RECEIVED
12-23-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

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 REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE TEXT MESSAGE EVIDENCE WAS ERRANTLY ADMITTED AND ITS INCLUSION WAS NOT HARMLESS. 1

II. GIACOMANTONIO SHOULD HAVE BEEN GIVEN AN IN CAMERA REVIEW OF KNR'S COUNSELING RECORDS; THE FAILURE TO GRANT REVIEW WAS NOT HARMLESS. 8

A. The State's Cumulative Evidence Argument is Unworkable and Would Make it Impossible for a Defendant to Ever Access Treatment Records. 8

B. Giacomantonio's Case is Virtually Indistinguishable from *State v. Johnson*; to not Follow its Holding Would Violate the Principle of Treating Similarly Situated Defendants Similarly 10

C. The Error was not Harmless. 13

CONCLUSION 14

CERTIFICATION 15

CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER 16

TABLE OF AUTHORITIES

CASES

Chapman v. California, 386 U.S. 18 (1967) ... 1, 2, 3, 4

Griffith v. Kentucky, 479 U.S. 314 (1987) 13

Harmann v. Hadley, 128 Wis. 2d 371,
382 N.W.2d 673 (1986) 12, 13

In re Jessica J.L., 223 Wis. 2d 622,
589 N.W.2d 660 (Ct. App. 1998) 13

Jensen v. Clements, 800 F.3d 892 (7th Cir. 2015) ... 2, 3

Lafler v. Cooper, 132 S. Ct. 1376 (2012) 3

Lockhart v. Fretwell, 506 U.S. 364 (1993) 3

Nischke v. Farmers & Merchs.
Bank & Trust, 187 Wis. 2d 96,
522 N.W.2d 542 (Ct. App. 1994) 1, 4, 5

Rodriguez v. State, 273 P.3d 845 (Nev. 2012) 5

Satterwhite v. Texas, 486 U.S. 249 (1988) 2

State v. Baldwin, 2010 WI App 162,
330 Wis. 2d 500, 794 N.W.2d 769 ..... 6, 7

State v. Canady, 2000 WI App 87,
234 Wis. 2d 261, 610 N.W.2d 147 1

State v. Gary M.B., 2004 WI 33,
270 Wis. 2d 62, 676 N.W.2d 475 2

State v. Green, 2002 WI 68,
253 Wis. 2d 356, 646 N.W.2d 298 ..... 8, 9, 10, 13

State v. Harris, 2008 WI 15,
307 Wis. 2d 555, 745 N.W.2d 397 ..... 1, 2

State v. Harvey, 2002 WI 93,
254 Wis.2d 442, 647 N.W.2d 189 2

State v. Johnson, slip op., No. 2011AP2864
(Wis. Ct. App. Apr. 18, 2012) 10, 11, 12

State v. Shiffra, 175 Wis. 2d 600,
499 N.W.2d 719 (Ct. App. 1993) 8, 9, 10

State v. Walther, 2001 WI App 23,
240 Wis. 2d 619, 623 N.W.2d 205 13

State v. Weed, 2003 WI 85, 263 Wis. 2d 434,
666 N.W.2d 485 3

Strickland v. Washington, 466 U.S. 668 (1984) 2

United States v. Johnson, 457 U.S. 537 (1982) .. 12, 13

STATUTES

Wis. Stat. § (Rule) 809.23(3)(b) 10

Wis. Stat. § 909.01 ..... 1, 4

Wis. Stat. § 910.01(3) 7

Wis. Stat. § 910.01(4) 7

TREATISES

John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality*, Strickland *Prejudice*, *and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153 (2005)... 3

ARGUMENT

I. THE TEXT MESSAGE EVIDENCE WAS ERRANTLY ADMITTED AND ITS INCLUSION WAS NOT HARMLESS.

Authentication is a prerequisite to admissibility; that is clear from the controlling statute, Wis. Stat. § 909.01, and Wisconsin's case law, *Nischke v. Farmers & Merchs. Bank & Trust*, 187 Wis. 2d 96, 106, 522 N.W.2d 542, 546 (Ct. App. 1994) (discussing authentication). Giacomantonio has therefore argued that the circuit court erred in the instant case by allowing the text messages into evidence *before* receiving evidence establishing their authorship. *See State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis. 2d 261, 610 N.W.2d 147 (wrong legal standard constitutes erroneous exercise).

In response, the State argues that the court's discretionary decision to admit the text message evidence *prior* to its authentication was not erroneous because additional evidence *later* established the text messages' authenticity. Giacomantonio disagrees.

