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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Case No. 2016AP2494-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MORRIS RASH,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING POSTCONVICTION RELIEF, BOTH
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE J.D. WATTS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

A criminal defendant's right to appeal includes the right to make a meaningful appeal based on adequate trial record. Any inadequacies in the record must be such that they do not materially affect the defendant's preparation of an appeal or contribute to this Court's improper determination of the appeal. Here, the exhibits from Rash's trial, including photographs of the victim and a witness, were missing from the record. Did the circuit court properly reconstruct the record in a manner that allows Rash to meaningfully appeal his convictions?

The circuit court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs based on settled legal principles.

INTRODUCTION

A jury found Rash guilty of substantial battery of S.A. and felon in possession of a firearm. Rash moved for postconviction relief. He requested a new trial because the trial exhibits, including photographs of the victim, S.A., and another witness, M.R., were lost and unavailable for appellate review. Rash contended that the photographs were necessary to allow him to appeal the circuit court's decision to publish the photographs of S.A. and M.R. to the jury and challenge his trial counsel's effectiveness for offering the photographs of M.R. into evidence.

In response, the State provided the circuit court with all of the photographs of S.A. and M.R. that the police department took in connection with Rash's case. The State also filed an affidavit of the trial prosecutor that identified

which photographs of S.A. and M.R. were most likely assigned exhibit numbers 3, 4, 13, and 14.

Based on the submission of the parties, its review of the record, and its recollection of the trial, the circuit court determined that the four images that were admitted into evidence as Exhibits 3, 4, 13, and 14 are now part of the record. The circuit court determined that the record had been sufficiently cured to allow Rash to proceed with his appeal.

While the circuit court could not precisely identify which photograph was assigned which exhibit number, it identified the photographs that it published to the jury. Based on this determination, Rash can appeal the circuit court's decision to publish the photographs of S.A. and M.R. to the jury on the grounds that they were unfairly prejudicial. He can also challenge the effectiveness of his attorney for offering the photographs of M.R. into evidence. Therefore, the circuit court properly reconstructed the record to allow Rash to meaningfully appeal his conviction.

SUPPLEMENTAL STATEMENT OF THE CASE

S.A. and her significant other, M.R., went to S.A.'s sister's house. (R. 43:4.) S.A. and M.R. were outside when Rash, whom M.R. described as her ex-boyfriend, came "from nowhere" and charged at M.R. (R. 42:103; 44:7.) Rash was striking M.R. with an object that S.A. later described as a "big black pistol." (R. 42:107.) S.A. walked to where Rash was beating M.R. to calm Rash down. (R. 42:108; 43:12.) Rash struck S.A. in the face while he still had the pistol in his hand and caused S.A. to become unconscious. (R. 42:108, 115.)

The State charged Morris Rash with substantial battery to S.A. and felon in possession of a firearm for an incident that occurred on February 22, 2012. (R. 1.)

Before trial, the State informed Rash and the circuit court that it intended to introduce photographs of S.A. and

the crime scene at trial. (R. 40:13.) The State told the circuit court that it would not introduce photographs of M.R. The circuit court also told Rash that it would not permit the State to introduce photographs of M.R. but would allow Rash to introduce them. (R. 40:9, 13.)

At trial, the State introduced several exhibits into evidence, including photographs marked as Exhibit 3 and Exhibit 4. (R. 14.) S.A. testified that Exhibit 3 was a photograph of S.A. in a neck brace and that Exhibit 4 was a photograph of her ankle. (R. 42:112.) S.A. explained that these photographs were pictures of her taken after an incident on February 22, 2012. (R. 42:112.) S.A. stated that she fell when Rash hit her and that she twisted her ankle. (R. 42:113.) When asked if she had injuries to her face, S.A. testified that her left jaw was swollen. (R. 42:113.) The circuit court received Exhibits 3 and 4 into evidence on the State's motion without objection. (R. 42:113.) Officer Paul Terriquez testified that Exhibit 3 was a photograph of the woman that he saw lying outside the residence when he responded to a shooting complaint on February 22, 2012. (R. 43:25–27.) The clerk's exhibit list reflects that Exhibit 3 is a "neck/head view (photo)" and that Exhibit 4 is an "ankle (photo)." (R. 14.)

