again, during that second search, no precautions were taken to ensure the data's integrity. (*Id.*:42-45.) The State's computer expert testified that the failure to follow forensic procedures when examining the cell phone could have resulted in changes to its data. (47:58, *id.*:74-75.)

The police later attempted to obtain records from the phone company showing the text messages sent from or received by K.N.R.'s phone. (48:42.) However, no such records existed. (*Id.*) Thus, the detective took photographs of the phone's screen while it displayed what the police deemed to be noteworthy text messages. (*Id.*:26, A-Ap. 50.) Seven of those photographs were entered into evidence as two separate exhibits at trial. (*Id.*:26, 49:77, 56, A-Ap. 50.) On direct examination, the detective identified the photographs, and then read to the jury the depicted text messages. However, the detective never attributed authorship to any of the text messages found in the photos. (48:27-28, A-Ap. 51-52.) Instead, he simply identified the phone numbers associated with each text message. (*Id.*) At no time during the

trial did the State present records showing each phone number's registered user.

Pretrial, Giacomantonio had sought exclusion of those text messages on the ground that they could not be properly authenticated. (20, A-Ap. 33-37.) He argued that merely identifying a person as the registered owner of a phone from which text messages were sent does not satisfy Wisconsin's authentication requirement. (*Id.*) In light of that challenge to the texts' authenticity, Giacomantonio additionally argued that the rules of evidence required the State to produce the original text messages, not copies thereof. (*Id.*)

The State responded that it could properly authenticate the texts by "calling [K.N.R.] who [could] testify that she received these text messages, the phone number she recognizes they come from is [Giacomantonio's], and ultimately if the defense says that somebody else stole his phone or something and he didn't send them, I think that goes to weight." (44:7, A-Ap. 40.) As for the need to produce the original writings, the State claimed that the originals were no longer available because the phone company did not keep records of texts; the photographs would have to suffice. (*Id.*:8-9, A-Ap. 41-42.) The State did not inform the court of its possession of the cell phone that was depicted in the photographs. Nor did the State allege that the cell phone was inoperable or unavailable to present the texts to the jury.

The circuit court denied Giacomantonio's motion. (*Id.*:12, A-Ap. 45.) To the circuit court, the ease with which "people can make fake facebook postings, [or] send emails under somebody else's name" actually weighed against Giacomantonio's authentication claim. (*Id.*:11-12, A-Ap. 44-45.) The circuit court concluded that authentication was not an issue because Giacomantonio was "certainly entitled to cross examine" the witnesses regarding whether "the

victim or another has falsely manufactured these text conversations." (*Id.*:12, A-Ap. 45.) No mention was made of the rule that authentication is a prerequisite to admissibility. *See* Wis. Stat. § 909.01; (*see also* 44:11-12, A-Ap. 44-45.)

As for the need to produce the original writing, the circuit court "accept[ed] [the prosecutor]'s word as an officer of the court that those -- and [defense counsel's] . . . seem[ing] . . . agree[ment] that the originals of those conversations are not available from the provider of the -- or the telephonic communications." (*Id.*:10, A-Ap. 43.) Thus, the State could rely on the photographs instead of the originals. (*Id.*)

At trial, when the detective started to tell the jury about a text message that he had read when searching K.N.R.'s phone, Giacomantonio again objected. (48:25, A-Ap. 49.) He argued that the detective's testimony about what he read in the text message while at the police station constituted hearsay. (*Id.*) In response, the prosecutor claimed that the testimony was "not hearsay. It's not being offered for the truth of the matter." (*Id.*) The circuit court overruled Giacomantonio's objection. (*Id.*)

When the State questioned the detective about the pictures he took of the text messages—which were eventually entered as Exhibits 8 and 9 (56, A-Ap. 47-48)—Giacomantonio renewed the objections that he had made pretrial regarding authenticity and the need to produce an original. The parties' sidebar discussion and the circuit court's ruling was later summarized for the record:

> THE COURT: Just quickly. There was a sidebar. And apparently based upon the conversations that took place about the text messages, apparently that was decided by Judge Rothstein, that issue.
>
> Does someone want to elaborate?

[PROSECUTOR]: My recollection is what was displayed in front of the jury here today were seven screen shots taken from -- by Detective McLeod from the phone which is marked Exhibit 6.

Previous to this Court taking the case, there had been a motion that these screen shots — just don't take – don't encapsulate everything that's on the phone. And that's true. They're just images here.

Judge Rothstein ruled that, in spite of that, they can be admissible. If defense wants to present other images, they can do so.

Obviously, there's an issue that somebody else sent these using a phone. That really goes to credibility, which is ultimately what this case is going to boil down to.

And so Judge Rothstein ruled that those images, the screen shots are admissible.

Defense can explore the fact that Detective McLeod just took specific pictures, didn't take full pictures of everything.

I would note that Detective McLeod did go through that Exhibit 6 completely, in fact, with [defense counsel]. And that was videotaped. That was all turned over.

So it ultimately goes to weight that somebody else sent these pictures. Is M[.R.] telling the truth. Did she do it. That's a matter for the jury. Who do you believe. And that's what we're getting into.

So that was the [S]tate's view of why, first, this issue has been already addressed and why these should come in. And ultimately goes to weight.

The jury might decide that, for reasons that are going to probably be explored with the next two witnesses, they made all this up and planted this evidence. But that's where we are.

THE COURT: Okay.

[DEFENSE COUNSEL]: Judge, I objected first on the grounds of hearsay when they first were trying to get in the content of those messages. They said that they weren't offered for the truth of the matter asserted.

I highly disagree. I think that's exactly what they were offered for. But despite that, they haven't been authenticated.

And the thing about text messages is it requires more than matching the registered owner of the phone number and phone number that the messages came from.

It requires circumstantial evidence that tends to corroborate the identity of the sender. That was not done in this case.

Additionally –

THE COURT: Well, actually that's not done in any case, quite frankly, the cases that this Court has seen. You've got a phone. But we don't know who enters the information on that phone.

[DEFENSE COUNSEL]: Well -- and, Judge, this area of the law is certainly developing with technology as it goes. There is not a case specifically on point out of Wisconsin. But there is a case out of Pennsylvania, which is Commonwealth v. Koch, K-O-C-H. And that cite is --

THE COURT: Was that cited to Judge Rothstein?

[DEFENSE COUNSEL]: It was.

THE COURT: So then she must have ruled on it.

[DEFENSE COUNSEL]: She did. But specifically, with respect to Wisconsin Statute 910.02, it states to prove the content of a writing, recording or photograph, the original writing, recording or photograph is required except otherwise provided.

> And so most courts have held at least a transcription or a transcript of the text messages is required. Here, we're just given piecemeal. We're given seven months of text messages. And it's not – it doesn't show that it wasn't changed, unchanged. It's electronics. So things can be altered.
>
> THE COURT: I think you brought that in on cross-examination. And based upon the Court's ruling, apparently Judge Rothstein has dealt with most of the objections that were made.
>
> And the Court will believe also that that goes to the weight of evidence. The Court allowed it in.
>
> Okay.

(48:51-54, A-Ap. 54-57.) In light of that ruling, the detective testified about the screenshots as detailed above.