The fact that evidence introduced subsequent to admission may have authenticated the messages—which Giacomantonio does not concede—does not salve from error the discretionary act of introduction before authentication. *See* Wis. Stat. § 909.01, *Nischke*, 187 Wis. 2d at 106, 522 N.W.2d at 546. Whether the text message evidence *could* have been authenticated *prior* to its admission is relevant only to whether the error was harmless.

"The Wisconsin Supreme Court has formulated the test for harmless error in two different ways." *State v. Harris*, 2008 WI 15, ¶¶ 42-43, 307 Wis. 2d 555, 745 N.W.2d 397. The first approach, pursuant to *Chapman v. California*, 386 U.S. 18 (1967), holds that "the error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained." *Harris*, 2008 WI 15, ¶ 42. The second approach "asks whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* ¶ 43 (quoted authority omitted.) "There is a different emphasis in the two approaches. The first inquires whether the [alleged] error contributed to the conviction, while the second inquires whether the untainted evidence provides overwhelming support for the conviction." *Harvey*, 2002 WI 93, ¶ 73, 254 Wis.2d 442, 647 N.W.2d 189 (Abrahamson, C.J., dissenting). However, "[t]he test for harmless error is not the same as the test for sufficiency of the evidence." *See State v. Gary M.B.*, 2004 WI 33, ¶ 93, 270 Wis. 2d 62, 676 N.W.2d 475. (Abrahamson, C.J., dissenting).

"Time and again, the [United States] Supreme Court has emphasized that a harmless-error inquiry is not the same as a review for whether there was sufficient evidence at trial to support a verdict." *Jensen v. Clements*, 800 F.3d 892, 902 (7th Cir. 2015). Instead, "[t]he Supreme Court has reinforced . . . over and over" that the harmless error test asks "'not whether the legally admitted evidence was sufficient to support the [verdict], . . . but rather whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Id.* (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) (quoting *Chapman*, 386 U.S. at 24))).

Contrary to that law, the State argues that the test for harmless error is the same as the test for prejudice in the ineffective assistance of counsel context: whether, but for the error, there is a reasonable probability of a different result. St.'s Br. at 16. But that is not a correct articulation of the harmless error test. As the United States Supreme

Court has before noted, *Strickland*[1] prejudice is not harmless error. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (distinguishing question of harmless error from *Strickland* prejudice), *Lafler v. Cooper*, 132 S. Ct. 1376, 1393 n.1 (2012) (Scalia, J., dissenting) (same); *see also* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality*, Strickland *Prejudice*, *and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1165-67 & n.39 (2005) (*Strickland* "reject[ed] harmless-error and newly-discovered-evidence prejudice standards").

Instead, in any harmless error analysis, the "focus [is] on the effect of the error on the jury's verdict," but not the sufficiency of the evidence aside from that which was improperly admitted. *See State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485. If a reasonable probability exists that the error contributed to the jury's verdict regardless of the sufficiency of the other evidence, it must be set aside. *Chapman*, 386 U.S. at 24, *Jensen*, 800 F.3d at 902. As the beneficiary of the alleged error in the instant case, the State has the burden of proving that it was harmless; that is to say, that there is no reasonable probability that the text message evidence contributed to the jury's verdict. *Chapman*, 386 U.S. at 24, *State v. Sullivan*, 216 Wis. 2d. 768, 792-93, 576 N.W.2d 30, 41 (1998). The State has not met its burden.

As a threshold matter, Giacomantonio disagrees with the State's assertion that "the State used the text messages primarily to support the incest charge." St.'s Br. at 16. To the contrary, the text message evidence was key to the sexual exploitation charge, which necessitated proof that Giacomantonio induced KNR to send him explicit photographs. The prosecutor's closing argument makes that point clearly. He argued to the jury that the text messages led to KNR's provision of illicit pictures. (R.50:22.) There was no

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

equivocation in that assertion. (*Id.*) Yes, the prosecutor said that the content of the text messages could be "interpreted in different ways" and "[m]aybe it's nothing." But, he followed that line with: "But what it led to was the pictures." (*Id.*) In other words, the prosecutor argued that, no matter how the jury chose to interpret the text messages' content, the fact remained that by the texts Giacomantonio got KNR to send him illicit photographs. (*See id.*) The State's present attempt to distance itself from that argument is inconsistent with the position it took below. The text messages were, in fact, a key part of the State's proof of inducement.