Rash called Officer Kevin Gaulke as a witness. (R. 43:74.) Gaulke responded to the complaint on February 22, 2012 and spoke to M.R., who looked "severely battered." (R. 43:75–76.) Defense counsel showed Gaulke two photographs, Exhibits 13 and 14. Gaulke identified M.R. as the person in the photographs with whom he spoke. (R. 43:76.) The exhibit list describes Exhibits 13 and 14 as "[M.R.] photo." (R. 14.) Trial counsel moved to admit Exhibits 13 and 14. (R. 43:79.) The circuit court admitted the photographs after it confirmed with Gaulke that Exhibits 13 and 14 depicted M.R. substantially as she appeared on February 22, 2012. (R. 43:80.) Later during the trial, Gaulke testified that M.R. told him that S.A.'s sisters fought with her. (R. 44:60–61.) Gaulke

stated that he had no reason to believe that Rash had committed a criminal act against M.R. (R. 43:89.)

Trial counsel also called M.R. (R. 44:6.) M.R. identified Exhibits 13 and 14 as photographs of her that show the injuries that she sustained after Rash hit her with a gun. (R. 44:46.) M.R. admitted that on the night of the incident, she told the police that S.A.'s sisters caused her injuries. (R. 44:47.) She testified that she did not tell the police the truth because she was scared that Rash would find her. (R. 44:49.)

During deliberations, the jurors asked to see the exhibits. (R. 45:36.) Rash objected to Exhibits 3, 4, 13, and 14 on the grounds that these photographs were inflammatory and prejudicial. (R. 45:37.) The circuit court reviewed the exhibits to determine if they were inflammatory. (R. 45:38.)

With respect to Exhibits 3 and 4, the photographs of S.A., the circuit court observed that:

[T]he 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.

With respect to Exhibits 13 and 14, the photographs of M.R., the circuit court stated that these exhibits:

[S]how 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 . . .

(R. 45:38-39.)

Rash renewed his objection, noting that he was not charged with the assault on M.R. (R. 45:39.) The circuit court acknowledged that the State had only charged Rash with substantial battery on S.A. Based on the testimony, the jury could believe that Rash assaulted both M.R. and S.A. The circuit court noted that several witnesses had discussed the photographs, which had been received into evidence and were part of the record. The circuit court overruled Rash's objection. (R. 45:40.)

A jury found Morris Rash guilty of substantial battery on S.A. and felon in possession of a firearm. (R. 27.)

Rash's prior appellate counsel filed a no-merit report. (R. 30.) This Court rejected the no-merit report because it was "unable to conclude that further proceedings would be wholly frivolous" without reviewing the missing trial exhibits. (R. 49:2.) It dismissed Rash's appeal without prejudice and authorized him to file a postconviction motion or notice of appeal. (R. 49:3.)

Rash moved for postconviction relief. He alleged that he was unable to meaningfully appeal his conviction because the trial exhibits were lost and unavailable for his review. (R. 60:1.) Rash's motion focused on the absence of Exhibits 3 and 4, the photographs of S.A., and Exhibits 13 and 14, the photographs of M.R. (R. 60:3.) Rash asserted that without the actual photographs that were admitted into evidence, it was impossible to reconstruct the record and that the circuit court should grant him a new trial. (R. 60:10–11.)

The State responded to Rash's motion. The State represented that the Milwaukee Police Department had

provided it with a disc of all of the photographs that it took in this case. (R. 62:1.) It prepared color copies of the photographs of S.A. and M.R. that are on the disk and attached them to its response. (62:3–12.) It also attached a copy of the CD. (R. 62:1.)¹

The CD contains 26 photographs. The first photograph is a record sheet that includes the date and location. (R. 64CD:1.) Photographs 2 through 16 show the front of a house and various evidence markers between the street and the house. (R. 64CD:2–16.) Photographs 17 through 22 show M.R. (R. 64CD:17–22) and correspond to the photographs attached to the State’s response and are numbered 17 through 22. (R. 62:3–8.) Photographs 23–26 show S.A. in a hospital setting (R. 64CD:23–26) and correspond to the photographs attached to

¹ The Milwaukee County Clerk of Court submitted an electronic record in this case. Because the record included an item that is not electronically maintained, it sent a supplemental record to the Court of Appeals. This item is described as “Item#64 Attachment (Digital CD of Photos).” A CD, inside of a smaller envelope and a larger plastic bag is paper clipped to the Clerk’s description. See Clerk’s Certificate file stamped February 3, 2017. While the word “Photos” and number “12-053-0150” were handwritten on the CD, neither the disc nor the packaging appears to contain a record number. Consistent with the clerk’s designation that the CD is an attachment to record item 64, the State will refer to items on the CD as follows: (R. 64CD:page #.)