When the detective testified about the text messages, no evidence had been offered connecting a specific phone number to a specific phone or to a specific person. (*See* 48:27-28, A-Ap. 51-52.) There had been some testimony from a police officer that M.R. had said that the phone containing the text messages belonged to K.N.R., but no witness had testified directly to ownership or exclusive use. (*See id.*:5.) There was absolutely no evidence at that time connecting any telephone numbers to any person. (*See id.*:27-28, A-Ap. 51-52.)

The State did not elicit testimony connecting telephone numbers to specific people until K.N.R. testified much later in the trial. (48:86-87.) By referencing Exhibit 8, K.N.R. was able to identify "[her] phone number" and "[Giacomantonio's] phone number." (*Id.*:86-88.)

When the State went through the contents of Exhibits 8 and 9 with K.N.R., she identified each text as being to or from a certain phone number. (*Id.*:88-

92.) She admitted sending only one of the text messages (*id.*:91-92), and she never testified that Giacomantonio had sent the other texts (*see id.*:88-92). Instead, she limited her testimony to stating that the other text messages had come from Giacomantonio's phone number or his phone. (*Id.*) K.N.R. stated that Giacomantonio would "oftentimes" text her "to go to his room late at night," and that "he sent [text messages] all the time" about her "'booty.'" (*Id.*) However, the prosecutor never asked and K.N.R. never testified that she knew or believed that Giacomantonio had sent the other texts in Exhibits 8 and 9. (*Id.*)

K.N.R. also admitted that she would use Giacomantonio's phone on certain occasions. (49:7, *id.*:24, *id.*:29.) And sometimes, she said, she would allow her cousin to use her phone. (*Id.*:58.) On other occasions, M.R. would take K.N.R.'s phone from her as punishment. (*Id.*:86.) And M.R. had access to K.N.R.'s phone for some undisclosed period of time prior to delivering it to the police station. (48:57-58.) Thus, the evidence at trial did not demonstrate any single person's exclusive use of the phones or phone numbers that K.N.R. identified as belonging to her and Giacomantonio.

In closing, the parties argued about the impact of the text messages on the State's case. The prosecutor argued that the text messages helped to prove Giacomantonio's guilt. He told the jury:

> Those text messages are the crimes. But there's text messages that include "I want my booty." They can interpreted different ways. Maybe it's nothing. But what it led to was pictures. And as she said when she wrote that statement, he referred to my buttocks and my vagina as my booty.

(50:22.)

Defense counsel, on the other hand, disputed the "seven text messages" as being offered to the jury "completely out of context. We didn't see what came before. We didn't see what came after it." (*Id.*:27.) The credibility of the text messages was suspect, argued defense counsel, because "M[.R.] accessed the phone" on which the text messages were found; "[s]he changed the data" and no one "kn[e]w how many messages [she] deleted." (*Id.*:30.) Additionally, no one "kn[e]w how many messages [K.N.R.] deleted." (*Id.*) As for the phone that had been attributed to Giacomantonio, defense counsel challenged the State's failure to present "subscriber data" connecting Giacomantonio to the "actual device." (*Id.*) He also attacked K.N.R. as "not a little kid," but rather as a "smart" and "manipulati[ve]" seventeen-year-old. (*Id.*:24.) K.N.R.'s relationship with Giacomantonio had become strained, said counsel, and she had fabricated a story with her mother by which to get him out of the house. The State, argued Giacomantonio, had "bought" that story "hook, line[,] and sinker." (*Id.*:34.)

In rebuttal, the prosecutor asked the jury to consider "who was manipulating whom and who was in control." (*Id.*:53.) It was Giacomantonio, said the prosecutor, who had manipulated and induced K.N.R. to send him illicit pictures. (*Id.*) The State's closing and rebuttal arguments were the culmination of its running theme that Giacomantonio used K.N.R.'s mental health and interpersonal relationships to his advantage. (*See id.*:18.) Giacomantonio had, pretrial, sought an in camera review of K.N.R.'s medical records for evidence specifically related to both K.N.R.'s mental health and her interpersonal relationships. (7, A-Ap. 3-9.) But, his motion was denied. (10, A-Ap. 32.)

B. The Circuit Court Refused Giacomantonio Pretrial Access to K.N.R.'s Psychological Treatment Records.

Giacomantonio asked the circuit court to conduct an in camera review of K.N.R.'s psychological treatment records on the ground that those records would contain exculpatory information necessary to his defense. (6, 7:3-5, A-Ap. 3-9.) Specifically, he argued that the records were likely show that K.N.R. discussed with her therapist her relationship with Giacomantonio and either denied or did not disclose any of the alleged crimes, even though those crimes were purportedly occurring while she was in therapy. (7:3-5, 41:5-8, A-Ap 6-8, 18-21.) The absence of any disclosure was reasonably likely to exist in K.N.R.'s records, said Giacomantonio, because, if K.N.R. had discussed the crimes during therapy, her therapist would have been required, by law, to disclose that information. (*Id.*); *see also* Wis. Stat. § 48.891(2)(a) (mandatory reporter law). K.N.R.'s failure to disclose any abuse to her therapist in a private, confidential setting while it was allegedly ongoing, argued Giacomantonio, would be powerful evidence for him at trial. (7:3-5, 41:5-8, A-Ap. 6-8, 18-21.)

In further support of an in camera review, Giacomantonio averred that K.N.R.'s therapy was purposed on addressing interpersonal relationships within her family, her depression, and suicidal tendencies. (*Id.*) He claimed that the interpersonal relationships in K.N.R.'s family would be "a key theme in this case." (41:5, A-Ap. 18.) In light of that fact, argued Giacomantonio, it was likely that K.N.R.'s records would contain additional information relevant to his defense. Namely, they would show that K.N.R. had a history of "using either the mom or the stepfather to get what she wants," that she was "using [the accusations] as a way to get back at [Giacomantonio] for trying to leave [his] marriage" to

M.R., and that she was "very afraid of her mother." (41:7, *id.*:9, A-Ap. 20, 22.) Furthermore, the records would show that "[Giacomantonio] and [K.N.R.] have a close relationship where [K.N.R.] and her mom are at odds about everything." (*Id.*:6, A-Ap. 19.)

The State objected to the in camera review. (8, A-Ap. 10-13.) In response, the State made two relevant admissions: 1) K.N.R. had been in therapy since December 2012 or January 2013, as the result of a suicide attempt in December 2012; and 2) K.N.R.'s mother was the party who brought the alleged assault to the attention of law enforcement. (*Id.*:1, A-Ap. 10.) Nonetheless, the State argued that Giacomantonio had failed to satisfy his burden to trigger an in camera review. (*Id.*:3, A-Ap. 12.)

The circuit court held a hearing on Giacomantonio's motion (41, A-Ap. 14-31) and denied it (10, A-Ap. 32). The circuit court reasoned that K.N.R.'s therapy records would be cumulative, and thus Giacomantonio was not entitled to review:

> [T]his defendant does have additional other avenues by which to pursue the facts, as he alleges them to be, that might impugn this victim's credibility. And for this Court to even find that there is a sufficient showing here to merit an in-camera review, I think, would thwart the process entirely.
>
> There would be very little point in having a two-step process like this. There would be very little point in having the defendant having to meet any burden at all if the Court were to deem that this was sufficiently met in this situation.

