STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

NO. 2017AP000452-CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

JAMES E. GRAY,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal From Decision and Final Order Denying Post-Conviction Motions Entered February 23, 2017,
Waukesha County Circuit Court Case No. 2014CF1072,
The Honorable Ralph M. Ramirez, Presiding

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I. The admission of evidence seized from Gray's residence (the sweater shirt and the bifold wallet) that was used to bolster the State's identification evidence was not harmless error.

The State conceded that physical evidence was illegally seized from the apartment Gray shared with Vaughn because it offered no arguments on the illegality of the seizure. See, *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493 (Ct.App.1979) (unrefuted arguments are deemed conceded).

The State contends instead that any error in admitting the evidence was harmless because the evidence was unimportant (State's Brief at 12) and because other evidence, specifically surveillance video, was so strong (State's Brief at 13). This contention is undercut by other points in the State's own brief and by the comments of the trial prosecutor about the importance of the evidence. The State acknowledges (State's Brief at 9) that it was important that Sergeant Ipavec was permitted to testify that he "was specifically looking for" the type of sweater that was seized *precisely* because "Gray was observed wearing that type sweater in surveillance videos." Also, the bifold wallet, which State's credit card transaction witnesses referenced in their testimony, was described by Ipavec as an item seized right from Gray's bedroom dresser. These items were prepared in advance and marked as State's exhibits, which also shows that the State considered them to have much more than "limited value;" why else would they have been readied for

use as State's evidence? They were not introduced merely as an afterthought. Instead they were used to provide an added link, beyond the surveillance videos, to connect Gray to the offenses charged.

So, of course, the seized evidence was useful, of value, and important to bolstering the State's other evidence. That's why the prosecutor began his opening remarks to the jury with the candid assessment that the seized evidence "will help foster the case or shore up the case." (R. 88: 88). Its admission was not harmless.

II. The admission of police opinion testimony as a substitute for in-court identification testimony was not harmless error.

The lay witnesses did not, as true identification witnesses, identify Gray as a person they observed at the retail locations committing credit card identity fraud; instead, they asserted that the person in the courtroom, in their opinion, happened to look like the person appearing in different surveillance videos. By offering no counterargument to Gray's points about Sergeant Ipavec's testimony, the State made another concession: the police identification opinion evidence was erroneously admitted.

To support its claim that the opinion evidence was harmless, the State then suggests that the sergeant's opinion evidence was limited and that the prosecutor placed little emphasis of the officer's opinion in his closing remarks (State's Brief at 16).

The State ignores the impact flowing from the fact that this opinion

evidence was presented by a police sergeant. It does not appear, at least in undersigned counsel's research, that Wisconsin courts have considered this point. But courts elsewhere have condemned this tactic because of a legitimate concern that jurors will be more susceptible to and more easily swayed by opinion evidence from police witnesses. In *Charles v. State*, 79 So.3d 233, 235 (Fla.App. 2012), the defendant also was charged with credit card fraud and the prosecution relied on surveillance video, just as here, for proof that Charles had fraudulently used a credit card. And just like this case, the jury heard testimony from a police officer opining that it was defendant Charles who appeared in the video. The court concluded that the evidence created reversible error, especially because it was an identification opinion ventured by a police officer:

> The error in admitting the officer's identification testimony was not harmless. '[E]rror in admitting improper testimony may be exacerbated where the testimony comes from a police officer." *Martinez v. State*, 761 So.2d 1074, 1080 (Fla.2000) (citation omitted). There is the danger that jurors will defer to what they perceive to be an officer's special training and access to background information not presented during trial. *Id.*

Other Florida courts have often found this error not to be harmless. In *Alvarez v. State*, 147 So.3d 537, 538-39 (Fla.App. 2014), the court reversed the conviction due to a detective's identification opinion that he based on observing a surveillance video. In *Proctor v. State*, 97 So.3d 313, 315 (Fla. App. 2012) the court found it was reversible error to allow a police officer to identify Proctor as the perpetrator in a surveillance video where the officer was in no better position than the jury to make that determination. In *Ruffin v. State*, 549 So.2d 250, 251

(Fla. App. 1989) the trial court was found to have erred in allowing officers to identify the defendant as the man in the videotape, where the officers were not eyewitnesses to the crime, did not have familiarity with Ruffin, and were not qualified as experts in identification.

In the *Charles* case credit card fraud case, the appellate court's ruling focused on facts that are virtually identical to those presented here: "[T]he testifying officer in this case was not an eyewitness to the use of the credit card at the gas station, he had no special familiarity with appellant, and he was not otherwise qualified as an expert in video identification." *Charles v. State*, 79 So.3d at 235 (Fla. App. 2012).