On opening the CD, undersigned counsel observed two PDF files. The first file is labeled 120530150. The file contains 26 images, including the images of S.A. and M.R. that are attached to the State’s response to Rash’s motion. (R. 62:1.) The first photograph is a picture of a Milwaukee Police Department photographic record sheet that shows the location 2162 N. 41St Street and a date of February 22, 2012. (R. 64CD:1.) The information in the first photograph corresponds to the date and location of the incident alleged in the complaint. (R. 1.) The State also noted the presence of a second file labeled 120530150A. The second file includes 12 pages of photographs and the first page includes a date of March 30, 2012. The photographs on this file appear unrelated to Rash’s case.

the State's response and are numbered 23 through 26. (R. 62:9–12.)

In its response, the State asserted that either photograph 24 or 26, which shows a head and neck view of S.A., was Exhibit 3. The State based its assertion on S.A.'s trial testimony that that is "me in a neck brace." (R. 62:1.) By affidavit, the trial prosecutor stated: "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." (R. 65:1.)

The State also claimed that photograph 25, which shows an ankle on a hospital bed, was marked as Exhibit 4. When asked about Exhibit 4, S.A. testified: "I believe that's my ankle." (R. 62:1.) The trial prosecutor stated: "Affiant believes that Exhibit 4, upon information and belief, was identical to the printed Photograph 25 provided by [the prosecutor who filed the response]." (R. 65:1.)

The trial prosecutor stated that Exhibits 13 and 14 were photographs of M.R. The prosecutor could not recall which of the printed photographs marked 17 through 22 in the State's response were actually marked and received as Exhibits 13 or 14. (R. 65:2.)

Rash objected to the State's effort to reconstruct the record. "Reconstruction of the record should be based on the trial court's own recollection, trial notes, consultation with the trial attorneys, and the recall of witnesses, not the unsupported allegations of the State." (R. 64:4.) Rash also objected to the trial prosecutor's affidavit because it did not establish which specific photographs of S.A. and M.R. were actually marked as exhibits. (R. 67:1–3.)

In a detailed written order and decision, the circuit court rejected Rash's claim that the record could not be

reconstructed. The circuit court found that the 10 photographs of M.R. and S.A. that the State filed with the circuit court were the only photographs taken of M.R. and S.A. It also found that those 10 photographs included the four photographs admitted into evidence as Exhibits 3, 4, 13, and 14. (R. 69:3–4.)

With respect to Exhibit 3, the circuit court found:

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 is 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.

(R. 69:4.)

With respect to Exhibit 4, the circuit court found:

[T]he 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.

(R. 69:4.)

With respect to Exhibits 13 and 14, the circuit court found:

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.

(R. 69:4.) The circuit court made its findings based on the photographs that the State submitted, the trial prosecutor's affidavit, its review of the trial testimony, and its own recollections of the exhibits from the trial. (R. 69:2–5.)

Based on its review of the record, the circuit court determined that the photograph exhibits were “no longer missing.” (R. 69:5.) “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.*” (*Id.*) It concluded that the record had been “sufficiently cured” for Rash to proceed with his appeal and denied his motion to vacate the judgement of conviction. (*Id.*)

Rash appeals.

STANDARD OF REVIEW

An appellate court reviews claims of error in the circuit court's effort to reconstruct the record under the “clearly erroneous” standard. *State v. Raflik*, 2001 WI 129, ¶ 36, 248 Wis. 2d 593, 636 N.W.2d 690. The ultimate question of whether the circuit court's reconstruction of the record is adequate for purposes of a meaningful appeal presents a legal question that this Court independently reviews. *Id.* ¶ 32.

