STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeals Case No.: 2015AP000994 - CR
Case No.: 2013CM000228

TRISTA J. ZIEHR,

Defendant-Appellant.

ON APPEAL BY THE DEFENDANT-APPELLANT, TRISTA J. ZIEHR, FROM FINAL ORDERS AND JUDGMENT IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, THE HONORABLE JOSEPH VOILAND, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENTS

I. The Controversy Was Not Fully Tried and Justice Has Been Miscarried.

Ziehr's wrongful conviction supports not only that "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried," but also that it is highly probable that justice has been miscarried. *See* Wis. Stat. § 752.35; *State v. Wyss*, 124 Wis. 2d 681, 735, 770–71 (1985); *see e.g.*, *Lorenz v. Wolff,* 45 Wis.2d 407 (1970).

The State correctly outlines the standards by which the Court may exercise its broad power of discretionary reversal pursuant to Wis. Stat. § 752.35. The Court, for one, may find that the real controversy has not fully tried without finding "the probability of a different result on retrial." *State v. Hicks,* 202 Wis.2d 150 (1996). The Court may also order a new trial "because it is probable that justice has for any reason been miscarried" if the Court is "convinced that the defendant should not have been found guilty and that justice demands the defendant be given another trial." Wis. Stat. § 752. 35; *Lock v. State*, 31 Wis.2d 110, 118 (1966). This case merits reversal under both standards.

First, the jury had before it evidence not properly admitted. The State "elected" to try a scenario which did not give rise to Ziehr's original criminal charges, and was able to introduce "other acts" with no opportunity for argument as to whether the evidence should be excluded. The Court admitted the incident after an improper *Sullivan* analysis, as relevant even if only to show that Ziehr was a "bad person." *See State v. Sullivan*, 216 Wis. 2d 768 (1998). In fact, while the court claimed to admit the evidence to show Ziehr's "knowledge," the court improperly instructed the jury that the PZ-JV incident could be used to show "intent" and "absence of mistake."

The introduction of the PZ-JV incident clouded a crucial issue such that the real controversy was not fully tried. The crucial issue was whether Ziehr knew about PZ-AM abuse prior to its report. The record supports that Ziehr interviewed all people directly involved in the PZ-AM abuse, and found no evidence that unlawful behavior occurred. However, the State was allowed to introduce the unrelated, after-occurring PZ-JV incident in an attempt to show that Ziehr knew that PZ-AM abuse occurred. The State was allowed to do so even though Ziehr's knowledge of the later PZ-JV abuse has no bearing on Ziehr's knowledge of earlier PZ-AM abuse. The jury was clearly exposed to the risk of conflating one situation for the other.

In addition to numerous other prejudicial issues, outlined throughout appellant's brief, the Court has sufficient evidence to conclude that Ziehr should not have been found guilty, and that justice demands Ziehr be given another trial.

II. The State Violated The Prohibition Against Duplicity.

Ziehr, in appellant's brief, details how the State violated the prohibition against duplicity. The State offers no rebuttal. The State simply cannot "bring criminal charges in a manner deemed to be correct" if, in doing so, the prohibition is violated. *See State's Response Brief* p. 7; *State v. Annala*, 168 Wis. 2d 453 (1992). The State offers no application of the law to the facts of this case to justify why two separate and distinct offenses charged under one count is not duplicitous. The State even admits that both the PZ-AM and PZ-JV incidents are separate and distinct offenses: "In each of these reports by different parents Ziehr failed to follow her requirements as a mandated reporter." *State's Response Brief* p. 7. Because the State has failed to respond to Ziehr's arguments, they should be deemed admitted. *State v. Dartez*, 301 Wis. 2d 499, 504 (Wis. Ct. App. 2007) (failure to respond to argument in a brief may be taken as a concession); *Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d 97, 109 (Wis. Ct. App. 1979).

III. "Other Acts" Evidence Was Unfairly Prejudicial.

The circuit court improperly admitted the PZ-JV incident as "other acts" evidence. The court did not engage in *Sullivan* analysis, and to the extent *Sullivan* was given lip service, the court misapplied the law. Moreover, Ziehr was never given any chance to comment or argue on whether the incident should be admitted as "other acts" evidence.

First, before trial began, the court ruled that the PZ-JV incident was admissible as "other acts" to prove Ziehr's "knowledge," but the jury was improperly instructed that they could consider it for the purposes of finding "intent" and "absence of mistake."

Second, the court simply concluded that the incident was "relevant" sans analysis. Upon elaboration, the court believed the incident would be relevant even to show that Ziehr was "a bad person. . . . She committed other crimes. You just shouldn't believe her. You should find her guilty regardless of what the evidence—other evidence is." (R. 122" p. 31). The fact is, the PZ-JV incident—which occurred and was reported by Ziehr and Kim Berens *after* the PZ-AM

incident—does not make it more or less probable that Ziehr intentionally failed to report an earlier separate incident.