(41:14, A-Ap. 27.) The "other avenues" (*id.*) by which the court suggested Giacomantonio might learn of what K.N.R. had or had not informed her therapist were Giacomantonio's "independent[] aware[ness] of [K.N.R.'s] suicide attempts" and her "relationship with another minor that apparently [K.N.R.'s] mother feels is inappropriate and has apparently, according to

[Giacomantonio], been untruthful about the nature of that relationship" (*id.*:13, A-Ap. 26). The circuit court said nothing specific about how Giacomantonio could garner the particular evidence that he claimed would be in the therapist's records—the absence of any disclosure to her therapist of the crimes while they were allegedly ongoing and her description of the interpersonal relationships in her family. (*Id.*:11-15, A-Ap. 24-28.)

At trial, the State elicited testimony from K.N.R. regarding both her mental health and her inter-family relationships—the very same grounds on which Giacomantonio sought access to her treatment records. (*See, e.g.,* 48:78-80, 85.) The State relied on K.N.R.'s suicide attempt to chronologically order Giacomantonio's crimes. (*See, e.g.,* 49:8.) It used K.N.R.'s description of her relationship with Giacomantonio as proof that he caused her to send him illicit photographs. (50:18, *id.*:21, *id.*:23.) And, the State used K.N.R.'s testimony about her mental health to show not only that she was susceptible to Giacomantonio's inducement, but also that he manipulated and controlled her. (*Id.*) K.N.R.'s manipulation story was believable, said the State, because she had explained how she was a troubled young girl that Giacomantonio was able to take advantage of her following her suicide attempt. (50:18.)

Without the in camera review, Giacomantonio was unable to dispute K.N.R.'s claim that she attempted suicide because of Giacomantonio. Nor was he able to dispute K.N.R.'s claim that she felt so controlled and manipulated by Giacomantonio that he was able to induce her illicit sexual behavior. It was Giacomantonio's expectation that K.N.R.'s treatment records would allow him to disprove those assertions.

Ultimately, the jury found him guilty of the sexual exploitation charge (26), but acquitted him of

incest (27). He appeals. (36.) Additional facts are set forth below where relevant to the argument.

ARGUMENT

I. THE PHOTOGRAPHS OF TEXT MESSAGES FOUND ON K.N.R.'S PHONE SHOULD HAVE BEEN EXCLUDED BECAUSE THEY WERE UNAUTHENTICATED, UNORIGINAL, AND HEARSAY.

A. Standard of Review.

Appellate courts "review the circuit court's evidentiary rulings for an erroneous exercise of discretion." *Horak v. Bldg. Servs. Indus. Sales Co.*, 2012 WI App 54, ¶ 11, 341 Wis. 2d 403, 815 N.W.2d 400. On review for an erroneous exercise of discretion, an appellate court "must uphold the [lower] court's discretion if its decision is made on appropriate facts and the correct law and thus is one which a court reasonably could have reached." *State v. Wyss*, 124 Wis. 2d 681, 733-34, 370 N.W.2d 745, 770 (1985).

B. The Text Messages Were not Authenticated, and Thus Were Inadmissible.

In the instant case, Giacomantonio challenges as unauthenticated certain text messages that he purportedly sent to the victim. Wisconsin's appellate courts have never before considered what is necessary to authenticate text messages. However, that issue has been addressed by a number of other jurisdictions. *See State v. Thompson*, 777 N.W.2d 617, 624-25 (N.D. 2010) (collecting cases). Each court to have considered the issue has decided that electronic correspondence—including text messages—does not warrant different or more stringent authentication rules than those that are used to authenticate other sorts of correspondence. *See, e.g., Commonwealth v. Koch*, 39 A.3d 996, 1004 (Penn. Super. Ct. 2011), aff'd by equally divided court,

106 A.3d 705 (Penn. 2014). Instead, text message authentication can and should be done in accordance with standard authentication rules. *Id.*

Wisconsin's authentication rules are set forth in its statutory code. Wis. Stat. §§ 909.01, 909.015. Authentication is a "condition precedent to admissibility." Wis. Stat. § 909.01. Evidence cannot be admitted absent a "sufficient" showing "that the matter in question is what its proponent claims." *Id.* "By way of illustration," Wisconsin's rules of evidence set forth a non-exhaustive list of "examples of authentication or identification conforming with the requirements of s. 909.01." Wis. Stat. § 909.015. None of the enumerated examples in Section 909.015 specifically addresses the authentication of text messages.

However, courts in other jurisdictions have routinely held that authenticating a text message cannot be done absent some evidence demonstrating who authored it. *See, e.g., State v. Francis*, 455 S.W.3d 56, 71-72 (Mo. Ct. App. 2014). "[E]stablishing the identity of the author of a text message or email through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility." *State v. Michael Koch*, 334 P.3d 280, 288 (Idaho 2014). It is widely accepted that authorship cannot be established merely by proving that a person owns or was associated with a number from which a text message was sent. *See, e.g., id.* "[A]uthentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person." *Koch*, 39 A.3d at 1005.

Such confirmation can be done by direct or circumstantial evidence. *Id.* at 1004. But, direct evidence is often hard to come by. Absent an admission of authorship or a witness who can testify to having seen the text being written, "[c]ircumstantial evidence,

which tends to corroborate the identity of the sender, is required." *Id.*

The search for circumstantial evidence to authenticate evidence is not unknown in Wisconsin. *See, e.g., State v. Baldwin*, 2010 WI App 162, ¶ 55, 330 Wis. 2d 500, 794 N.W.2d 769. In *Baldwin*, the state relied on recorded jail calls to prove that the defendant had contacted the victim. The defendant argued that the jail calls were inadmissible because the state could not directly prove that he was the caller and the victim the recipient, and thus could not authenticate them. *Id.* ¶ 52. This Court disagreed, recognizing that "telephone calls can be authenticated by circumstantial evidence." *Id.* ¶ 55. The recordings were held to be authentic based on: 1) a witness's testimony identifying the victim's voice on the recordings, 2) evidence that the defendant was located in the area of the jail from which the calls were made, and 3) the content of the calls, "which demonstrated knowledge familiar only to [the defendant] and [the victim]." *Id.* ¶ 53. *Baldwin* is thus informative of how circumstantial evidence can be used to authenticate, but its application to the instant case is limited. Recorded phone calls are not text messages; they include a voice that can be identified. Text messages, on the other hand, are comprised of far less information; they contain only written language.