ARGUMENT

Rash can meaningfully appeal the circuit court’s decision to publish photographs of S.A. and M.R. to the jury because the circuit court properly reconstructed the record based on the party’s submissions, its review of the record, and its recollection of the trial.

A. General legal principles.

The Wisconsin Constitution guarantees a party an absolute right to appeal. Wis. Const. art I, § 21(1). The right to appeal must be “meaningful.” *See State v. Perry*, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987). A meaningful appeal includes a right to a “full transcript—or a functionally equivalent substitute that, in a criminal case, beyond a reasonable doubt, portrays in a way that is meaningful to the particular appeal exactly what happened in the course of trial.” *Id.* But reconstruction is not required if meaningful appellate review can be accomplished without the record of the missing component. *See Perry*, 136 Wis. 2d at 100. Reconstruction also is not necessary for “[a]n inconsequential omission or a slight inaccuracy in the record which would not materially affect” resolution of the claim of error. *Id.*

In *State v. DeLeon*, 127 Wis. 2d 74, 79–82, 377 N.W.2d 635 (Ct. App. 1985), this Court identified the procedures that a circuit court should follow for reconstructing a missing record. The supreme court subsequently approved these procedures. *Perry*, 136 Wis. 2d at 101.

The appellant bears the initial burden of demonstrating “a ‘colorable need’ for the missing portion of the record.” *Raflik*, 248 Wis. 2d 593, ¶ 40. That is, the appellant must “assert that the portion of the transcript that is missing would, if available, demonstrate ‘reviewable error.’” *Perry*, 136 Wis. 2d at 101. The appellant need only allege “that there

is some likelihood that the missing portion would have shown an error that was arguably prejudicial.” *Id.* at 103.

If the circuit court determines that appellant’s claim of reviewable error is facially valid, then the circuit court has a duty to determine whether it can reconstruct a missing portion of the record. *Id.* at 101, 116. In making this determination, the circuit court considers several factors including “the length of the missing portion in relation to the entire transcript, the time lapse from trial to the discovery of the hiatus in the record, and the availability of witnesses and counsel to reconstruct the record.” *Id.* at 101.

If the circuit court determines that the effort to reconstruct the record would be “insurmountable,” then it must order a new trial. *Id.* But if the circuit court determines that reconstruction may be possible, the burden is on the appellant to summarize the record and prepare an affidavit that incorporates the evidence as the appellant reconstructs it. The appellee may then propose amendments and make objections. If the parties agree on the proposed reconstructed record, they may then proceed on the agreed facts. *Id.* at 103.

If the parties cannot resolve their disagreement about the record, then the circuit court must resolve it. The circuit court may reconstruct the record based on “its own recollection, trial notes, consultation with counsel, affidavits, or recall of witness . . .” *Id.* The circuit court may also conduct hearings. *Raflik*, 248 Wis. 2d 593, ¶ 36. The reconstruction procedure does not allow for speculation. *Perry*, 136 Wis. 2d at 103. The circuit court “must be satisfied that the reconstructed record accurately reflects what actually happened to the same level [of proof] required in the proceeding itself.” *Raflik*, 248 Wis. 2d 593, ¶ 54. Thus, when the circuit court reconstructs the record of a criminal trial, it “must find that the record has been adequately reconstructed beyond a reasonable doubt.” *Id.*

B. The circuit court properly reconstructed the record and any inaccuracy in it does not materially affect Rash’s ability to appeal his convictions.

1. The circuit court reconstructed the record consistent with the procedures under *Perry*.

The circuit court properly reconstructed the exhibits missing from the record beyond a reasonable doubt and in a manner that permits Rash to meaningfully appeal his convictions for substantial battery to S.A. and felon in possession of a firearm. The circuit court complied with *Perry* when it reconstructed the record of the missing Exhibits 3, 4, 13, 14.² It did not do so in a vacuum, but based on the arguments of the parties and their submissions, its review of the trial record, and its own recollection of the trial. (R. 69:1–5.)

As the record demonstrates, the circuit court allowed the parties to provide meaningful input before it reconstructed the record. In addition to Rash’s postconviction motion and its attachments (R. 60), the State responded to Rash’s postconviction motion. (R. 62.) The State attached to its response a CD that included all of the photographs that the Milwaukee Police Department took in the investigation. The CD included six photographs of M.R. and four photographs of S.A. that were printed and attached to the State’s response. (R. 62:3–12; 64CD:17–26.)