Thus, the text messages certainly contributed to the jury's verdict. *See also* Giaco.'s 1st Br. at 35-36 (harm from text messages further detailed). On this record, the State cannot prove that admission of the text messages was harmless, and the verdict must be set aside. *Chapman*, 386 U.S. at 24. Giacomantonio turns to the text messages' erroneously admission.

In support of his authentication argument, Giacomantonio relied on authority both from Wisconsin and other jurisdictions. Giaco.'s 1st Br. at 16-24. In Wisconsin, authentication necessitates a "record [that] supports a finding that the statements were actually made by [the person who it is claimed made them]." *Nischke*, 187 Wis. 2d at 106, 522 N.W.2d at 546; *see also* Wis. Stat. § 909.01.

But, Wisconsin has never before addressed the specific issue of authenticating text messages. Giacomantonio asserted the law of foreign jurisdictions to flesh out how standard authentication rules apply to text messages. *See* Giaco.'s 1st Br. at 16-24. He did not use those foreign cases to argue that electronic communication necessitates "specific authentication standards." *Contra* St.'s Br. at 8-9. Instead, Giacomantonio clearly stated that "text message authentication can and should be done in

accordance with standard authentication rules." Giaco.'s 1st Br. at 17.

Foreign jurisdictions have consistently reasoned that the authentication of text messages—pursuant to standard rules like Wisconsin's—requires proof of authorship. *See, e.g., Rodriguez v. State*, 273 P.3d 845, 848-49 (Nev. 2012) (identical authentication statute). Such reasoning is wholly consistent with Wisconsin's authentication rules; it does not call for more onerous requirements than already exist. *See Nischke*, 187 Wis. 2d at 106, 522 N.W.2d at 546. Instead, it merely articulates a manner by which courts can adjudge text messages authenticated under Wisconsin law.

Along those lines, Giacomantonio asserts that the State failed to authenticate the text messages here because of an absence of any evidence demonstrating his authorship. KNR testified only that the messages were sent from one number to another. She never testified that Giacomantonio sent her the challenged text messages, but rather that she received text messages from Giacomantonio's phone number. In fact, KNR never even expressed even a belief that Giacomantonio had sent the text messages. Instead, she consistently and repeatedly testified only that the text messages were sent from Giacomantonio's phone number.

The State tells this Court that the messages were authenticated because "[KNR] understood that the messages had come from [Giacomantonio]." St.'s Br. at 6. However, the portion of the transcript to which the State cites offers it no support. *See id.* (citing R.48:86-88, A-Ap. 58-60). In fact, it was KNR's testimony that she recognized one of the text messages that was sent from Giacomantonio's phone number, but she could "[n]ot exactly" "remember when [it] happened." (R.48:89, A-Ap. 61.) Despite testifying that she recognized that single text message, KNR never testified to any understanding that Giacomantonio

had sent it. (*Id.*) She simply testified that Giacomantonio had sent messages like that to her before; she said nothing about his authoring the specific text message that had been introduced into evidence. (*Id.*:89-90, A-Ap. 61-62.) Nor did she espouse any belief that he had written it. (*Id.*)

As for the remaining text messages, KNR was never asked and she never offered any testimony regarding whether she understood Giacomantonio to have authored them. (*Id.*:90-92, A-Ap. 62-64.) Instead, the entire focus of the State's inquiry was on which phone had sent the texts, which phone had received them, what the texts read, and what KNR believed the content of the texts to mean. (*Id.*)

Presumably given that problem, the State turns to the content of the text messages for support. St.'s Br. at 6. However, in so doing the State makes strained inferences in an attempt to authenticate the messages. For example, the State seeks to establish that two messages were authored by the same person simply because one was sent at night and another sent early the next morning. *Id.* (messages "likely came from the same writer . . . *given the early morning timing*" (emphasis added)). Using that threadbare connection, the State seeks to prove that still yet a third message must have been sent by the same person as those other two because it bears some similarity to the content of only one of those other two messages. *Id.* ("[I]t also follows that the other messages referencing 'booty' likely came from the same writer.")

The State next turns to one text message's reference to KNR's girlfriend, Paige. The State's reliance on that information is likewise unpersuasive. Certainly, it has been recognized that when a statement contains information known only to a certain person, that information and proof that the alleged speaker knew it can serve to authenticate the statement. *See State v. Baldwin*, 2010 WI App 162, ¶

53, 330 Wis. 2d 500, 794 N.W.2d 769. However, multiple persons knew about KNR's relationship with Paige, including MR. (R.49:32, 93.) It cannot thus be said that Giacomantonio alone knew of that relationship or that reference to it establishes him as the text's author. *See Baldwin*, 2010 WI App 162, ¶ 53.