Thus to circumstantially authenticate text messages, courts often look for unique or identifying features in the messages to determine authorship. *See State v. Taylor*, 632 S.E.2d 218, 230-31 (N.C. Ct. App. 2006). When the content of a text message independently indicates its writer, courts have had no problem with authentication. *Id.* For example, in *Taylor*, the text messages were held properly authenticated because they included the purported sender's first name and a description of the type of car he drove. *Id.*

However, not every text message includes information identifying its author. *See Francis*, 455 S.W.3d at 71-72. In such situations, extrinsic evidence connecting the message to the purported author is necessary for it to be properly authenticated. *See State v. Otkovic*, 322 P.3d 746, 752-53 (Utah Ct. App. 2014). For example, the government was able to authenticate the text messages in *Otkovic* by offering a co-actor's testimony that he witnessed the defendant in possession of the phone contemporaneous with the time when the messages were sent. *Id.* Similarly, in *Rodriguez v. State*, the government presented video evidence showing the defendant using the victim's cell phone at the same time that the victim's boyfriend received two text messages. 273 P.3d 845, 850 (Nev. 2012). The video evidence thus demonstrated the defendant's authorship and authenticated the text messages. *Id.* However, several subsequent text messages received by the boyfriend were not authenticated because "the record [was] devoid of any evidence that [the defendant] authored or participated in authoring the ten text messages that were sent after he and [the codefendant] exited the bus" from which the video was taken *Id.* As *Rodriguez* demonstrates, the absence of extrinsic evidence of authorship is fatal to authentication when the message's content alone does not prove it. *Id.*; *see also Francis*, 455 S.W.3d at 71-72, *Koch*, 29 A.3d at 288.

In *Francis*, police located a cell phone on the defendant after following him from the site of suspected drug manufacturing. 455 S.W.3d at 58-59. A search of the defendant's phone discovered text messages discussing drug activity, which were introduced at trial. *Id.* at 59-60. However, there was nothing unique in the messages' content that demonstrated that the defendant had authored them. *Id.* at 71-72. And, the State lacked any extrinsic evidence proving authorship. *Id.* Simply because the defendant had possession of the phone upon arrest was not enough to prove that he had written the texts.

Id. Additionally, the fact that the texts were about drug activity made no difference even in light of the defendant's purported involvement with drug manufacturing. *Id.* The government's inability to circumstantially establish authorship rendered the text messages unauthenticated and inadmissible. *Id.* at 72-73.

Similarly, in *Commonwealth v. Koch*, the government introduced drug-related text messages from the defendant's cellphone as evidence that she intended to deliver marijuana. 29 A.3d at 1000. Prior to admitting the text messages, the government presented no direct evidence establishing authorship, and the "text messages themselves" contained "no contextual clues . . . tending to reveal the identity of the sender." *Id.* To the contrary, the evidence showed that multiple persons had access to the defendant's phone and may have been able to send text messages from it. The trial court admitted the text messages, "reason[ing] that doubts as to the identity of the sender or recipient went to the weight of the evidence, rather than to its admissibility." *Id.* The appellate court "disagree[d]," noting that "[a]uthentication is a prerequisite to admissibility," which demands evidence "tend[ing] to corroborate the identity of the sender." *Id.* at 1005. Whereas "evidence tending to substantiate that [the defendant] wrote the drug-related text messages" was "[g]laringly absent in th[e] case," the messages were unauthenticated and inadmissible. *Id.* Thus, "the admission of the text messages constituted an abuse of discretion." *Id.* Giacomantonio contends that the holding should be the same in the instant case.

First, the circuit court here admitted the text messages based on reasoning similar to that which the *Koch* court rejected. The circuit court explained its pretrial ruling admitting the text messages as follows:

> You know, the victim will be here. If she's allegedly a participant in these conversations, she

> would be available for cross examination to you and as would the detective who drafted the reports. So unless you have anything further, any Wisconsin law on point, the Court is going to allow this evidence. And certainly you *will be afforded the opportunity to vigorously cross examine as to its authenticity* and as to the context and to whether or not they were accurately reported to law enforcement and law enforcement -- whether or not law enforcement accurately reported those conversations to the D.A. and to the Court.
>
> [DEFENSE COUNSEL]: I do believe, Judge, that *they would still have to be authenticated before they are presented before the jury*.
>
> THE COURT: Well, we have the screen shots, we have the conversations that occurred. If -- you know, the Court has faced these same issues with regard to facebook postings, social media postings. *There are always ways for individuals to circumvent controls put on electronic communications, and people can make fake facebook postings, they can send emails under somebody else's name.* All these things can be done by people who are far brighter than I at maneuvering the electronic communications system.
>
> *If you have a basis to cross examine witnesses and you believe that the victim or another has falsely manufactured these text conversations, you are certainly entitled to cross examine them on that point*. So your motion is denied.

(44:11-12, A-Ap. 44-45 (emphasis added).) When Giacomantonio renewed his objection during trial and reiterated his position that authentication "require[d] circumstantial evidence that tends to corroborate the identity of the sender," the trial court disagreed. The court explained, "Well, actually *that's not done in any case, quite frankly, the cases that this Court has seen*. You've got a phone. *But we don't know who enters the information on that phone. . . . [T]he Court will believe*

also that that goes to the weight of the evidence. The Court [thus] allowed it in." (48:54, A-Ap. 57.)

Whereas the trial court denied Giancomantonio's authentication objections on the ground that authorship mattered for weight, not admissibility, it erred as a matter of law. Wisconsin agrees with *Koch* and every other jurisdiction to consider this issue that "[a]uthentication is a prerequisite to admissibility." *Compare Koch*, 29 A.3d at 1005, *with Nischke v. Farmers & Merchs. Bank & Trust*, 187 Wis. 2d 96, 106, 522 N.W.2d 542, 546 (Ct. App. 1994) ("A prerequisite to the admissibility of all evidence is that it meet the authentication requirements of § 909.01 STATS."). It should similarly join those other jurisdictions and hold that proof of authorship is required to authenticate text message evidence. Absent such proof, text message evidence should not be admissible.

Second, and under the rule Giacomantonio proposes, there was insufficient evidence at trial to prove his authorship of the text messages. No direct evidence was offered to prove that he authored the text messages. No one witnessed him writing the messages and Giacomantonio never admitted doing so. Therefore, the analysis must turn to whether sufficient circumstantial evidence was presented to demonstrate that he was the author. The record shows that it was not.

The messages' content does not disclose Giacomantonio as their author. Unlike the texts in *Taylor*, Giacomantonio's name does not appear in the text messages and there is nothing self-descriptive in them. *Contra* 632 S.E.2d at 230-31. Additionally, unlike the jail call recordings in *Baldwin*, the text messages here do not disclose things that would have been known only to Giacomantonio. *Contra* 2010 WI App 162, ¶ 53. The question of authorship must then

turn to an analysis of extrinsic evidence that could be used to prove his authorship.

Importantly, no witness ever claimed to know that Giacomantonio sent the text messages. Certainly, the victim identified each text message, but she testified only as to the number from which she received them. And while it is true that she correlated that phone number to Giacomantonio's cell phone, such correlation is not alone enough to demonstrate that he was the author. *Koch*, 39 A.3d at 1005. Additionally, no evidence established Giacomantonio's contemporaneous use of the cell phone at the time that the texts were sent. *Contra Rodriguez*, 273 P.3d at 850. Not even K.N.R. testified that she believed Giacomantonio had sent her those texts.

As in *Koch*, there was evidence at trial that K.N.R.'s phone had no lock and its functionality was accessible to anyone who might possess it. K.N.R.'s cousin was known to use her phone at times, and M.R. also would often take K.N.R.'s phone from her as punishment. M.R. even testified that she had easily accessed the phone's contents before delivering it to the police. As for Giacomantonio's phone, K.N.R. testified that she would occasionally use it.