Based on its review of S.A.’s testimony, the State explained why Exhibit 4 is the photograph of the ankle

² While all of the trial exhibits are missing from the record, Rash’s appeal focuses on the circuit court’s reconstruction of Exhibits 3 and 4, which are the two missing photographs of S.A., and of Exhibits 13 and 14, the two missing photographs of M.R. (Rash’s Br. 9, 11.)

marked as Image 25 on the CD and why Exhibit 3 is either the photograph of S.A. in a neck brace marked Image 24 or 26 on the CD. (R. 62:1, 10–12.) The trial prosecutor subsequently submitted an affidavit in which she expressed her belief that Exhibit 3 was photograph 24 and why Exhibit 4 was photograph 25. (R. 65:1.) The State did not identify which two of the six photographs of M.R. were marked and received as Exhibits 13 and 14. (R. 62:1; 65:2.)

Rash responded to both the State’s response and the trial prosecutor’s affidavit. (R. 64, 67.) Rash did not specifically challenge the State’s assertion that Exhibits 3 is either photograph 24 or 26, the only two pictures that show a head and neck view of S.A. (R. 14; 62:10, 12.) Rash also did not specifically contest the State’s assertion that Exhibit 4 is photograph 25 that focuses on S.A.’s ankle. (R. 14; 62:11.) Finally, Rash did not refute the State’s claim that Exhibit 13 and 14 came from the six photographs of M.R. that it attached to its response. (R. 62:3–8.)

Rash made no effort to supplement the record with an offer of proof or affidavit from trial counsel, who actually offered the photographs of M.R. into the record, (R. 43:75–79), or from himself, even though he actively participated in his trial.³ Instead, Rash asserted that reconstruction should be based on the circuit court’s own recollection, trial notes, consultation with the trial attorneys, and the recall of witnesses. (R. 67:2 citing *Perry*, 136 Wis. 2d at 103.)

Following the parties’ submissions, the circuit court issued a detailed decision and order. It reviewed relevant portions of the trial record, including its decision to allow the

³ Even though Rash was represented by counsel, he actively participated in the litigation of his case. Rash filed *pro se* motions to dismiss his case, to suppress photograph evidence, and for a new trial. (R. 11; 12.) The circuit court also allowed Rash to make arguments before and during trial. (R. 40:5, 7–11; 44:69.)

jurors to view the photographs of S.A. and M.R., marked as Exhibits 3, 4, 13, and 14, over Rash's objections. (R. 69:1–2.) The circuit court then described its review of the CD containing 26 photographs that the police took in the investigation, including the photographs of S.A. and M.R. It also noted that the State had provided it with ten printouts of the photographs of S.A. and M.R. (R. 69:3.)

Based on its review of the record, the circuit court found that the 10 photographs of S.A. and M.R. that the State provided “include the four photos that were admitted into evidence at [Rash]'s trial.” (R. 69:4.) The circuit court then proceeded to make findings linking the photographs that the State submitted with the exhibit numbers.

With respect to Exhibit 3, the circuit court found:

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.

(R. 69:4.)

The record supports the circuit court's findings that Exhibit 3 is either photograph 24 or 26. These are the only two photographs that show S.A.'s face, with a neck brace. One photograph shows her from the left side and the other from the right side. (R. 62:10, 12.) These photographs are most consistent with S.A.'s testimony that Exhibit 3 shows her in a

neck brace and that it was taken after the February 22, 2012 incident. (R. 42:112.)⁴ It is also consistent with the clerk's record sheet which describes Exhibit 3 as a "neck/head view (photo)." (R. 14.)

With respect to Exhibit 4, the circuit court stated that:

[T]he 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.

(R. 69:4.)

The record supports this determination. The clerk's exhibit list reflects that Exhibit 4 is an "ankle (photo)." (R. 14.) It is the only photograph that focuses on S.A.'s ankle. (R. 62:11.) S.A. testified that Exhibit 4 was a photograph of her ankle taken after the incident. She explained that she fell when Rash hit her and that she twisted her ankle. (R. 42:112–13.)

