STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2016AP002494-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MORRIS RASH,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Postconviction Motion, Both Entered in Milwaukee County Circuit Court, the Honorable J.D. Watts, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

Was the court wrong to find the record from Mr. Rash's jury trial was reconstructed beyond a reasonable doubt without admitting any evidence, and relying solely on the allegations of the prosecutor?

The circuit court ruled the record was reconstructed beyond a reasonable doubt.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Publication is not likely warranted because this case applies well-established law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

Pre-trial

On March 10, 2012, Mr. Rash was charged in a two-count criminal complaint with substantial battery, contrary to Wis. Stat. § 940.19(2), and possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2)(a). (1:1-2).

According to the complaint, M.R. witnessed Mr. Rash hit S.A. in the face with an open hand, causing her to lose consciousness. (1:1-2) M.R. stated that Mr. Rash then fired a gun into the air 6 to 7 times as he left the scene of the battery. (1:1).

During a preliminary hearing, the State called M.R. to testify. (32:5). M.R.'s testimony was different from her statement in the criminal complaint. She testified that Mr. Rash hit her and S.A.—not just S.A.—with a gun, not his

hand. (32:7). Despite this preliminary hearing testimony, the State only pursued a battery charge for Mr. Rash's alleged conduct against S.A. (40:7-9).

As part of the investigation in the case, police took photographs of S.A.'s and M.R.'s alleged injuries. (42:112; 43:76).

Prior to trial, Mr. Rash filed a number of *pro se* motions including a motion objecting to the admission of any photographs during his jury trial because they were unfairly prejudicial. (11:1-5). The court addressed Mr. Rash's objections during a pretrial hearing, but did not make a ruling on the admissibility of the photographs of S.A. (40:12-13). At the hearing, the State indicated that it would not introduce the photographs of M.R. or even call her as a witness at trial because the State did not believe the photographs of M.R. were relevant as the State was not pursuing charges against Mr. Rash for allegedly striking M.R. (40:7-9).

Jury Trial

Mr. Rash had a three-day jury trial starting on January 7, 2013.

The State called S.A. as a witness. (42:100). During S.A.'s testimony, the State admitted into evidence two photographs of S.A.—Exhibits 3 and 4. (42:112). S.A. testified that Exhibit 3 pictured her "in a neck brace" at the hospital, and Exhibit 4 showed her "ankle" after Mr. Rash assaulted her. (42:112). Further, the exhibit list from the trial described Exhibit 3 as "neck/head view (photo)," and Exhibit 4 as "ankle (photo)." (14:1). S.A. testified she sustained the injuries depicted in the photographs when Mr. Rash hit her with a gun, causing her to lose consciousness. (42:106-08).

Defense counsel called M.R. as a witness. (44:6). During the trial, defense counsel admitted into evidence two photographs of M.R.—Exhibits 13 and 14. (43:76). On cross-examination by the State, M.R. testified that the photographs showed injuries she sustained from Mr. Rash hitting her with a gun. (44:46). Both Exhibits 13 and 14 were described in the trial exhibit list as "[M.R.] photo." (14:1). M.R. testified that Mr. Rash hit both her and S.A. with a gun. (44:23-25). She also testified that immediately prior to being assaulted by Mr. Rash, S.A.'s sister—in a separate altercation—hit her in the face. (44:12-16).

While the jury was deliberating, they requested that all of the exhibits from the trial, including the photographs of S.A. and M.R., be sent back to them for their review. (45:36). Mr. Rash objected to the jury seeing the photographs of S.A. and M.R. arguing that they were unfairly prejudicial. (45:37). Additionally, Mr. Rash separately argued that the photographs of M.R. were unfairly prejudicial because he was not charged with assaulting her. (45:39). The trial court ruled that the photographs were not unfairly prejudicial and allowed the jury to see them again. The court said:

> Mr. Rash, the issue is whether these are unfairly inflammatory. In other words, do they create emotions or feelings that would make someone's observation of them feel strongly or irrationally when you consider the facts of the case. For example, Exhibits 3 and 4, which are of [S.A.], the depictions are not so strongly offensive or upsetting to the ordinary viewer. In fact, they're fairly tame. One is a photograph of S.A.'s lower calf, ankle, and foot. And Exhibit 3 is S.A.'s upper torso, neck, and head on a hospital gurney. So those don't particularly incite any passions or unfair feelings.
>
> Exhibits 13 and 14 do show the injuries to [M.R.], but the testimony in this record is that these photographs

> accurately showed her injuries as of the event. And these photographs are descriptive. They don't involve any particular unfair emotion or the like. They show injuries that one can argue are consistent with the testimony of the particular witness or witnesses. The expression on [M.R.'s] face is fairly neutral. The background is dark. She appears conscious. These do not create any turmoil or unfair suggestion. I don't see anything wrong with them. They are fairly factual. I'm going to give the jury all of the exhibits.