The ease of accessibility and multiple use of the cell phones in the instant case makes it similar to *Koch*. Those facts also distinguish the instant case from others in which courts have found text messages properly authenticated. *See, e.g., Thompson*, 777 N.W.2d at 620. In those cases, the evidence demonstrated singular use or otherwise involved no evidence of multiple use. *See, e.g., id.* But here, the evidence showed that multiple persons had access to both phones.

Given the absence of evidence in the instant case proving that Giacomantonio authored the text messages, the circuit court abused its discretion in admitting them. Proof of authorship is a prerequisite

of admissibility, and the failure to satisfy Wis. Stat. 909.01 should have resulted in the texts' omission.

C. The Photographs of the Text Messages did not Conform with Wisconsin's Best Evidence Rule, and Thus Were Inadmissible to Prove Their Content.

Wisconsin's best-evidence rule requires a party seeking to prove the content of a writing to produce the original, absent limited circumstances. Wis. Stat. §§ 910.02-910.04; *see also State v. Booker*, 2006 WI 79, ¶ 47, 292 Wis. 2d 43, 717 N.W.2d 676 (Abrahamson, C.J., concurring) ("remind[ing] counsel and the bench that Wisconsin does indeed have an original writing rule"). The statutes enumerate four exceptions to the rule wherein "[t]he original is not required." Wis. Stat. §§ 910.04(1)-(4) . None apply in the instant case. Similarly, the statutes allow for a duplicate to be used "unless . . . a genuine question is raised as to the authenticity of the original." Wis. Stat. § 910.03. However, as previously explained, Giacomantonio disputed the text messages' authenticity.

Thus, in the instant case, the best-evidence rule required the State to prove the content of the text messages by producing the originals at trial. Wis. Stat. § 910.02. It is indisputable that the photographs of the text messages constitute a duplicate under the best-evidence rule. *See* Wis. Stat. § 910.01(4) (defining "[a] duplicate" as, *inter alia*, "a counterpart produced by . . . means of photography"). And, it is equally indisputable that the State used those photographs for the specific purpose of proving the text messages' content.

Using the photographs to prove the content of the text messages was therefore improper. *See State v. Ford*, 2007 WI 138, ¶ 63, 306 Wis. 2d 1, 742 N.W.2d 61 ("best evidence" rule stands for proposition that "in order to prove the content of a writing, recording,

or photograph, the original is required"). There is no evidence that the original text messages were lost, destroyed, or unobtainable. To the contrary, the State maintained possession of K.N.R.'s phone throughout trial, even admitting it into evidence. The State offered no proof that the text messages had been deleted from K.N.R.'s phone or that her phone had become inoperable. And, it used those photographs to prove inducement, which was a core issue in the case, not some collateral matter.

The circuit court concluded that because record of the text messages were not maintained by the phone company, the originals were unavailable. Certainly, it is true that unavailability of an original is an exception to the best-evidence rule. Wis. Stat. § 910.04(1) & (2). However, the absence of records at the phone company does not mean that the original text messages were unavailable. It would be hard to say that the phone company's records constitute the original writing of a text message that was typed into one electronic device and transmitted to another. The original would, in that circumstance, not be the phone company's duplicative record of that transmission, but rather the transmission itself. If the postal service kept in its records a copy of every letter that it delivered, no one would claim that the destruction of that copy constituted a destruction of the original letter. The same goes for text messages; just because the phone company does not keep a copy of the texts it delivers does not mean that the text received is not the original.

Relevantly, in the instant case, the State had possession of the phone on which the original text messages occurred, and the originals were therefore available to it. The State could have used the phone itself to display the text messages to the jury. Alternatively, the State's forensic expert had analyzed the phone's contents; the content she downloaded from the phone—including the challenged text messages—

could have been presented to the jury. (*See* 47:70-72.) Whereas the State could have presented the originals, the circuit court erroneously exercised its discretion by admitting the photographs over Giacomantonio's best-evidence objection.

D. The Detective's Testimony About What he Read from K.N.R.'s Phone at the Police Station was Inadmissible Hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3). It applies both to written and oral statements.

In the instant case, Giacomantonio challenged as hearsay the detective's testimony about the contents of the text messages that Giacomantonio purportedly sent to K.N.R. (48:25, *id.*:52, A-Ap. 49, 55.) What those text messages read was clearly an out-of-court statement. Whether it was inadmissible hearsay depends on the reason it was offered.

The State contended that it was not offering the text message for the proof of the matter asserted. Giacomantonio disputed that. Contrary to the State's assertion, "[t]he only relevance of the text messages and precisely the reason the [State] sought to introduce them was because they demonstrated," *Koch*, 39 A.3d at 1006, that Giacomantonio "did induce [K.N.R.] to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct" (5; 50:11). "The relevance was not that statements were made, but the content of the statements. The evidentiary value of the text messages depended entirely on the truth of their content." *Koch*, 39 A.3d at 1006. "The mere existence of the text messages themselves was not enough to prove" sexual exploitation of a child. *Id.* Instead, "[t]he jurors had to believe the actual text of the text

messages, that is, the matters asserted therein, to grasp what the text messages were offered at trial to prove." *Id.*

As such, the detective's testimony about the text message was inadmissible hearsay. The circuit court erroneously exercised its discretion when it held to the contrary.

E. Giacomantonio was Prejudiced by Admission the Text Message Evidence.

The text message evidence was not some minor part of the State's case against Giacomantonio; it was key to proving his guilt. To prove Giacomantonio guilty of sexually exploiting K.N.R., the State had to show that he induced her to send him explicit photographs. (50:11); *see also* Wis JI-Criminal 2120.

The State devoted a considerable portion of its case to the text message evidence. The investigating detective, M.R., and K.N.R. were all individually asked about the text messages. The State had the investigating detective read each of the text messages aloud to the jury. Through the detective's testimony, the State introduced into evidence a picture of each text message. The State used M.R.to explain how the text messages confirmed her suspicions of Giacomantonio's illegal behavior. Then, with K.N.R., the State deliberately asked multiple questions about every single text message. Additionally, the State elicited testimony from K.N.R. that Giacomantonio would use text messages to get her to engage in sexually explicit behavior. (48:89-90.)

The State relied on the text messages to prove inducement. The prosecutor's comments in closing regarding the text messages are exemplary of the importance that evidence played at trial. He argued that the "text messages are the crimes" insofar as they "led to [the] pictures." (50:22.) In other words, the texts

were part of Giacomantonio's inducement. (*See id.*) As such, the text message evidence was key to the State's proof of sexual exploitation, and its inclusion in the case against Giacomantonio was prejudicial. He should have a new trial.

II. GIACOMANTONIO'S RIGHT TO PRESENT A DEFENSE WAS INFRINGED WHEN THE CIRCUIT COURT REFUSED TO CONDUCT AN IN CAMERA REVIEW OF K.N.R.'S TREATMENT RECORDS.

A. Standard of Review

> [T]he standard to obtain an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant.

State v. Green, 2002 WI 68, ¶ 19, 253 Wis. 2d 356, 646 N.W.2d 298. "[I]nformation will be necessary to a determination of guilt or innocence if it tends to create a reasonable doubt that might not otherwise exist." *Id.* ¶ 34. The *Green* "test essentially requires the court to look at the existing evidence in light of the request and determine, as the *Shiffa* court did, whether the records will likely contain evidence that is independently probative to the defense." *Id.* (relying on *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993)). "The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court." *Id.* ¶ 20.