This reasoning is not peculiar to Florida jurisprudence by any means. For example, in *State v. Belk*, 201 N.C.App. 412, 418, 689 S.E.2d 439, 443 (2009) the court held that "Officer Ring's testimony identifying the individual depicted in the surveillance video as the Defendant played a significant if not vital role in the State's case, making it reasonably possible that, had her testimony been excluded, a different result would have been reached at trial." It explained its rationale, in part, because "there is no evidence that Defendant altered his appearance between the time of the incident and the trial, that the individual depicted in the footage was wearing a disguise, or that there were any issues regarding the clarity of the surveillance footage not ameliorated by allowing the jurors to view the footage on the laptop." In *State v. Finan*, 275 Conn. 60, 61, 881 A.2d 187, 189 (2005) the

court reversed a robbery conviction, holding that the opinion testimony of police officers was improper to identify the defendant on a surveillance videotape of the robbery because the testimony was directed at the ultimate issue of identity. See also, *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

Regrettably, the prosecutor here appears to have been concerned in his closing argument that the photo evidence alone would not seal Gray's fate, if it depended solely on the jury's own observations of the surveillance videos. He gave his personal opinion about the strength of that video evidence. Indeed, the State's Brief at 14 notes that the prosecutor implored the jurors to accept his personal opinion: "I looked at the video. I saw the video, and that's James Gray. That's what I think. I don't have any doubt."

While the defense did not lodge an objection, these remarks plainly were intended to influence the jury's view of the video evidence as depicting Gary as the perpetrator, and they were improper. See, Wis. SCR 20:3.4(e) and *State v. Johnson*, 153 Wis.2d 121, 133 n. 11, 449 N.W.2d 845 (1990) (stating that it is "unprofessional 'for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant.'" (internal citation omitted).

Sergeant Ipavec's inadmissible opinion testimony when coupled with the prosecutor's improper closing argument assertions, both of which were used to influence the jury's view of the video evidence, created reversible error, even if no

objection was lodged to the prosecutor's statements. That was the result, for example, in *People v. Holiday*, 36 N.Y.S.3d 520, 522–23, 142 A.D.3d 625, 626–27 (2016), where the prosecutor committed misconduct during her summation when, while playing a surveillance video introduced into evidence at trial, she identified figures on the screen as the victim and the defendant.

Finally, the State tries to diffuse the force of Gray's points on the above police identification testimony issue (State's Brief at 14), by criticizing Gray for "[r]elying on cases from other jurisdictions" and "specifically his reliance on outside jurisdictions." Yet the State offered no Wisconsin authority at all (State's Brief at 14-17) to support its position and provided no supporting case authority from any other jurisdiction. Gray's case authorities are, at minimum, relevant and instructive; and their reasoning is persuasive.

III. The admission of Shelly Zais' lay witness opinion testimony as a substitute for in-court identification testimony was not harmless error.

The State begins its response to Gray's challenge to Shelly Zais' identification opinion testimony by contending that Gray's trial counsel forfeited the issue when he did not object (State's Brief at 18). But that contention fails for at least two reasons. First, trial counsel had already voiced his objections to the type of identification opinion evidence then being offered. When Sergeant Ipavec first shared his opinions, counsel's objections were overruled -- twice. Hence, it would have been futile to raise the same objection again. Second, there was no "sandbagging" behind trial counsel's silence when Zais' started giving her

identification opinions, which is the State's main concern for invoking its own forfeiture rule objection on appeal.

Contrary to the State's other argument in support of Zais' opinions (State' Brief at 19), a foundation for their admission was woefully lacking for at least three reasons: (1) Zais did not claim to have a continuous relationship with Gray that would strengthen her familiarity with him; (2) Zais did not claim that she had previously seen Gray in attire, and particularly on September 7, 2014, that was similar to the person depicted in the video/photographs; and (3) the person in the videos did not appear to be wearing a disguise. (R. 89: 84-89). Accordingly, there was no basis to conclude that Zais was more qualified to look at the video/photo evidence and conclude that the person depicted there was Gray, than any of the jurors who sat in the same courtroom.

Curiously, the State's Brief consistently claims that the surveillance video evidence was overwhelmingly strong proof that Gray was the perpetrator of credit card fraud using KJ's identity, for example: (1) the prosecutor "relied most heavily on the surveillance videos, Gray's beret-style hat, and his cane" (at 13); (2) "evidence, in particular, the videos, convinced the jury to convict Gray" (at 13); (3) "all the jury had to do to find Gray guilty was review the surveillance videos" (at 14); and (4) "the State had a strong case against Gray because it had the surveillance videos" (at 17). If that is the State's position, it destroys any justification for introducing the identification opinions of Zais, and Ipavec, too.

The State laid absolutely no foundation for either witness' opinion by showing that the jury needed assistance through their opinions. The case law discourages such testimony where the prosecution claims that the evidence of itself, unaided by the opinion testimony, is sufficient to prove the identity of the perpetrator. Courts generally conclude that a witness may not identify an individual depicted in a photograph or video when that witness is in no better position to identify the individual than is the jury. See, *e.g.*, *Charles v. State*, *supra*: "[T]he testifying officer in this case was not an eyewitness to the use of the credit card at the gas station, he had no special familiarity with appellant, and he was not otherwise qualified as an expert in video identification."