(45:38-39).

The jury returned verdicts of guilty on both the substantial battery and possession of a firearm by a felon charges. (46:18). Mr. Rash was sentenced to 1.5 years initial confinement and 1 year extended supervision on the substantial battery, and to a consecutive 4 years initial confinement and 4 years extended supervision on the possession of a firearm by a felon. (27:1; App. 101).

Postconviction Proceedings

While reviewing Mr. Rash's case, postconviction counsel unsuccessfully attempted to get the photographic trial exhibits of S.A. and M.R. from the court, the prosecutor, trial counsel, and law enforcement. (54:1-2; 60:5).

On July 18, 2016, Mr. Rash filed a postconviction motion asking for a new trial because he was unable to receive a meaningful appeal without the court and counsel having the opportunity to review the photographic trial exhibits of S.A. and M.R. (60:1-24).

The State filed a response to the postconviction motion. (62:1-2). With the response, the State supplied a disc with 26 images the State said it retrieved from the

Milwaukee Police Department (MPD) related to the investigation in this case, and attached the alleged photographs of S.A. and M.R. from the disc to its response brief. (62:1-12). The disc and attachments included a total of 10 alleged photographs of S.A. and M.R.—4 alleged photographs of S.A. (photographs 23-26) and 6 alleged photographs of M.R (photographs 17-22). (62:3-12). None of the photographs from the MPD were the original marked exhibits from Mr. Rash's trial. (62:3-12). The State argued that by turning over the images the State said were of S.A. and M.R., many of which were never entered into evidence at Mr. Rash's trial, it had cured any defects in the record and the record was reconstructed. (62:1-2).

Mr. Rash filed a reply. (64:1-5). He asserted that the record had not been reconstructed with the addition of the photographs from the MPD because the State had not supplied any evidence as to which of the 10 photographs, *if any*, were actually the photographs of S.A. and M.R. shown to the jury. (64:1-5).

In response, Attorney Burtch—the prosecutor who tried Mr. Rash's case—filed an affidavit wherein she sought to identify which of the photographs retrieved from the MPD were shown to the jury nearly four years prior. (65:1-2; App. 109-110). The affidavit stated:

> Affiant has personal recollection of the trial in this case, and has also reviewed the exhibit list, the State's Brief in Support of State's Response to Defendant's Postconviction Motion along with accompanying exhibits, and portions of the trial transcripts, in preparation for drafting this affidavit. Affiant was unable to review the State's file prior to drafting this affidavit.

> Affiant believes that Exhibit 4, upon information and belief, was identical to the printed Photograph 25…
>
> While the printed Photographs 24 and 26 appear quite similar, Exhibit 3, to the best of affiant's knowledge and recollection, was Photograph 24. Affiant believes, to the best of affiant's knowledge and recollection, that Photograph 23 was not presented to the jury.
>
> Exhibits 13 and 14, introduced at trial by defendant's trial counsel, were photos of M.R. To the best of affiant's knowledge and recollection, affiant cannot recall which of the printed photographs of M.R…were Exhibits 13 or 14.

(65:1-2; App. 109-110).

Mr. Rash filed an additional reply to the State's affidavit. (67:1-3). He again argued that the record was not reconstructed because there still was no evidence beyond the State's own allegations that the photographs supplied by the MPD contained the photographic trial exhibits. (67:1-3).

On November 28, 2016, the Honorable J.D. Watts denied the postconviction motion without a hearing. (69:5-6; App. 107-108). In regards to the State's efforts to reconstruct the record, the court wrote:

> The State also provided ten color printouts of the photos taken of [S.A.] and [M.R.]. Four of these photos are of [S.A.] taken at the hospital. These photos are numbered 23-26. The other six photos are of [M.R.] numbered 17-22. The State submits that the photos cure the defect in the record, although the State does not indicate with certainty which photos were admitted into evidence at trial as Exhibits 3, 4, 13 and 14. The defense counters that the State has not provided any evidence that these photos are the pictures from the trial and that determining which four of the ten photos were admitted

into evidence at the defendant's jury trial calls for impermissible speculation. Consequently, the defendant argues that the record cannot be reconstructed and that he cannot meaningfully appeal the court's decision to furnish the photos to the jury.