"In cases where it is a close call, the circuit court should generally provide an in camera review." *Id.* ¶ 35. "The preliminary burden for seeking an in camera review [is] less stringent than the standard applied by the court during its in camera inspection." *Id.* ¶ 31.

On review, appellate courts consider the circuit court's factual findings "under the clearly erroneous

standard. Whether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that [appellate courts] review de novo." *Id.*

B. Giacomantonio Satisfied his Burden to Trigger an in Camera Review.

In *State v. Speese*, this Court considered a fact pattern nearly identical to the one presented in the instant case and concluded that the defendant was entitled to an in camera review. 191 Wis. 2d 205, 224, 528 N.W.2d 63, 71 (Ct. App. 1995) (reversed on harmless error grounds by 199 Wis. 2d 597, 545 N.W.2d 510 (1996)) (recognized as good law by *State v. Lynch*, 2015 WI App 2, ¶¶ 31-32, 259 Wis. 2d 482, 859 N.W.2d 125). The result should be the same in the instant case.

Speese was charged with, *inter alia*, having had sexual contact and intercourse with a juvenile. *Id.* at 214-15, 528 N.W.2d at 67. Pretrial, he sought access to the victim's medical records. *Id.* at 215, 528 N.W.2d at 67. He argued that he was entitled to access because the victim had received mental health treatment and no mental health professional reported any alleged abuse. *Id.* "'The absence of reporting the alleged assaults to medical officials [was] exculpatory,'" argued Speese, and he should therefore be entitled to the requested records. *Id.* (quoting defendant's trial pleadings).

On appeal, this Court reviewed de novo whether Speese had met his burden under *Shiffra*, to compel an in camera review. *Id.* at 222, 528 N.W.2d at 70. It concluded that he had:

> The charges against Speese include eleven counts alleging that in January and February 1991, he had sexual intercourse and sexual contact with Kari, who had not attained the age of sixteen. Her hospitalization occurred in February

> 1991. Had she told the hospital staff that Speese sexually abused her, the staff would have been required to report that sexual abuse to the county or sheriff or police. Kari's sexual abuse was first reported to the police in September 1991, by her mother and Teresa's mother. A reasonable inference is that Kari did not tell the hospital staff about Speese's sexual abuse of her.
>
> It may be necessary for a fair determination of Speese's guilt or innocence that the jury know that Kari claims Speese had sexual intercourse and sexual contact with her on eleven occasions shortly before her psychiatric hospitalization but appears not to have told the hospital staff about any of those occurrences. Without an explanation for her silence, a jury might disbelieve Kari's testimony in support of those eleven counts. It might also discount her testimony in support of the counts that allegedly occurred after her hospitalization, count twenty-two, exposing a child to harmful material, and count twenty-three, nonconsensual sexual contact.
>
> Because Speese made the required preliminary showing as to Kari's February 1991 psychiatric records, the trial court should have ordered that unless Kari consented to an in camera inspection of those records, she would not be permitted to testify at the trial.

Id. at 223-224, 528 N.W.2d at 70-71 (internal citations omitted). The result should be the same in the instant case.

Giacomantonio was charged with the sexual exploitation and incest of K.N.R. The parties did not dispute that K.N.R. was receiving mental health treatment during the period of the alleged criminal acts. Nor did they dispute that it was K.N.R.'s mother, not a mental health professional, who informed the police of Giacomantonio's alleged criminal acts.

Like in *Speese*, "[h]ad [K.N.R.] told [her therapist] that [Giacomantonio] sexually abused her,

[her therapist] would have been required to report that sexual abuse . . .. [K.N.R.]'s sexual abuse was first reported to the police . . . by her mother . . .. A reasonable inference is that [K.N.R.] did not tell [her therapist] about [Giacomantonio]'s sexual abuse of her." *Id.* at 223, 528 N.W.2d at 70. As the *Speese* court reasoned, it "may be necessary for a fair determination of [Giacomantonio]'s guilt or innocence that the jury know that [K.N.R.] claims" Giacomantonio was engaging in ongoing criminal sexual behavior while she was in therapy "but [K.N.R.] appears not to have told [her therapist] about any of those occurrences." *Id.* Whereas the *Speese* court found a sufficient basis to trigger an in camera review under nearly identical facts, so too should the circuit court in the instant case have deemed Giacomantonio's showing sufficient. *See id.* at 224, 528 N.W.2d at 71.

Giacomantonio asserted that he anticipated K.N.R.'s therapy records would demonstrate that she discussed her relationship with Giacomantonio during therapy but never informed her therapist that Giacomantonio had sexually abused her. That information, said Giacomatonio, would allow him to impeach K.N.R.'s credibility regarding the alleged sexual contact and abuse. The fact that K.N.R. never told her therapist about any sexual contact or abuse went directly to the credibility of her allegation.

What is more, what K.N.R. did or did not tell her therapist was available to Giacomantonio only through accessing K.N.R's privileged records. Contrary to the State's position, Giacomantonio could not gain verifiable proof of what K.N.R. told her therapist by asking K.N.R. or her mother or any other person. And, despite what the circuit court reasoned, Giacomantonio's knowledge of the asserted reasons behind K.N.R.'s attending therapy does not disclose what K.N.R. said to her therapist. Only the therapist's records can verifiably reveal the content of K.N.R.' conversations and the likely fact that she never told

her therapist about Giacomantonio's alleged criminal acts. Additionally, only those records can prove whether K.N.R. described Giacomantonio as controlling and manipulative, or instead ascribed those labels to her mother. Only the records can show whether K.N.R. expressed anger with Giacomantonio for trying to divorce M.R.

The circuit court reasoned that Giacomantonio was not entitled to an in camera review because he was "personally aware of many of the facts and the allegations that are set forth in the defense motion." (41:13, A-Ap. 26.) Specifically, said the court, Giacomantonio was "independently aware" of K.N.R.'s suicide attempts, her involvement in a relationship that her mother feels is inappropriate, and her untruthfulness about the nature of that relationship. (*Id.*) Thus, said the circuit court, any evidence in K.N.R.'s records would be cumulative. The circuit court's analysis misses the mark, and is inconsistent with this Court's prior cases. *See State v. Johnson*, No. 2011AP2864, slip op. (Wis. Ct. App. Apr. 18, 2012) (affirmed 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609) (reaffirmed and decision recognized as "the law of the case" by 2014 WI 16, 353 Wis. 2d 119, 846 N.W.2d 1), (A-Ap. 65-78).

In *State v. Johnson*, this Court held that a defendant in substantially similar circumstances to Giacomantonio who made a substantially similar showing had satisfied his burden to trigger an in camera hearing. *Id.* ¶¶ 3-4, 11-15, (A-Ap. 67, 69-71). Johnson was charged with sexually assaulting his stepdaughter. *Id.* ¶ 3, (A-Ap. 67). Like Giacomantonio, he requested an in camera review of the victim's counseling records. He offered the following facts as justification for an in camera review:

> 1. [The victim] was in counseling during the time period in which [the victim] alleges that Johnson was engaging in repeated acts of sexual abuse.