With respect to Exhibits 13 and 14, the circuit court found:

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.

(R. 69:4.)

The record also supports the circuit court's determination. The clerk's notes reflect that Exhibits 13 and 14 are photographs of M.R. (R. 14.) At trial, trial counsel

⁴ S.A. testified that she her left jaw was swollen as a result of the incident. (R. 42:112.) The State notes that S.A.'s jaw appears swollen in photograph 26. (R. 62:12.)

showed M.R. Exhibits 13 and 14. M.R. identified Exhibits 13 and 14 as photographs of her that show the injuries that she sustained on the night of the incident. (R. 44:46.) While she told the police that someone else caused her injuries (R. 44:47), M.R. testified that Rash caused the injuries when he struck her with a gun (R. 44:46). When the circuit court granted the jury's request to view the exhibits, it found that Exhibit 13 and 14 showed M.R.'s injuries, that "[t]hey don't involve any particular unfair emotion[,] that "[t]he background is dark," and the expression on M.R.'s face is "fairly neutral." (R. 45:38–39.) Photographs 17 and 18 are the only photographs that show a full face shot in which the background is dark and show all of her injuries and face. (R. 62:3-4.) The remaining photographs show limited portions of M.R.'s face, focused on specific injuries. (R. 62:5–8.)

Based on its own review of the record, the circuit court determined that the photographic exhibits were "no longer missing." (R. 69:5.) "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.*" (*Id.*) It concluded that the record had been "sufficiently cured" for Rash to proceed with his appeal and denied his motion to vacate the judgement of conviction. (*Id.*)

2. The circuit court adequately reconstructed Exhibits 3, 4, 13, and 14 to allow Rash to meaningfully appeal his convictions.

The State agrees with Rash that he has demonstrated a colorable need for the photographs of S.A. and M.R. so that he can meaningfully appeal the circuit court's decision to provide the jurors the photographs during deliberations. (Rash's Br. 11–12.) By reconstructing the record, the circuit court implicitly recognized that Rash had a colorable need for the missing photographs. (R. 69:3.) *See Perry*, 136 Wis. 2d at

100–01. The question is whether the circuit court reconstructed the missing Exhibits 3, 4, 13, and 14 in a manner that permits Rash to meaningfully appeal his convictions.

Here, the circuit court found that the record “has been sufficiently cured to allow [Rash] to proceed with his appeal . . .” (R. 69:5.) Rash’s primary claim is that the photographs are necessary to establish that the circuit court erred when it determined that publication of the photographs of S.A. and M.R. to the jury did not unfairly prejudice Rash. Rash also claimed that the photographs were necessary to allow him to challenge whether trial counsel was ineffective for offering photographs of M.R. into evidence. (Rash’s Br. 11–12.) The circuit court’s reconstruction of Exhibits 3, 4, 13, and 14 allows Rash to challenge the circuit court’s determination that publication of the photographs of S.A. and M.R. to the jury did not unfairly prejudice Rash.

The circuit court found that the CD of the photographs that the State provided (R. 64CD:1-26) “contain all the images taken by the police during this investigation of this case” (R. 69:3). Likewise, the circuit court found that the 10 color photographs of S.A. and M.R. that the State attached to its response (R. 62:3–12) included the “four photos [Exhibits 3, 4, 13, and 14] that were admitted into evidence at the defendant’s trial” R. 69:4).

The fact that the circuit court could not determine whether Exhibit 3 was photograph 24 or 26 does not undermine Rash’s ability to appeal the circuit court’s decision to publish either photograph of S.A. Rash wants to challenge the admissibility of these photographs because they show “her in a neck brace, laid out on a hospital gurney with tubes extending from her body.” (Rash’s Br. 12.) The record as the circuit court reconstructed it allows Rash to make this argument. Both photographs 24 and 26 show S.A. on a gurney with a neck brace and an oxygen cannula running to her nose.

The only difference between the two photographs is that they are taken from opposite sides of her face. (R. 62:10, 12.) Whether photograph 24 or 26 was marked as Exhibit 3 does not preclude Rash from challenging its publication to the jury. He can make the same argument regardless of which photograph was actually marked and received as Exhibit 3.

