STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2017 AP 871-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TANYA LYNN SCHMIT,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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On appeal from the Circuit Court
of St. Croix County, Hon. R. Michael Waterman,
Circuit Judge, presiding.

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ISSUE FOR REVIEW

1. Was trial counsel constitutionally ineffective when he failed to investigate witnesses his client told him had exculpatory information?

   The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE[1]

1. Trial

The sole contested issue in this OWI 3rd case[2] was whether Tanya Schmit (Tanya[3]) was the driver of a white SUV that pulled into a Holiday gas station in Somerset, Wisconsin.

It was January 22, 2013, just before 10:00 p.m., when Ronald Hill was fueling his pick-up truck at the Holiday gas station in Somerset, Wisconsin. (83:17, 183). He heard a "loud noise" coming from the east. (83:183). He finished fueling and walked into the station. (83:183). As he was standing at the check-out counter, he saw a white GMC SUV vehicle pull up to the pumps with severe damage to the passenger front end and the airbags deployed. (83:18, 184). He could only see the passenger side of the van. (83:197). He could not see inside the vehicle. (83:195). A woman wearing a black and blue coat, with "dark longer style hair[,]" and "thin build" then appeared in front of the SUV on the front passenger side of the vehicle to check the damage. (83:185, 197). He did not know whether she came around from the front or the back of the SUV. (83:195, 196). He did not see anyone exit the vehicle. (83:196-197). He could not see the driver's side of the vehicle. (83:197) As she was assessing the

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1 The Statement of the Case and the Statement of Facts are combined.

2 Tanya was also charged with one count of bail jumping and one count of resisting or obstructing an officer, both misdemeanors. She entered a guilty plea to the bail jumping charge prior to trial. She was found guilty of resisting or obstructing an officer by the jury. (84:344). This appeal pertains exclusively to the OWI 3rd conviction.

3 As there are two Schmits, Tanya Schmit will be referred to by her first name.

damage, another woman appeared and talked to the her. (83:186, 198). She was wearing a white jacket. (83:186). He did not know where she came from. (83:198). He saw both women for the first time on the passenger side of the SUV. (83:198). He motioned to the gas station clerk, with a hand gesture, to call 911. (83:186). He then approached the women and told them he knew who the driver was (the person wearing the black and blue coat with dark hair), an assumption he made based on having seen this person "come around the vehicle to check the damage." (83:187).

The gas station had a surveillance system with one "pump" camera pointed directly from the store entrance towards the passenger side of the SUV. The recording was not an actual video, but a series of still photos taken in intervals ranging from one to five seconds. Based on these photos, the white SUV arrived at 9:54:57. (A:6). The first photo to show either Tanya or Britney Aumer was at 9:55:19. (A:7). This frame shows a person with dark clothes, presumably Tanya, at the rear of the SUV. There is a frame at 9:55:20 showing her proceed from the back of the vehicle to the passenger side. (A:8). The next frame is 9:55:25, five seconds later, which shows Tanya inspecting the damage to the right front of the SUV. (A:9). Aumer first appears walking behind the SUV at 9:55:59. (A:10). The camera does not cover most of the area in front of the building. The images are fuzzy and blurred. Ultimately, the photos do not show who was driving the SUV or who exited the driver's door. (83:30, 145-146, 153-154).

The police officer who arrived at the scene stated Tanya was a "rather small, thin woman" who he "believe[d]" was wearing a "blue coat and black pants." (83:205, 230). Aumer was the other person in the vehicle and was wearing a white coat. She refused to give a statement. (83:206). Tanya repeatedly told the police officer she was not driving. At one point, according to the officer, Tanya admitted she was driving, only to state again that she was not driving. (83:206, 210, 234, 246). There's no dispute Tanya was intoxicated.