The court has reviewed its ruling from the January 9, 2013 a.m. trial proceedings (Tr. 1/9/13 a.m., pp. 38-42) and the ten color photos submitted by the State. The prosecutor who prepared the State's response indicates that the CD contains all the images taken by police during the investigation of this case. The court accepts the prosecutor's statement as an officer of the court, and there being no indication that any other photos exist, the court is satisfied that the 10 color photos of [S.A.] and [M.R.] include the four photos that were admitted into evidence at the defendant's trial. Having reviewed the color photos, and based on its own recollection of the trial, the court can state with confidence that Exhibit 4 is the photo of [S.A.'s] lower calf, ankle and foot, marked as number 25 in the State's submission. The court's on-the-record description of Exhibit 4 is a perfect match to the image depicted in photo number 25. The court can further state with confidence that Exhibit 3 is [S.A.'s] upper torso, neck and head as depicted either in the photo marked number 24 or the photo marked number 26 in the State's submission. Although the court *cannot state definitively* which photo was admitted as Exhibit 3, there is no need to reconstruct the record in this regard, since each photo depicts [S.A.'s] upper torso, neck and head on a hospital gurney, albeit from different angles. The photo marked number 23 depicts [S.A.'s] entire body on a hospital gurney, from an angle that does not clearly depict her upper torso, neck and head, and is not consistent with the court's description of Exhibit 3 on the record. The court does not recall this photo from the defendant's trial and does not believe it was admitted as an exhibit.

The court's on-the-record description of Exhibits 13 and 14 is most consistent with the photos marked numbers 17 and 18 in the State's submission. These are the only photographs which depict a dark background and [M.R.'s] face with a neutral expression. Photo numbers 19-22 do not depict [M.R.'s] facial expression and are not consistent with the court's description of Exhibits 13 and 14 at trial.

The prosecutor who prepared the State's response in this matter, ADA Denis Stingl, is not the prosecutor who appeared for the State at the defendant's trial. The State appeared by ADA Marissa Burtch (formerly Santiago). On October 25, 2016, ADA Burtch filed an affidavit based upon her personal recollection of the trial and her review of the exhibit list, the State's brief and attachments in support of its response to the defendant's postconviction motion and portions of the trial transcript. ADA Burtch states upon information and belief that Exhibit 4 was identical to photograph number 25 provided by ADA Stingl. She further states that photograph numbers 24 and 26 appear quite similar but that Exhibit 3, to the best of her knowledge and recollection, is photograph number 24. ADA Burtch states to the best of her knowledge and recollection that photograph number 23 was not presented to the jury. She cannot recall which of the photographs numbered 17-22 were Exhibits 13 and 14 as these exhibits were introduced at trial by defense counsel.

ADA Burtch's affidavit is consistent with the court's on-the-record description of Exhibits 3 and 4. Again, the court perceives no need to determine whether Exhibit 3 is photograph number 24 or 26 as the photos are quite similar. Although ADA Burtch is unable to recall which photos were presented as Exhibits 13 and 14, only photograph numbers 17 and 18 match the court's description of these exhibits.

> The court is not persuaded by the defendant's citation to ***State v. DeLeon***, 127 Wis. 2d 74 (Ct. App. 1985) and ***State v. Perry***, 136 Wis. 2d 92 (1987). Each of those cases involved missing portions of the trial transcript and the methodology for determining whether the missing testimony could be reconstructed. In this instance, the photo exhibits are no longer missing. All of the images taken during the investigation of this case have been submitted by the State with its response to the defendant's motion, including the four images that were admitted into evidence as Exhibits 3, 4, 13 and 14. Based upon the foregoing, the court finds that the record has been sufficiently cured for the defendant to proceed with his appeal, and therefore, his motion to vacate the judgment of conviction is denied.

(69:3-5; App. 105-107).

ARGUMENT

I. The Record from Mr. Rash's Jury Trial Has Not Been Reconstructed Beyond a Reasonable Doubt.

On appeal, Mr. Rash renews his argument that the record has not been reconstructed beyond a reasonable doubt to include the photographs of S.A. and M.R. actually admitted at trial. Because the record has not been reconstructed—and there is insufficient evidence to show that reconstruction is possible—this Court should grant Mr. Rash a new trial. If this Court does not grant Mr. Rash a new trial, it should remand Mr. Rash's case to the circuit court and require the court to conduct a hearing and admit evidence to determine if the record can be reconstructed beyond a reasonable doubt.