The circuit court determined that photograph 24 (R. 62:10; 64CD:25) was received as Exhibit 4. It shows S.A.'s ankle and is the only photograph that shows the ankle. If he chooses, Rash can argue that this photograph is unduly prejudicial.

With respect to the photographs of M.R., Exhibits 13 and 14, the circuit court explained why it determined that these were photographs 17 and 18 rather than photographs 19 to 22, which focused on specific injuries to M.R.'s face. (R. 62:3–8; 64CD:17–22; 69:4.) The circuit court's failure to decide which photograph (17 or 18) was marked as which exhibit (13 or 14) is not fatal to Rash's ability to seek review of the circuit court's decision to publish both of these photographs of M.R. to the jury. With respect to these photographs, Rash can also challenge the effectiveness of his trial counsel for offering them into evidence.

C. Any error in the reproduction of the exhibits is harmless in Rash's case.

In *Perry*, the supreme court recognized that any “[e]rror in transcript preparation or production, like error in trial procedure, is subject to the harmless-error rule.” *See Perry*, 136 Wis. 2d at 100. Whether the claimed error “is prejudicial or harmless is usually determinable only in the context of the entire record.” *Id.* at 105.

The nature of the item missing from the record bears on the harmless error analysis. In *Perry*, the supreme court recognized the particular importance of a transcript to a meaningful appeal. *Id.* at 98, 106. The transcript portrays

“exactly what happened in the course of trial.” *Id.* at 99. In contrast, when an exhibit is missing, the appellant and a reviewing court can still determine what happened during the trial through the transcript. This is particularly true in this case where the transcript includes testimony from S.A. and M.R. that describes how they were injured, the nature of their injuries, their testimony about the exhibits, and the circuit court’s description of the exhibits.

S.A. testified that Rash struck her once, causing her to fall unconscious. (R. 42:108.) She also twisted her ankle in the fall. (R. 42:113.) S.A. testified that Exhibit 3 was a photograph of her in a neck brace and that Exhibit 4 was a photograph of her ankle. (R. 42:112.) The clerk’s exhibit list reflects that Exhibit 3 is a “neck/head view (photo)” and that Exhibit 4 is an “ankle (photo).” (R. 15.) S.A. explained that these photographs were pictures of her taken after the February 22, 2012 incident. (R. 42:112.) When asked if she had injuries to her face, S.A. testified that her left jaw was swollen as well. (R. 42:113.) In addition, the circuit court described what was depicted in Exhibits 3 and 4 when it decided to publish them to the jury:

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.

(R. 45:38–39.)

S.A. testified that she saw Rash charge M.R. and strike her with an object that she later determined was a handgun. (R. 42:103–04, 107.) While M.R. told the police that S.A.’s sisters injured her (R. 44:47), M.R. testified that Exhibits 13 and 14 show the injuries that she sustained after Rash hit her

with a gun (R. 44:46). Officer Gaulke stated that M.R. looked “severely battered” when he spoke to her on February 22, 2012. (R. 43:75–76.) He identified her as the person in Exhibits 13 and 14. (R. 43:76.) When the circuit court decided to show these exhibits to the jury, it explained that they “accurately showed [M.R.’s] injuries . . .” It also noted that the photographs did not show “unfair emotion” and that the expression on her face was “fairly neutral.” Because the photographs did not create “unfair suggestion” and were “fairly factual,” the circuit court gave them to the jury. (R. 45:38–39.)

In addition to the description of the missing photographs in the record, the circuit court also found that the 10 photographs of S.A. and M.R. that the State submitted with its response included the four photographs admitted as Exhibits 3, 4, 13, and 14. (R. 69:4.) Rash has not demonstrated that the circuit court’s finding is clearly erroneous.

Based on this record, any error that occurred in the circuit court’s reconstruction of the missing exhibits is harmless. The record includes the photographs that were marked and received as exhibits. Rash can argue the decision of the circuit court to publish the exhibits to the jury. He can also challenge trial counsel’s effectiveness for introducing the photographs of M.R. during the trial. Any error in reconstructing the record here is inconsequential and does not materially affect Rash’s preparation of an appeal or this Court’s resolution of it. The error is harmless and reversal of Rash’s conviction is not warranted. *See Perry*, 136 Wis. 2d at 100.