Finally, the State's reliance on the dates and times on which the messages were purportedly sent is problematic. *See* St.'s Br. at 6. The State's own expert testified at trial that the "dates and times" on the phone may have been altered when MR and the police had "powered [the phone] on and looked through [it]." (R.47:74.) "With respect to creation dates," the expert admitted, "those dates could have been modified as a result of the data being accessed prior to a forensic copy being made." (*Id.*:75.) KNR was admittedly unable to recall when the text messages occurred, and thus could not verify the times and dates on which the State now seeks to rely. (R.48:89, A-Ap.61.) KNR's lack of recollection and the forensic expert's admission that the dates and times may not be accurate renders the dates and times of questionable value to the authentication analysis.

For all those reasons, Giacomantonio maintains that the evidence was insufficient to authenticate the text messages, and thus they should never have been admitted.

The text messages should also have been omitted under the best evidence and hearsay rules, as Giacomantonio argued at length in his opening brief. Giaco.'s 1st Br. at 24-27. The State's suggestion that the photographs of the text messages were originals is inconsistent with Wis. Stat. § 910.01(3). Surely, the content of any text message as it appeared on the face of the phone would be an original, as would be a printout of the contents of the phone. *See* Wis. Stat. § 910.01(3). However, a picture of either of those things is unquestionably a duplicate, and therefore violated

the best evidence rule. Wis. Stat. § 910.01(4). Any forensic printout of the text messages would have shown the order in which the messages were sent and received, as well as any otherwise omitted messages. Such original would show the context of the text messages, and thus clarify their meaning for the jury. The State's reliance on evidence other than the original, however, omitted that information from the jury.

For all those reasons, the circuit court erred in admitting the text messages, and that error was not harmless. Giacomantonio should have a new trial.

II. GIACOMANTONIO SHOULD HAVE BEEN GIVEN AN IN CAMERA REVIEW OF KNR'S COUNSELING RECORDS; THE FAILURE TO GRANT REVIEW WAS NOT HARMLESS.

A. The State's Cumulative Evidence Argument is Unworkable and Would Make it Impossible for a Defendant to Ever Access Treatment Records.

Before he could secure review of KNR's treatment records, Giacomantonio had to "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information." *State v. Green*, 2002 WI 68, ¶ 19, 253 Wis. 2d 356, 646 N.W.2d 298. He bore the burden of "making a preliminary evidentiary showing" before review could be triggered, *id.* ¶ 20, which necessitated his showing that the evidence was not cumulative to "evidence already available to [him]," *id.* ¶ 33.

To satisfy *Shiffra*[2]/*Green*'s preliminary showing requirement, Giacomantonio asserted—in good faith—why he expected that KNR's records would disclose the information he sought: he knew that she was in counseling and he knew the purpose of that

[2] 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

counseling. But, based on that knowledge alone, the State claims that the content of KNR's treatment records would be cumulative.

The State's response takes the cumulative evidence exception to an unworkable extreme. Under the State's standard, Giacomantonio's good faith statement of why he expected KNR's treatment records to contain relevant evidence was itself proof that any evidence in the records would be cumulative. Specifically, because Giacomantonio knew that KNR had attempted suicide, that she had a girlfriend, and that she had a strained relationship with her mother, Giacomantonio had shown that whatever KNR had said to her therapist about the same was merely cumulative.

But, Giacomantonio does not know what KNR told her therapist. He does not know what she said about her relationship with her mother. He does not know what she said about her relationship with him. He does not know what she said about why she attempted suicide. He does not know what she said about the genesis of her depression. Only the records of KNR's therapy can disclose that information.

Taking the State's reasoning to its logical end, there is nothing that Giacomantonio—or any other defendant for that matter—could have said that would have satisfied the preliminary showing requirement and not simultaneously have proven the content of the records cumulative. Anytime a defendant could articulate a good faith expectation of what the records may disclose, the defendant would lose on cumulative evidence grounds because the defendant's articulation would itself prove the records cumulative.

The State's test would render the *Shiffa*/*Green* analysis a nullity. A defendant cannot make a good faith showing that relevant evidence exists within treatment records without having some independent reason to believe that such evidence actually exists

within the records. There will thus always be an independent ground from which a defendant comes to expect that the treatment records would contain information helpful to the defense.