A. Introduction and standard of review.

A defendant's right to a *meaningful* appeal is constitutionally guaranteed in Wisconsin. Wisconsin Constitution, Article I, Section 21(1); Wis. Stat. §808.02; ***State v. Perry***, 136 Wis. 2d 92, 98, 401 N.W.2d 748 (1987). Any deficiency in the trial court record that prevents the defendant from demonstrating possible error at the trial court level is a deprivation of the right to appeal. ***Perry***, 136 Wis. 2d at 99-100.

When a portion of the trial court record is missing, the defendant's only burden is to show a "colorable need" for the missing portion on appeal. ***Id***. at 108. A defendant has a "colorable need" for a missing portion of the record when evidence of that missing portion might lend to a claim of prejudicial error by the trial court on appeal. ***Id***. at 101. The defendant does not need to show that an alleged error is in fact prejudicial. ***Id***. at 108. Instead, "all that need be alleged is that there is some likelihood that the missing portion would have shown an error that was arguably prejudicial." ***Id***. at 103.

Once the defendant demonstrates a "colorable need" for the missing portion of the record, the duty then shifts to the trial court "to determine whether the missing portion of the record can be reconstructed." ***Id***. at 101. "The court must carefully review the reconstruction effort and determine, in a criminal case, that the reconstruction is correct beyond a reasonable doubt." ***Id***. at 107. The reconstructed record must be "a functionally equivalent substitute that…portrays in a way that is meaningful to the particular appeal exactly what happened in the course of trial." ***Id***. at 99. If the record cannot be reconstructed beyond a reasonable doubt and without speculation, the remedy is a new trial. ***Id***.

If there is no dispute between the parties concerning the contents of the missing record, a court can simply approve the substituted record agreed upon by the parties. ***State v. DeLeon***, 127 Wis. 2d 74, 81, 377 N.W.2d 635 (Ct. App. 1985). But, as here, where there is not an agreement on the contents of the missing record, it is the court's duty to establish what the contents of the missing record from trial was beyond a reasonable doubt. ***Id***. at 81-82. To do this, a court should generally hold a hearing and rely on its own recollections, its notes from trial, affidavits of the parties, consultation with the trial attorneys, and recall of witnesses to reconstruct the missing portion of the record. ***Id***.; ***Perry***, 136 Wis. 2d at 103.

A trial court's reconstruction efforts are subject to the clearly erroneous standard of appellate review. ***State v. Raflik***, 2001 WI 129, ¶36, 248 Wis. 2d 593, 636 N.W.2d 690.

B. Mr. Rash has a "colorable need" for the photographs of S.A. and M.R. from his trial.

As a threshold matter, Mr. Rash has a "colorable need" on appeal for the photographs of S.A. and M.R admitted at trial. It is arguable that the photographs were unfairly prejudicial, and the trial court should not have admitted them into evidence or given them to the jury during deliberations.

Whether photographs are too prejudicial for a trial court to admit into evidence or let go back to the jury during their deliberations is a common and arguable issue for appeal in Wisconsin. Under Wis. Stat. § 904.03, relevant evidence may be excluded by the trial court "if its probative value is substantially outweighed by the danger of unfair prejudice." A trial court abuses its discretion when admitting photographs

if "it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury." ***State v. Williams***, 2015 WI 75, ¶ 84, 364 Wis. 2d 126, 867 N.W.2d 736. "Photographs should be admitted if they will help the jury gain a better understanding of material facts; they should be excluded if they are not 'substantially necessary' to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations." ***Sage v. State***, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979).

If the record in Mr. Rash's case was reconstructed properly and the exact photographs that were admitted into trial were identified, Mr. Rash could potentially argue on appeal that the photographs of S.A. and M.R. were unfairly prejudicial. Even if the photographs provided by the State depict S.A., they were not simply factual photographs depicting her injuries. Instead, they included photographs of her in a neck brace, laid out on a hospital gurney with tubes extending from her body. (62:9-12). Mr. Rash could argue that these photographs tended to create unnecessary indignation in the minds of the jurors.