Finally, it bears remembering neither KJ nor any credit card transaction witness could identify Gray as the cardholder imposter. While most prosecutions rely on witnesses who can dramatically point out the defendant in the courtroom as the perpetrator of the offense, this prosecution could not do so because there were no such witnesses. To compensate, the prosecution resorted to presenting testimony by pseudo-identification witnesses whose opinions invaded the province of the jury, contrary to Wis. Stats. §§ 904.01, 904.03, and 907.01. Because the inadmissible testimony of those two witnesses was further buttressed by the improper opinion statements of the prosecutor, the error was plain and reversible, even if objections were not made. See, e.g., *State v. Lamb*, 145 Wis.2d 454, 464, 427 N.W.2d 142, 146 (Ct. App. 1988) (where the purpose of the testimony was to

convince the jury that defendant was guilty because the witness believed he was guilty, the trial testimony impermissibly invaded the jury's province and was not harmless).

IV. The jury instructions improperly directed a jury verdict on the issue of whether Gray had used KJ's "personal identifying information."

The State objects (State's Brief at 20-21) to any consideration of the above issue because trial counsel did not object to the instruction. Yet the State concedes that the issue, if otherwise waived, may be a basis for reversal in the interests of justice. Gary respectfully requests that the issue be considered under that standard, and particularly so, where the number and seriousness of the errors raised on appeal were likely so determinative of the jury's verdict, both as to whether Gray was the person who used KJ's credit card, or whether the card itself constituted personal identifying information within the meaning of the statute.

V. The evidence was insufficient to prove the crimes charged because there was no evidence that Gray made any overt and affirmative representations that he was KJ, or that he had her authority to use the cards, or that the cards belonged to him.

The State argues (State's Brief at 21-28) that merely by using KJ's credit card Gray was representing himself to be KJ or that he acted with KJ's authorization or consent.

The statute at issue, Wis. Stats. § 943.201(2), requires that there be proof that the accused made a representation about owning the card or having

permission to use it. Yet the State contends that the "act of using another's debit or credit card constitutes the prohibited representation by implication." (State's Brief at 24). The several points of disagreement between the State and Gray are now clearly laid out, as the State's points essentially were already addressed in Gray's opening brief.

There is more to be considered, however, given an analogous situation discussed by the United States Supreme Court in *Williams v. United States*, 458 U.S. 279 (1982). The Court there held that, because a check cannot be true or false, the writing of a check, if not supported by sufficient funds could not constitute the offense of making a false statement. The Court decided that a check does not make a factual "statement" as to the state of an individual's bank account and rejected the Government's argument that a drawer on a check is generally understood to represent that he has sufficient funds to cover the face value of the check. The Court noted that "a check is literally not a 'statement' at all," and that to hold otherwise would slight the wording of the statute that made it a federal crime "to knowingly mak[e] any false statement or report" in the process of obtaining a financial institution loan. *Id*. at 286.

The same point holds here under the Wisconsin statute that criminalizes the use of another person's personal information or a personal document if accompanied by the user's "representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the

information or document belongs to him." In *Williams* the Court ruled that a check, when there are insufficient funds on account to cover it, does not carry with it any representation as to the drawer's account balance. So too, the presentation of a credit card and its use to obtain goods does not carry with it any sort of "prohibited representation," as to the cardholder status of the user, or consent relationship between the user and the card account holder. The card literally, to borrow from Williams, is neither a statement nor a representation.

No proof of an overt misrepresentation by Gray of his identity was presented at the trial; the State contended at trial that evidence that his use of the card carried with it the type of representation that is prohibited. But KJ's card when used was no different than Williams' check when presented. Accordingly, the evidence was wholly insufficient to prove his guilt on the five counts charged.

CONCLUSION

The several evidentiary errors in this case had a cumulative effect, which likely steered the jury to find that Gray was the offender in the retail transactions at issue. If any one error, standing alone, was insufficient to create reversible error, the accumulation of errors tipped the scales unfairly against Gray. This court should aggregate the effects of those multiple errors in determining whether their overall impact satisfies the standard for a new trial. *State v. Harris*, 2008 WI 15, ¶ 110, 307 Wis.2d 555, 601, 745 N.W.2d 397, 419–20.

Appellant Gray respectfully requests that the decision and order of the

circuit court be reversed, and this matter be remanded either with instructions that the charges be dismissed or that a new trial be granted.

Dated at Milwaukee, Wisconsin, December 6, 2017.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,935 words.

_____
James A. Walrath

RULE 809.19(12) (f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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James A. Walrath

CERTIFICATE OF SERVICE

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 7th day of December 2017, I caused three copies of Appellant's Reply Brief to be served by hand delivery by a representative of Alphagraphics Printing in Madison, Wisconsin on opposing counsel of record, Jennifer R. McNamee, Assistant Attorney General, at the Offices of the Attorney General, Madison, Wisconsin, 53707.

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James A. Walrath