Cody Card saw the white SUV collide with the inside wall of a bridge before it drove the short distance to the Holiday gas station. The collision caused extensive damage to the passenger side. (83:173-175). His vehicle was face to face with the SUV just after it hit the bridge wall. He never got a look at the driver because he was staring at the SUV's headlights. (83:176). He did, however, see a woman exit from the front passenger door. He got out and met her halfway between the vehicles and asked if she was OK. (83:173). He described this "passenger" as a woman of "thin-build" with dark hair, probably mid-20s, "give or take," and wearing a jacket "of some kind." (83:176). He later testified she was "at least late 20's" (83:181). He admitted he's "never been a very good judgment on age…" He was 19-years-old at the time. (83:179-180, 181).

The jury returned guilty verdicts. (84:343, 344). The circuit court imposed three years of probation with 60 days in jail. The jail term was stayed pending appeal. (53:1; Appendix (hereinafter "A:"), p. 13).

2. Postconviction Hearing.

Tanya filed a motion for postconviction relief claiming ineffective assistance of trial counsel. She had, prior to trial, provided trial counsel with the names of two potential witnesses: Holly Korn and Chad Schmit (Chad). (89:40). Her trial counsel, Aaron Nelson, failed to contact either of them or investigate their potential testimony.

Nelson testified he did not recollect everything Tanya told him about Holly Korn, but did remember Tanya telling him Korn was at the gas station and could provide information about what she saw and heard. (90:13, 14, 15; 91:5). Nelson did not remember what Korn's specific observations were, but assumes "they were helpful, otherwise [Tanya] wouldn't have told them to me." (91:5). Nelson believed Tanya had given him Korn's name "one to two weeks before trial, sometime very close to the trial date." (89:43, 52). Based on the contacts he had with Tanya in his calendar, it was probably either the

15th, 17th, or 20th of June, 2016. It could have also been "some other day." (90:14). The trial began on June 21st, 2016. (83).

Tanya also told Nelson to contact Chad Schmit, Tanya's estranged husband. Chad and Tanya were still in business together, and the SUV was owned by their company, Seal King, an asphalt paving company. (89:9). Nelson recalled that Chad had information regarding a phone call or text he had received from someone at the scene. (89:41, 52). Nelson did not recall when Tanya told him about Chad, but believed it was "well before" Korn. (91:33). He did "not know when, though." (91:33).

Nelson had no explanation for why he didn't speak to Korn or Chad:

> Í can't remember what my response was to Tanya. All I know is I didn't do anything. I didn't call the witnesses. I didn't hire an investigator. I didn't send her a letter to say, We need money for an investigator. ….it appears I did nothing.

(89:41). He could not "imagine" he had any strategic reasons for not following up. Before he could have made a strategic decision he "would need to have information from that witness and I had no information. I mean, there was no strategy involved at all, I didn't do it." (91:19). Nelson confirmed that identifying the driver was the central issue in the case. (89:42). He volunteered that he should have done an investigation. (89:47).

Nelson did offer that he was under tremendous stress just prior to Tanya's trial. He was "spending a lot of time managing [his son] James' counseling and doctor's appointments based on his then suicidal ideation." (91:35). He was also preparing for a triple homicide trial "which began the Monday after the Schmit trial." (91:35, 92:36). "I suspect that my failure to properly investigate Ms. Schmit's witnesses had a lot to do with my being overwhelmed with family life and the Milberg trial." (92:36).

Holly Korn testified at the postconviction hearing. At the time of the incident on January 22, 2013, she lived in Somerset. She had worked with Chad and Tanya at Seal King the previous season (April – October). On the night of the incident, she hadn't seen Tanya for at least a couple months. (89:9). At around 10:00 p.m., she drove to the Holiday gas station in Somerset to buy cigarettes. (89:10). She parked on the south-west side of the building. (89:10, 11; 61:5 (A:11)). As she got out of her car and walked around the corner to the front of the building, she saw Britney Aumer get out of Tanya's car on the driver's side. According to Korn, Aumer "walked up to me because she had seen me. And she was frantic. She was crying. She asked me to call Chad [Schmit]." (89:12). This conversation took place in front of the ice machine, which was between Korn's car and the front door. (89:12, 20). Korn called Chad three of four times before he answered. She then gave the phone to Britany, "and she explained what happened." Korn also spoke with Tanya and one of the officers. (89:14). Korn remained outside for "about" half an hour before she entered the gas station at 10:24 p.m. (89:14, 15; Exhibit 4 (A:11)). She identified herself in several of the surveillance photos, including one with her standing next to the SUV at 10:22 p.m. (89:14, 15; Exhibit 2 (A:12)).