In addition, Mr. Rash could contend on appeal—as he did at trial—that the pictures of M.R. were too prejudicial and directed the juror's attention to improper considerations because Mr. Rash was not charged with an assault against M.R. (40:7-9). Further, he could argue that the photographs of M.R. did not aid the jury in deciding the material facts of the case against him because M.R. was involved in a fight—separate from the incident with Mr. Rash—in which she was hit in the face. (44:12-16). Moreover, because defense counsel introduced the pictures of M.R. at trial, Mr. Rash could also argue that counsel's decision constituted ineffective assistance of counsel. (43:76).

In sum, whether the court here erroneously exercised its discretion when it admitted the photographs of S.A. and M.R. at trial is potentially an issue for appellate review. And, Mr. Rash has a "colorable need" for the photographs.

C. The postconviction court erred in determining, without a hearing, that the record from Mr. Rash's trial had been reconstructed beyond a reasonable doubt.

The reconstruction of the record *cannot be based on speculation*. ***Perry***, 136 Wis. 2d at 103. It is the duty of the trial court to determine what the record from a trial actually was beyond a reasonable doubt. ***Id***.; ***DeLeon***, 127 Wis. 2d at 81. To do so, a court should generally hold a reconstruction hearing to determine if the record can be reconstructed. *See* ***DeLeon***, 127 Wis. 2d at 82; *see also* ***DeFilippo***, 2005 WI App 213, ¶12, 287 Wis. 2d 193, 704 N.W.2d 410; *see also* ***Raflik***, 2001 WI 129 at ¶ 36. At the hearing, the court's determination of whether the record has been reconstructed should be based on the trial court's own recollection, trial notes, consultation with the trial attorneys, and the recall of witnesses. *See* ***Perry***, 136 Wis. 2d at 103.

Here, without a hearing, the court simply accepted the State's assertion it had provided the court with the photographs of S.A. and M.R. from Mr. Rash's trial. In its order denying Mr. Rash's postconviction motion, the court wrote:

> The prosecutor who prepared the State's response indicates that the CD contains all the images taken by police during the investigation of this case. The court accepts the prosecutor's statement as an officer of the court, and there being no indication that any other photos

> exist, the court is satisfied that the 10 color photos of [S.A.] and [M.R.] include the four photos that were admitted into evidence at the defendant's trial.

(69:3-4; App. 105-106).

A determination that within the 10 photographs provided by the State were the 4 exhibits from Mr. Rash's trial required more than the court simply accepting this one-sided assertion from the State. For the court to determine that the photographs were indeed from Mr. Rash's trial beyond a reasonable doubt, the court was required to take further steps to ensure the reliability of the State's assertions. These steps could have included: consulting with defense counsel, asking other parties to the trial to submit affidavits, recalling witnesses, or checking to see if any notes from the trial existed. *See* ***DeLeon***, 127 Wis. 2d at 82; *see also* ***Perry***, 136 Wis. 2d at 103. A judge's recollection alone cannot resolve the reconstruction. ***DeFilippo***, 2005 WI App 213 at ¶14. It is entirely possible that another party would have disagreed with the State's assertion that within these 10 photographs from the MPD were the photographic exhibits from Mr. Rash's trial. Accordingly, during the reconstruction process, it was never established beyond a reasonable doubt that the State provided the actual photographs from Mr. Rash's trial or even photographs associated with his trial.

Although this additional effort places a burden on the court, Mr. Rash did not cause the trial exhibits to be lost. These steps—beyond just accepting the State's assertion that it had provided the photographs from Mr. Rash's trial—seem reasonable to ensure he receives a meaningful appeal where the record is, if possible, reconstructed beyond a reasonable doubt.

Additionally, even if the 10 photographs from the MPD included the 4 photographs of S.A. and M.R. from the trial in this case, the court's determination, without a hearing, that the record had been reconstructed was based on impermissible speculation and uncertainty. In determining that the record had been reconstructed, the court relied heavily on the affidavit from Assistant District Attorney Burtch. (69:4-5; App. 106-107). That reliance was misguided for multiple reasons.

First, Attorney Burtch only once expressed something resembling certainty in her matching of a photograph to an exhibit number. At paragraph 4 in her affidavit, she stated that she "believes that Exhibit 4, upon information and belief, was identical to printed photograph 25." (65:1; App. 109).

Her statements regarding the other photographs and exhibits include far more uncertainty. Regarding Exhibit 3 allegedly depicting S.A., Attorney Burtch stated that two of the photographs—photographs 24 and 26—"appear quite similar" but she "believes" that photograph 24 was given to the jury as Exhibit 3. (65:1; App. 109). Further, when discussing the alleged photographs of M.R., Attorney Burtch said she "cannot recall which of the printed photographs of M.R…were Exhibits 13 or 14." (65:2; App. 110).