But, to the State, knowledge of what might be in treatment records constitutes proof that the records' content is cumulative. That test is inconsistent with the principles of *Shiffa*/*Green* and its application would eviscerate the rule that a defendant can gain review upon a sufficient, good faith showing.

Thus, in accordance with *Shiffa*/*Green*, the information that Giacomantonio sought was not cumulative; what KNR told her therapist was not "evidence *already available* to [him]." *See Green*, 2002 WI 68, ¶ 33. The State's reasoning to the contrary is unworkable and inconsistent with controlling precedent. This Court should conclude that the sought after evidence was not cumulative and Giacomantonio was entitled to review.

B. Giacomantonio's Case is Virtually Indistinguishable from *State v. Johnson*; to not Follow its Holding Would Violate the Principle of Treating Similarly Situated Defendants Similarly.

While this Court is certainly not bound to follow *Johnson*, Wis. Stat. § (Rule) 809.23(3)(b), so doing would be inequitable to Giacomantonio and result in contradictory holdings between two appellate districts on substantially similar facts. Giacomantonio therefore urges this Court to follow *Johnson* and hold that he met the pleading requirements for review.

As Giacomantonio explained in his opening brief, the facts of his case are squarely on point with *Johnson*. Giaco.'s Br. at 32-35. In both *Johnson* and the instant case, the defendant was the victim's stepfather. *Compare State v. Johnson*, slip op., No.

2011AP2864, ¶ 3 (Wis. Ct. App. Apr. 18, 2012) (A-Ap. 67) *with* (R.2:1-2). In both cases, the victim-stepdaughter alleged the defendant to have sexually assaulted her. *Id.* In both cases, the victim was approximately fifteen-years-old at the time of the alleged assault and seventeen-years-old at the time of trial. *Id.* In both cases, the defendant sought the victim's medical records, stating that the victim was in counseling during the period of alleged abuse. *Compare Johnson*, No. 2011AP2864, ¶ 4, (A-Ap. 67) *with* (R.7:1-2, A-Ap. 4-5). Each defendant asserted that the purpose of the counseling was to discuss issues related to interpersonal relationships within the victim's family, including relationships with the defendant. *Id.* And each defendant asserted a reasonable likelihood that the victim had discussed her relationship with the defendant but not disclosed any criminal activity. *Id.*

The State seeks to factually distinguish *Johnson* on two grounds: (1) the purpose of the victims' counseling and (2) the timing of the therapy. However, both claims fail.

The State argues that KNR, unlike the victim in *Johnson*, was in counseling "not specifically [for] family relationships, but to address her attempted suicide." St.'s Br. at 25. Despite taking that position, the State later concedes that KNR's therapy "potentially involved discussion of K.R.'s family relationships." *Id.* at 26. In fact, KNR explained at trial that the purpose of her therapy was "[t]o deal with . . . everything that [Giacomantonio] did to [her] and all like trauma." (R.48:79-80.) The evidence at trial thus proves that KNR's counseling was not just potentially about relationships within her family, it was certainly about those issues. (*See id.*:35, 59 (MR reported suspicion of abuse to police because KNR's psychologist encouraged it).) Thus, on the purpose of the victims' therapy, the facts of *Johnson* and the instant case are not distinguishable.

As for the timing of the records sought, both Johnson and Giacomantonio alleged that the victim was in counseling during the time period of the alleged assaults. *Compare Johnson*, 2011AP2864, ¶ 4, (A-Ap. 67) *with* (R.7:1-2, A-Ap. 4-5). In both cases, the timing of the victim's counseling was undisputed. *Compare Johnson*, 2011AP2864, ¶ 5, (A-Ap. 68) *with* (R.8:1, A-Ap. 10). The requests for in camera review in *Johnson* and the instant case are thus indistinguishable as to time.

Thus, on substantially similar facts to those in the instant case, a panel of three judges from the District II Court of Appeals agreed that the defendant had met the pleading requirements for an in camera review of the victim's medical records. *Johnson*, 2011AP2864, ¶¶ 14, 23 (majority and dissent agree on sufficient showing) (A-Ap. 70, 74). In light of the similarity between *Johnson* and the instant case, the outcome should be the same; namely, a conclusion that Giacomantonio established a sufficient basis for an in camera review.