D. Rash’s arguments notwithstanding, the circuit court properly reconstructed the record.

Rash contends that the circuit court erred when it accepted the State’s representation that the 10 photographs

that the State submitted included the four missing exhibits. He contends that the circuit court could have consulted with defense counsel, asked other parties to the trial to submit affidavits, recalled witnesses, or checked notes. (Rash’s Br. 14.)

Here, Rash responded to the State’s response that included the 10 photographs of S.A. and M.R. (R. 64) and to the affidavit of the trial prosecutor (R. 67). While Rash challenged the adequacy of the State’s offer for reconstructing the record based on these submissions (R. 64:3–4; 67:1), Rash did not specifically dispute that the 10 photographs included the four missing exhibits. Rash could have offered his own affidavit or that of trial counsel if he disputed the State’s representations. He could have requested a hearing to test the validity of the State’s assertions regarding the photographs. He did neither.

More importantly, the circuit court did not base its decision solely on the State’s representations. Rather, it reviewed Rash’s pleadings, the proffered photographs, the prosecutor’s affidavit, the trial testimony, and its own recollection of the trial when it reconstructed the record. (R. 69:4–5.) This is precisely the process that the supreme court contemplated in *Perry* when the parties cannot agree on the record. That is, the circuit court must resolve the dispute based on “its own recollection, trial notes, consultation with counsel, affidavits, or recall of witness . . .” *Perry*, 136 Wis. 2d at 103. While the circuit court could have conducted a hearing, it was not required to do so. *See Raflik*, 248 Wis. 2d 593, ¶ 36.

Contrary to Rash’s assertion, the circuit court did not speculate when it reconstructed the record. Rather, its detailed decision reflects a reasoned analysis deciding which photographs were the missing exhibits. It identified the missing exhibits from the submitted photographs based on its review of the trial record and its own recollection of the trial.

That it could not definitively conclude whether Exhibit 3 was 24 or 26 is not fatal to its analysis since the photographs are merely similar views of S.A. from her left and right side. What matters is that Rash can meaningfully appeal the circuit court's decision to admit a photograph of S.A. lying on a gurney with a neck brace and oxygen cannula. Similarly, it adequately identified photographs 17 and 18 as Exhibits 13 and 14 so as to permit Rash to meaningfully appeal any challenges to the use of these photographs of M.A. (R. 69:4-5.)

The circuit court's failure to include the phrase "beyond a reasonable doubt" in its findings is not fatal to its reconstruction of the record. Its reference to *Perry* (R. 69:5) and its analysis demonstrates that it was aware of *Perry*'s requirement that it reconstruct the record beyond a reasonable doubt. That is, the circuit court "must find that the record has been *adequately* reconstructed beyond a reasonable doubt." *Raflik*, 248 Wis. 2d 593, ¶ 54 (emphasis added). Perfection is not required.⁵ Rather, the question is whether the record is such that Rash can meaningfully appeal the circuit court's decision regarding the publication of photographs to the jury and allow this Court to properly determine his claim. *Perry*, 136 Wis. 2d at 100. Exhibits 3, 4, 13, and 14 as the circuit court has reconstructed them allow Rash to his appeal his conviction.

⁵ Rash acknowledges that his "potential claim of error is entirely contingent on an analysis of the exact photographs that the jury received . . ." (Rash's Br. 17.) *Perry* does not establish a threshold of exactness. To the contrary, it recognizes that an inaccuracy in the record is subject to the harmless error analysis. *Perry*, 136 Wis. 2d at 100.

E. Remand is appropriate if this Court concludes that the circuit court did not adequately reconstruct the record.

Rash asserts that he is entitled to dismissal of his case because the record has not been adequately reconstructed to permit him to take an appeal. For the above reasons, the State disagrees. If this Court disagrees with the circuit court's determination that the record is adequate, then it should remand the case to the circuit court to determine if it can more accurately reconstruct the record. As part of this process, Rash can submit additional information to the circuit court. In addition, the circuit court can conduct a hearing if appropriate.

CONCLUSION

For the above reasons, the State respectfully requests this Court affirm Rash's judgment of conviction and the circuit court's order denying Rash's postconviction motion.

Dated this 18th day of July, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,857 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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 18th day of August, 2017.

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