2. The purpose of the therapy sessions was to discuss issues relating to interpersonal relationships within [the victim]'s family, including her relationship with her stepfather, Johnson.

3. There is a reasonable likelihood that the therapy records contain exculpatory information, specifically that:

   a. [the victim] discussed her relationship with Johnson,

   b. [the victim] either denied or did not disclose any sexual assault by Johnson.

Id. ¶ 4, (A-Ap. 67). Thus, Johnson's circumstances and proffered reasons for an in camera review were nearly identical to Giacomantonio's. *Compare id. with* (7).

In affirming the circuit court's decision to grant Johnson an in camera review, this Court wrote,

> We agree with the circuit court's order granting in camera inspection. Johnson set forth that [the victim] was in counseling at the time that the alleged acts of abuse occurred and that the purpose of counseling was centered on interpersonal relationships within [the victim]'s family, including her relationship with Johnson. [The victim] agreed that Johnson correctly set forth the time and purpose of her counseling sessions. It is reasonably likely, therefore, that the records contain relevant evidence of [the victim]'s recitation as to her relationship with and the actions of Johnson.
>
> We conclude that there is a "reasonable likelihood" that the records contain relevant information necessary to a determination of guilt or innocence such that in camera inspection is required. The fact that the purpose of the therapy was to address interpersonal relationships between [the victim] and Johnson and that the therapy occurred during the time period at issue makes it reasonably likely the records contain relevant information necessary to a determination of guilt or innocence. Just as the

> statements made by [the victim] to a member of the child advocacy center and agents of the prosecution are relevant, the statements [the victim] made to her therapists at the time of the alleged assaults may be relevant to the determination of guilt or innocence of Johnson.

Johnson, 2011AP2864, ¶ 14-15, (A-Ap. 70-71) (internal citation omitted). This Court should reach the same conclusion in the instant case.

First, in the instant case as in *Johnson*, it is undisputed that the victim sought counseling at the time the ongoing sexual assaults and sexual exploitation was allegedly occurring. Second, the purpose of the therapy was, in part, to discuss the relationship with the alleged perpetrator, the victim's stepfather. These reasons were sufficient for the *Johnson* court to conclude that the counseling sessions were sufficiently material to satisfy the requisite preliminary showing under *Shiffra-Green* to compel an in camera review. This Court should reach the same conclusion in the instant case.

The circuit court's reasoning that Giacomantonio's independent awareness of K.N.R.'s suicide attempts, interpersonal relationships, and untruthfulness regarding the same rendered the contents of her therapy records cumulative is contrary to the analysis in *Johnson*. Certainly, Johnson would have been independently aware of the victim's interpersonal relationships, but that did not render cumulative the exculpatory evidence related thereto that was reasonably likely to exist in her therapy records. Here as in *Johnson*, Giacomantonio did not have information already at his disposal to evaluate and impeach the victim's credibility. The circuit court's ruling is thus contrary to *Johnson*, and should not stand.

For all those reasons, there is "a reasonable likelihood that [K.N.R.'s] records contain relevant information necessary to a determination of guilt or

innocence [that] is not merely cumulative to other evidence." *Green*, 2002 WI 68, ¶ 19.

Giacomantonio therefore met his burden to trigger an in camera review, and the circuit court erred in reaching the contrary conclusion.

C. The Failure to Grant Giacomantonio Access to K.N.R.'s Treatment Records Impugned his Right to Present a Compete Defense.

"Under the due process clause, criminal defendants must be given a meaningful opportunity to present a complete defense." *Shiffra*, 175 Wis. 2d at 605, 499 N.W.2d at 721 (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *see also* U.S. Const. Amends. V, XIV. That right is not unlimited, however, and in the context of privileged medical records a balance must be struck between the defendant's due process right and the patient's right to the confidentiality of their privileged medical records. *Green*, 2002 WI 68, ¶ 23. In light of those competing interests, Wisconsin courts rely on the in camera review process. *Id.*

As detailed above, the circuit court erred in the instant case when it concluded that Giacomantonio was not entitled to an in camera review of K.N.R.'s therapy records. Upon a finding that the trial court erroneously exercised its discretion in denying the in camera review, this court must "conduct a harmless error analysis to determine whether the error 'affected [Giacomantonio's] substantial rights.'" *See Martindale v. Ripp*, 2001 WI 113, ¶ 30, 246 Wis.2d 67, 629 N.W.2d 698"An error is not harmless if it undermines our confidence in the outcome of the proceeding." *See Westport Ins. Corp. v. Appleton Papers Inc.*, 2010 WI App 86, ¶ 49, 327 Wis. 2d 120, 787 N.W.2d 894. Whether an error was harmless presents a question of law that is reviewed de novo. *State v. Ziebart*, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369. The

circuit court's error in the instant case was not harmless; it violated Giacomantonio's federal and state constitutional right to present a complete defense. The State used the lack of an in camera review to its advantage at trial by eliciting testimony from its witnesses about matters for which Giacomantonio sought in camera review. Without the in camera review, Giacomantonio was unable to meaningfully challenge the State's presentation of that evidence.

As stated above, an element of the offense for which Giacomantonio was convicted was that he "induced [K.N.R.] to engage in sexually explicit conduct." (50:11); *see also* Wis JI-Criminal 2120. To get a guilty verdict, the State had to convince the jury that Giacomantonio somehow caused K.N.R. to send him explicit pictures. *See* Wis JI-Criminal 2120. To prove that inducement, the State theorized and argued to the jury that Giacomantonio took advantage of his relationship with K.N.R. and her delicate mental condition following her 2012 suicide attempt. (50:23.) "[H]e was able to induce her," said the prosecutor, "[b]ecause of that situation when she was living as a kid who tried to kill herself in December of 2012. She was a tragic kid. And he used that to his own advantage." (50:23.)

To highlight how susceptible K.N.R. was to Giacomantonio's pressures, the State repeatedly used her suicide attempt to establish the timing of the photos that she sent him. The prosecutor asked K.N.R. at least ten times whether certain pictures were taken—or whether specific incidents of sexual contact occurred—before or after her suicide attempt. (49:8, *id.*:13, *id.*:16, *id.*:19, *id.*:23, *id.*:24, *id.*:25, *id.*:27, *id.*:28.) All of the photos, she said, happened afterward. (*Id.*)

Then, in support of its theory that Giacomantonio took advantage of K.N.R.'s delicate

mental condition, the State elicited the following testimony:

> [Prosecutor] The picture you took of your vagina, why would you take that picture? . . .
>
> [K.N.R.] Because he made me feel as though he did so much for me that he deserved stuff, those pictures in return for everything he would do for me.
>
> [Prosecutor] Like what? What would [he] do for you?
>
> [K.N.R.] He would provide alcohol for me and my friends. He would give me any type of medication if I couldn't sleep or didn't feel well. He would help - - he would make me feel like he was the one that would allow me to have any type of freedom because it was all up to him. And if I was willing to do stuff for that freedom, I could get freedom. . . .
>
> [Prosecutor] But why -- why would you want to send [these pictures] to him?
>
> [K.N.R.] Once again, so that I could get some type of freedom or if he did something for me, I had to pay him back is how he made it.
>
> [Prosecutor] How did he make -- how did he make that happen?
>
> [K.N.R.] If I would tell him no or would refuse to send him a picture, let him grab my butt, then he would stop talking to me. He would take my phone away. He would cause problems with my mom and get me in trouble so that I couldn't do anything. . . . or get anything unless I did that and let him grab me.