Korn did not see Tanya again until April of 2014. (89:15). The incident never came up until June of 2016, when Tanya made a passing reference to her upcoming jury trial. This was about two weeks before trial was scheduled to begin. (89:25). Korn was confused because she had seen Aumer get out of the SUV, and didn't understand why Tanya was going to court for it. That's when she told Tanya, "Hey, I seen her [Aumer]." (89:16). Korn knew Aumer from working with her at Seal King and from high school. (89:18, 19). Korn described Aumer as not a small girl but "bigger boned." (89:22). Korn no longer worked for Seal King or the Schmits at the time of the postconviction hearing. (89:16)

Chad testified that he was a co-owner of Seal King with Tanya. He knew Korn and Aumer, both of whom had worked for him in the past. (89:29). The white SUV, a GMC Arcadia, was owned by their

business. (89:30, 31). He and Tanya were still technically married but had been separated for the "better part" of five years. (89:31).

He remembered receiving a phone call the night of the accident. He believed it was Korn's phone but he was talking to Aumer. Aumer told him: "they had smashed the vehicle up, crashed into a bridge,…." Chad asked "who was driving. Britney [Aumer] said she was. She was crying. She was upset. And she said Tanya was – they were taking Tanya to jail. And I said, Well, if you were driving, why don't you tell the cops. And she said, I tried to, but they don't want to listen to me." (89:30-31)

The circuit court denied the postconviction motion in a written decision filed on April 17, 2017. (66 (A:1-5)). Tanya now appeals.

ARGUMENT

I. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE FAILED TO INVESTIGATE EXCULPATORY WITNESSES NAMED BY SCHMIT.

1. Legal Standards

The defendant was denied her right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id.* Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trial counsel has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110

Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). Counsel's performance cannot be based on an "irrational trial tactic" or "caprice rather than judgment." *State v. Domke*, 2011 WI 95, ¶ 49, 337 Wis.2d 268, 805 N.W.2d 364.

If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. *Felton*, at 506-507. The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The *Strickland* test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

Trial counsel has a duty to conduct a reasonable investigation of the facts, or reasonably decide that a particular investigation is unnecessary. *State v. Thiel*, 2003 WI 111, ¶40, 264 Wis. 2d 571, 665 N.W.2d 305; *Strickland*, 466 U.S. at 691. Trial counsel must adequately investigate "the circumstances of the case and to explore all avenues which could lead to facts that are relevant to either guilt or innocence,…." *Felton*, 110 Wis.2d at 501; see also *State v. Cooks*, 2006 WI App 262, ¶2, 297 Wis. 2d 633, 726 N.W.2d 322 (Defense counsel "had a duty to investigate the alibi witnesses" client named). The failure to conduct any pre-trial investigation generally constitutes a clear instance of ineffectiveness. *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989). Counsel cannot make a strategic choice against pursuing an investigation when he has not yet obtained the facts on which such a decision could be made. See *Strickland*, 466 U.S. at 690-91; see also *United States v. Debango*, 780 F.2d 81, 85 (D.C. Cir. 1986) ("The complete failure to investigate potentially corroborating witnesses . . . can hardly be considered a tactical decision"). See also *Gray*, at 712 (client's reluctance to subpoena witnesses did not absolve counsel "of his independent professional responsibility to investigate what information these potential witnesses

[named by the client] possessed, even if he later decided not to put them on the stand.")

2. Trial counsel was constitutionally ineffective when he failed to investigate and present two exculpatory witnesses directly relevant to the contested issue in this case.

a. Trial counsel was deficient for failing to investigate the witnesses Schmit asked him to contact.