Both the United States Supreme Court and the Wisconsin Supreme Court have before articulated the "basic judicial tradition" of "treating similarly situated defendants similarly." *United States v. Johnson*, 457 U.S. 537, 547 (1982) (quoted authority omitted), *Harmann v. Hadley*, 128 Wis. 2d 371, 384, 382 N.W.2d 673, 679 (1986). "A basic tenet in our judicial system is that individuals similarly situated should be treated similarly." *Harmann*, 128 Wis. 2d at 384, 382 N.W.2d at 679. According to that principle, "[When] another similarly situated defendant comes before [an appellate court], [the court] must grant the same relief or give a principled reason for acting differently." *U.S. v. Johnson*, 457 U.S. at 547 (quoted authority omitted). To not apply *Johnson* in the instant case would result in "the *actual inequity* that results when [an appellate court] chooses which of many similarly situated defendants should be the chance beneficiary of a new

rule." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quoted authority omitted).

Given the similarities between *Johnson* and the instant case and the longstanding principle of treating similarly situated defendants similarly, *Johnson*'s reasoning should be followed here.

The State's reliance on *In re Jessica J.L.*[3] does not dictate a different result. *See* St.'s Br. at 22. *Jessica J.L.* did not address the question of a defendant's burden to compel an in camera review. 223 Wis. 2d at 625-26, 589 N.W.2d 660. Instead, it considered whether a victim had standing to challenge a request for treatment records under *Shiffra*. *Id.* Thus, *Jessica J.L.*'s statement that the defendant's pleading was insufficient to trigger an in camera review is merely dicta, and thus not controlling in the instant case. *See id.* at 635. Additionally, *Jessica J.L.*'s reasoning as to the sufficiency of the pleading was later rejected as inconsistent with and imposing a higher burden than *Shiffra*. *See State v. Walther*, 2001 WI App 23, ¶ 1, 240 Wis. 2d 619, 623 N.W.2d 205. *Jessica J.L.* is thus not determinative of Giacomantonio's claim.

Instead, consistent with *Johnson*, this Court should conclude that the circuit court erred when it failed grant Giacomantonio an in camera review. To reach a different conclusion would be unfair to Giacomantonio, inconsistent with controlling precedent, and a contrary to judicial principles. *Green*, 2002 WI 68, ¶ 19, *U.S. v. Johnson*, 457 U.S. at 547, *Harmann*, 128 Wis. 2d at 384, 382 N.W.2d at 679.

C. The Error was not Harmless.

The State's harmless error analysis regarding KNR's treatment records makes the same mistake that it made when discussing harm in the text messages. Namely, it argues that the evidence was

[3] 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998).

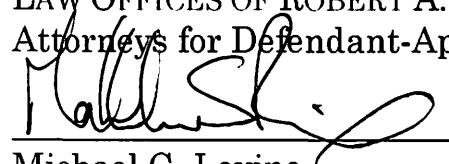
sufficient regardless of what Giacomantonio might have gleaned from the treatment records. St.'s Br. at 25-28. However, the test for harmless error is not one for the sufficiency of the evidence. As Giacomantonio argued in his first brief, the failure to conduct an in camera review left him unable to rebut the State's theory that KNR was subject to inducement because of her delicate mental condition and the relationships within her family. The State developed that theory by eliciting testimony from its witnesses directly related to the reasons that Giacomantonio sought review of KNR's records. The failure to conduct an in camera review was thus not harmless. This Court should reverse.

CONCLUSION

For the aforementioned reasons and those more fully detailed in his first brief, Giacomantonio asks this Court to reverse the judgement and remand to the circuit court for further proceedings consistent with its opinion.

Dated this 22nd day of December, 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

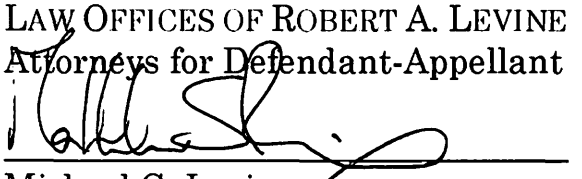
I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,992 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 22nd day of December, 2015.

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



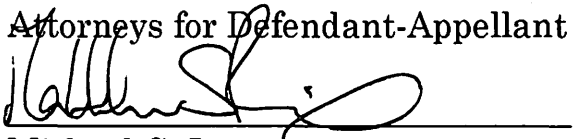
Michael G. Levine
State Bar No. 1050078
Matthew S. Pinix, of counsel
State Bar No. 1064368

CERTIFICATION OF 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 Dec. 22, 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 22nd day of December, 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