It should be noted that the State is taking contradictory positions. On the one hand the State argues that the PZ-AM and PZ-JV incidents are part of "one continuous crime." On the other, the State used PZ-JV incident as "other acts" evidence and the separate PZ-AM incident proceeded to trial. For the reasons stated in appellant's brief, introduction of the PZ-JV incident was unfairly prejudicial and should have been excluded.

IV. Ziehr Was Entitled To A Jury Instruction Regarding Third-Party Reporter Immunity.

The State fails to address Ziehr's entitlement to an immunity instruction. Instead, the State argues why Ziehr's "behavior does not comply with the mandated reporter statutes," and how she is "subject to prosecution for failure to follow through" with her "reporting obligations correctly." *State's Response Brief* p. 9. This has nothing to do with whether Ziehr was immune from suit for "participating in good faith in the making of a report" under Wis. Stat. § 48.981(4) according to the *Behnke* court's interpretation of immunity. Because the State has failed to respond to Ziehr's arguments, they should be deemed admitted. *State v. Dartez*, 301 Wis. 2d 499, 504 (Wis. Ct. App. 2007) (failure to respond to argument in a brief may be taken as a concession); *Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d 97, 109 (Wis. Ct. App. 1979).

V. Ziehr Was Entitled To A Jury Instruction Regarding Time To Perform A Preliminary Investigation Consistent With Wis. Stat. § 48.981 and *Behnke*.

The court should have instructed the jury consistent with Wisconsin Law that the "decision to conduct a preliminary investigation prior to reporting the allegations" of abuse is "consistent with the statute's requirement that the information be reported immediately." *Phillips v. Behnke*, 192 Wis. 2d 552, 565 (Wis. Ct. App. 1995). "An individual is only required to make a report where there is 'reasonable cause to suspect' that a child has been abused or neglected." Wis. Stats. § 49.981(2); *Behnke*, 192 Wis. 2d at 562.

The State's contention that a mandated reporter cannot take time to investigate the reasonableness of a claim of child abuse prior to reporting is absurd, and contrary to the language and policy behind Wis. Stat. § 48.981. While of course Wis. Stat. § 48.981 is designed to require the report of child

abuse, the question is how "immediately" must the report be made. While the State argues that the report must be made almost instantaneously and without reasonable verification, the Wisconsin Court of Appeals in *Behnke* disagrees. Consistent with Wisconsin's policy of protecting an individual's reputation from extremely damaging allegations by first investigating the reasonableness of the allegation, the court found that time is allowed for verification of any allegation. Even if the word "immediately" is ambiguous as to exactly how immediate one must report, *Behnke* and the Rule of Lenity dictate that it should be construed in Ziehr's favor. The State's position, on the other hand, is one which has no support in Wisconsin Law.

VI. The Jury Lacked Sufficient Evidence To Convict.

The State believes that Ziehr had reasonable cause to suspect AM's abuse because "witnesses testified that they had informed Ziehr that PZ had sexually abused their child." *State's Response Brief* p. 12. But, these "witnesses" to which the State refers, had no direct, personal knowledge of the incident. Indeed it's likely that the State is referring to AM's parents who were quite possibly at work when the alleged behavior at the daycare occurred. What the trial record *does* indicate, however, is that Ziehr interviewed all persons directly involved (PZ, AM, and Christina Gould), and found not one indication of child abuse. The quoted section of Ziehr's testimony used in the State's Response Brief does not address whether Ziehr had reasonable cause to suspect AM's alleged abuse, and is therefore not sufficient to support this conviction. *State's Response Brief* p.12. No trier of fact could conclude that Ziehr had reasonable cause to suspect child abuse when those directly involved testified to the contrary.

VII. Ziehr's Cooperation With Police Investigation Gave Her Immunity From Prosecution.

While the State is correct that the Wisconsin Legislature provided a "carrot and a stick" for reporters, apparently the State's position is that there is no carrot for those who report allegations of child abuse to the police. This position is directly at odds with the reporter immunity provisions of Wis. Stat. § 48.981(4):

> **(4) Immunity from liability.** Any person or institution participating in good faith in the making of a report, conducting an investigation, ordering or taking of photographs or ordering or performing medical examinations of a child or of an expectant mother under this section shall have immunity from any liability, civil or criminal, that results by reason of the action. For the purpose of any

> proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed. The immunity provided under this subsection does not apply to liability for abusing or neglecting a child or for abusing an unborn child. (emphasis added).