[Prosecutor] How do you know you had to do that?

[K.N.R.] Because if I said no, then, like I said before, I wasn't allowed to do anything. And he would ignore me and treated me like shit.

[Prosecutor] So what would happen when you would take a picture of your buttocks or vagina?

[K.N.R.] Everything would just -- would just pretend like it didn't happen, and I got freedom. And I was allowed to hang out with friends or go places or do things. . . .

[Prosecutor] Did you think you had to provide these pictures?

[K.N.R.] Yes.

[Prosecutor] Why?

[K.N.R.] Because if I didn't, I was treated as though I didn't exist. And I wasn't allowed to have any type of life or do anything with friends. . . .

[Prosecutor] So why did you feel you had to?

[K.N.R.] Because I know when I didn't, everything was a lot harder. And I felt trapped and like I had no life and no freedom. . . .

[Prosecutor] What would happen after you took these pictures and provided them to him?

[K.N.R.] Anything from he would let me sleep over at a friend's house, go to a friend's house, or he would provide alcohol for my friends and I.

[Prosecutor] Didn't your mom let you sleep over at friends' houses?

[K.N.R.] He was too demanding and controlling.

(49:6, *id.*:12-13, *id.*:20-21, *id.*:26.) As that line of questioning shows, the State developed evidence from K.N.R. to characterize Giacomantonio as controlling and manipulative of her. It returned to her description of that relationship numerous times. For example, K.N.R. testified on direct that Giacomantonio had supplied her with the pills she used in her suicide attempt:

[Prosecutor] In December of 2012, you tried to do something that led to your hospitalization, correct?

[K.N.R.] Yes.

[Prosecutor] What did you do?

[K.N.R.] I tried to kill myself.

[Prosecutor] How?

[K.N.R.] He used to give me like percocets and other types of like - -

[Prosecutor] When you say he, who's he?

[K.N.R.] Giancarlo. . . .

[Prosecutor] After being released from the hospital, were you in any type of counseling?

[K.N.R.] Yeah.

[Prosecutor] How long were in counseling or are you still in counseling?

[K.N.R.] I'm still in it.

[Prosecutor] Why are you in counseling?

[K.N.R.] To deal with this.

> [Prosecutor] When you say this, what are you referring to?
>
> [K.N.R.] Like everything that he did to me and all like trauma and what - -

(48:78-80.)

The State had started the theme of Giacomantonio taking advantage of K.N.R. in opening. (47:34.) Then again, in closing, the State used K.N.R.'s description of her relationship with Giacomantonio to show inducement:

> . . . [A]s she said, did he give her, for example, the Samsung phone and sa[y] hurry up and take the pictures. Did he do this? *If she didn't do it, he would come down hard on her. As she said, he would withhold emotional nourishment. He would not let her have freedom*. . . . When she says I did this because of him, because he wanted me to. *Because he withheld things from me. Because if I didn't, he gave me things. He gave me freedom that mother was not giving me. That's inducement*. . . .
>
> And the truth is what he was doing in this house that was kind of screwed up -- everybody agrees to that, her friends agree to that -- was *he was using emotional power on a kid to get something that he wanted*.
>
> He induced her. . . .
>
> And he was able to induce her. Because of that situation, when she was living as a kid who tried to kill herself in December of 2012. She was a tragic kid. And he used that to his own advantage.

(50:18, *id.*:21, *id.*:23 (emphasis added).)

Giacomantonio's request for an in camera review of K.N.R.'s medical records was based partly on the theory that "interpersonal relationships is a key theme in this case." (41:5, A-Ap. 18.) The above-quoted language from the trial transcript demonstrates that Giacomantonio was right about the importance that

the parties' interpersonal relationships would play in the State's case.

However, K.N.R.'s treatment records were never reviewed. Giacomantonio had anticipated that an in camera review would show how she had described her relationship with Giacomantonio, as well as her relationship to her mother. Contrary to the State's theory, it was Giacomantonio's theory that K.N.R.'s mother was actually the controlling parent. He expected that K.N.R.'s treatment records would show that she had claimed her mother, not Giacomantonio, to have been the one preventing her from doing things. Such evidence would have weakened the State's inducement argument. And yet, because no review was conducted, when K.N.R. testified at trial that Giacomantonio's controlling and manipulative behavior caused her to send him pictures, he could not refute her claims.

The circuit court's refusal to conduct even a preliminary examination of K.N.R.'s records deprived him of access to records that could have countered the State's inducement claim. If K.N.R. had never told her therapist that Giacomantonio was controlling or manipulative, it would have been very difficult for the State to sustain its burden of proof. However, in the absence of that evidence, the State used K.N.R.'s description of her relationship with Giacomantonio to paint a very different picture. Rather than being a supportive parent, he was made out to be a controlling, manipulative stepparent capable of inducing K.N.R. to commit illicit sexual behaviors. Without the benefit of an in camera review of K.N.R.'s treatment records, Giacomantonio was thus unable to prepare an adequate defense to what the State presented at trial.

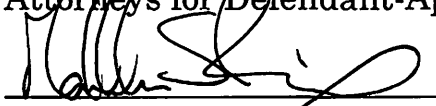
The circuit court's error thus impaired Giacomantonio's ability to present a complete defense; he should therefore be entitled to relief.

CONCLUSION

For the aforementioned reasons, Giacomantonio asks this Court to reverse the judgement and remand to the circuit court for further proceedings consistent with its opinion.

Dated this 26th day of August, 2015.

LAW OFFICES OF ROBERT A. LEVINE
Attorneys for Defendant-Appellant



Michael G. Levine
State Bar No. 1050078
Matthew S. Pinix, of counsel
State Bar No. 1064368

CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,998 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 26th day of August, 2015.

LAW OFFICES OF ROBERT A. LEVINE
Attorneys for Defendant-Appellant

Michael G. Levine
State Bar No. 1050078
Matthew S. Pinix, of counsel
State Bar No. 1064368

CERTIFICATION OF APPENDIX CONTENT

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 Section 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.

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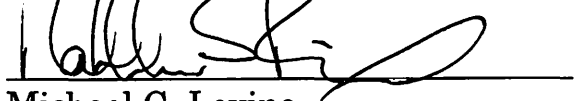
LAW OFFICES OF ROBERT A. LEVINE
Attorneys for Defendant-Appellant



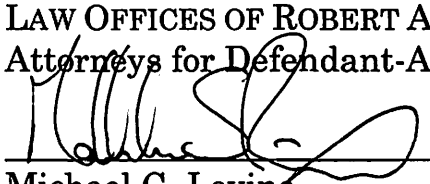
Michael G. Levine
State Bar No. 1050078
Matthew S. Pinix, of counsel
State Bar No. 1064368

CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Short Appendix will be delivered to a FedEx, a third-party commercial carrier, on August 26, 2015, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 26th day of August, 2015.

LAW OFFICES OF ROBERT A. LEVINE
Attorneys for Defendant-Appellant



Michael G. Levine
State Bar No. 1050078
Matthew S. Pinix, of counsel
State Bar No. 1064368