Attorney Burtch's comments that the photographs "appear quite similar" but she "believes" that Exhibit 3 was photograph 24 do not rise to the level of proof beyond a reasonable doubt that Exhibit 3 was photograph 24. Moreover, her statements regarding the alleged photographs of M.R. do not aid in the reconstruction at all. Based on the uncertainty in Attorney Burtch's affidavit, the court should have held a hearing in which the court admitted evidence

from Attorney Burtch and others involved in Mr. Rash's trial, instead of just relying on her statements in the affidavit.

Second, nearly four years had passed since the end of Mr. Rash's trial and when Attorney Burtch prepared her affidavit. (41:1; 65:2; App. 110). In light of this large time span, it is understandable that Attorney Burtch was unsure in her statements as to which of the photographs of S.A. and M.R. from the MPD were used as exhibits at Mr. Rash's trial. This Court has found that "[f]ifteen months…is certainly long enough for recollections to become inaccurate." ***DeFilippo***, 2005 WI App 213 at ¶14. Due to the problems with the large passage of time, the court should have held a reconstruction hearing and admitted evidence, instead of relying on the unsupported allegations of the State.

In addition, even if the State provided the photographs from Mr. Rash's trial, the court's written decision, incorporating Attorney Burtch's affidavit, reflects a similar level of uncertainty and speculation regarding which photographs retrieved from the MPD were the trial exhibits.

Regarding Exhibit 3 allegedly depicting S.A., the court said:

> The court can further state with confidence that Exhibit 3 is [S.A.'s] upper torso, neck and head as depicted either in the photo marked number 24 or the photo marked number 26 in the State's submission. Although the court *cannot state definitively* which photo was admitted as Exhibit 3, there is no need to reconstruct the record in this regard, since each photo depicts [S.A.'s] upper torso, neck and head on a hospital gurney, albeit from different angles.

(69:4; App. 106) (emphasis added). By its own words, the court "cannot state definitively" which photograph from the MPD was Exhibit 3. These words demonstrate that the court is merely speculating about which photograph was Exhibit 3 and not making a determination beyond a reasonable doubt which photograph of S.A. was admitted at trial.

In addition, the court continued to impermissibly speculate in regards to which photographs were Exhibits 13 and 14 of M.R. The court wrote:

> The court's on-the-record description of Exhibits 13 and 14 is *most consistent* with the photos marked numbers 17 and 18 in the State's submission. These are the only photographs which depict a dark background and [M.R.'s] face with a neutral expression. Photo numbers 19-22 do not depict [M.R.'s] facial expression and are not consistent with the court's description of Exhibits 13 and 14 at trial.

(69:4-5; App. 106-107) (emphasis added). The court was required to determine beyond a reasonable doubt which of the photographs of M.R. were from the trial, not the photographs that were "most consistent" with the trial transcript. Because the court failed to do this, the record regarding the photographs of M.R. also has not been reconstructed.

A great deal of ambiguity still exists concerning which photographs were presented to the jury. Considering that Mr. Rash's potential claim of error is entirely contingent on an analysis of the exact photographs that the jury received, the record cannot be said to be adequately reconstructed beyond a reasonable doubt. The remedy for a missing record that cannot be reconstructed is a new trial. ***Perry***, 136 Wis. 2d at 99; ***DeLeon***, 127 Wis. 2d at 82. Because the record has not

been reconstructed—and there is insufficient evidence to show that reconstruction is possible—this Court should grant Mr. Rash a new trial. If this Court does not grant Mr. Rash a new trial, it should remand Mr. Rash's case to the circuit court and require the court to conduct a hearing and admit evidence to determine if the record can be reconstructed beyond a reasonable doubt.

CONCLUSION

For the reasons stated in this brief, Mr. Rash respectfully requests that this Court remand to the circuit court with directions that the court vacate Mr. Rash's convictions and grant him a new trial.

If this Court does not grant Mr. Rash a new trial, he requests that this Court remand to the circuit court with directions that the court hold a reconstruction hearing to determine if the trial record including the photographs of S.A. and M.R. can be reconstructed beyond a reasonable doubt.

Dated this 14th day of July, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,838 words.

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 on or after 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 14th day of July, 2017.

Signed:

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of July, 2017.

Signed:

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