Further, *Behnke* prescribes that one who reports information to another with the "understanding and expectation that information would be investigated and, if verified, reported to proper authorities" is entitled to immunity. *Behnke*, 192 Wis. at 560. Of course, by going to the police station, and cooperating with the police, Ziehr had the very reasonable expectation that the police would investigate, verify, and, if necessary, report the incident to the proper authorities. Ziehr was therefore immune from prosecution.

VIII. The Prosecutor Erred In Using "Other Acts" Evidence As Propensity Evidence.

Introduction of the PZ-JV incident as "other acts" was improperly used by the State to show Ziehr's propensity. An after-occurring incident of child abuse which Ziehr *did* report is not relevant to "intent" or "absence of mistake" in failing to report allegations of PZ-AM abuse which Ziehr learned to be false. The State's purpose in introducing the PZ-JV incident was to show an alleged *repeated* failure to report.

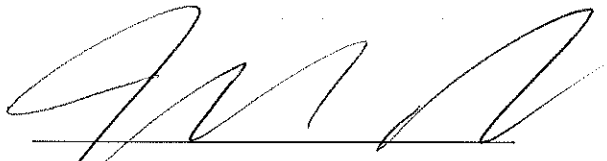
Moreover, the PZ-JV incident was improperly introduced to show that as PZ's mother, Ziehr likely hid the wrongdoings of her son "merely because [s]he was a person likely to do such acts." *Whitty v. State*, 34 Wis. 2d 278, 292 (1967). In fact, to a jury, the two separate child abuse allegations were so similar, the likelihood of "the confusion of issues which might result from bringing in evidence of other crimes" means that the jury was more likely to convict. *Id.* In closing, the State took advantage of the apparent similarity and argued that in both the PZ-JV and PZ-AM incidents Ziehr failed to report. Ziehr was not on trial for the PZ-JV incident, nor could the State permissibly argue that she was more likely to fail to report the PZ-AM incident because she failed to report the PZ-JV incident. Yet, the State did so.

CONCLUSION

For the reasons set forth in this Appellant's Brief, and this Reply Brief, the defendant-appellant believes that the defendant-appellant's conviction was made in error. As such, the defendant-appellant respectfully requests the Court of Appeals reverse the decision of the Trial Court and remand the matter to the Trial Court for either a new trial, or to direct the Trial Court to enter a judgment of acquittal.

Dated at Milwaukee, Wisconsin this 5 day of October, 2015.

Respectfully submitted,



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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions 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 person, specifically including juveniles and parents of juveniles, with a notation portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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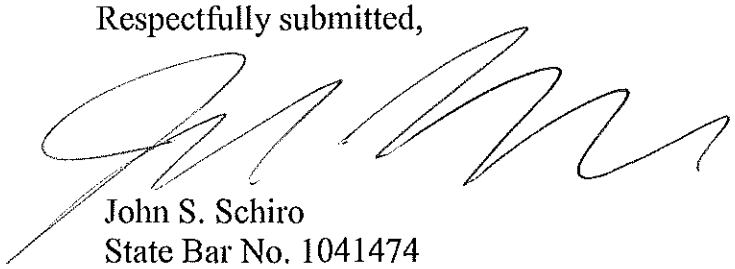

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

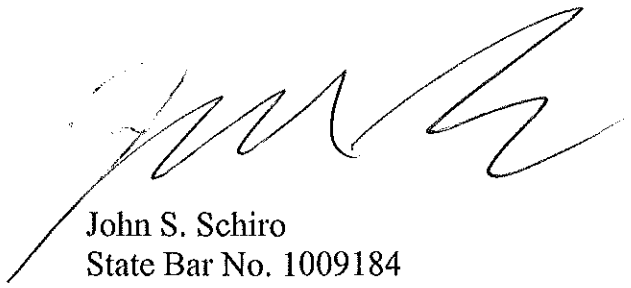
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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.

Respectfully submitted,



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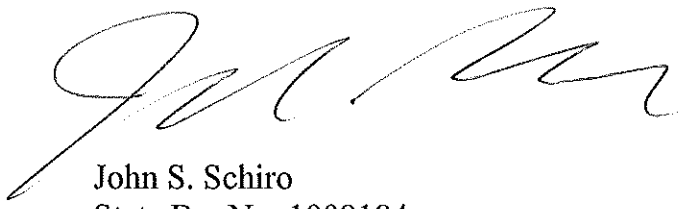
CERTIFICATION OF FORM AND LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. §§ (Rules) 809.19(8)(b) and (c) in that it is: proportional Times Roman, minimum printing resolution of 300 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13-point type and the length of the brief is 2,814 words.

Respectfully submitted,



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