Nelson testified to a limited memory of his conversations with Tanya concerning Holly Korn and Chad Schmit. What he did recall was Tanya had named both individuals as potential witnesses prior to trial. (89:40). She told him "something about Holy Korn being there at the scene and her having information about what she saw or heard at the scene." (90:13). Korn had "factual observations" she could relay. (91:5). He did not specifically recall "whether Tanya told him [Korn] had seen [Aumer] driving." (90:15). He assumes Korn's observations would have been "helpful," or "Tanya wouldn't have told them to me." (91:5). Tanya may have given him Korn's contact information. (90:15).

Nelson also recalled Tanya discussing Chad as having information based on a phone call or text he received from someone at the scene: "What I understood about Chad was that Chad had spoken with, either by phone or by text, somebody that was at the scene," and had "information that he had learned…." (89:41, 52).

Nelson did not claim that what he remembered was the only information Tanya provided. Rather, he did not recall "exactly what Ms. Schmit told" him. (91:5). As the sole contested issue in this case was whether Tanya was driving the vehicle; there's no reason Tanya would have brought these witnesses to Nelson's attention without telling him what they had to say.

Nelson acknowledged he should have done an investigation. (89:47, 51). At a minimum, he knew there were two witnesses—including one eye-witness—with possible exculpatory evidence. Nelson assumed these witnesses would be helpful to Tanya's defense or she wouldn't have brought them up. (91:5). Both witnesses were connected to the same location the SUV had been driven and disembarked. A person at the scene, or a person talking on the phone to someone at the scene, could have shed light on who the driver was. Nelson had a duty to find out. He failed that duty. (89:51).

Nelson could not remember why he didn't talk to them. (89:45). He could not "imagine" any strategic reason for failing to follow-up with the information Tanya had provided. He could not have made a strategic decision because he didn't have the information he needed to make one. (89:45; 91:19). In fact, there *was* no conceivable strategic reason because the evidence would have only bolstered the same defense Nelson was already using. Rather, Nelson believes he failed to act because he was both personally and professionally overwhelmed at the time. (91:35-36).

b. Trial counsel's deficient performance prejudiced Schmit.

Tanya was prejudiced because the state's evidence was weak and the proffered evidence is directly relevant whether she was the driver.

The State's evidence was entirely circumstantial. Ron Hill did not see the driver. He assumed it was Tanya because she appeared from the driver's side of the vehicle. (83:185, 196). He didn't know whether she came around the front or the back of the vehicle. (83:185). The surveillance photos likewise do not identify the driver or show who got out on the driver's side of the SUV. (A:7, 10).

In addition, Card's testimony described the *passenger* in a way that could have only been Tanya. Right after the collision, Card spoke with a person of thin-build and dark hair who got out of the *passenger*

side of the SUV. (83:173, 176, 181). The person Card saw was a woman "at least late 20's" (83:181). Despite being 37-years-old at the time of the accident[4], only Tanya would have fit the description of someone with a "thin build" and "dark hair." Aumer was not thin. (89:22).

In short, the state's evidence was circumstantial, weak, and arguably contradicted by its own witness. Korn and Chad's testimony would have substantially bolstered Tanya's defense that she was not the driver.

Korn saw Aumer exit the SUV from the driver's side door at the gas station. (89:12). Her observation, moreover, was close in time to when the SUV arrived. Korn testified she went to the gas station at "approximately" 10:00 p.m. (89:9-10). According to the surveillance camera (whose time stamp was never proven), the SUV arrived at 9:54:57. (A:6). In addition, Korn testified she spent "about" a half an hour outside before she entered the station, which occurred at 10:24 p.m. (89:14; (A:11). That would also put her arrival on par with the SUV.

Aumer told Chad she was driving the SUV. (89:30). She made this statement shortly after the accident. Aumer's admission is unqualified and thus highly exculpatory.

While Aumer's statement is arguably hearsay, there are at least two ways this evidence could have been admitted at trial.

First, Aumer's admission would likely qualify as an excited utterance. Her vehicle had just collided with a bridge. Both Korn and Chad described Aumer as "crying,", "upset," and "frantic." (89:12; 30-31). Under Wis. Stat. § 908.03(2), a statement "relating to a startling event or condition" is admissible if "made while the declarant was under the stress of excitement caused by the event or condition." See

4 Card admitted he's "never been a very good judgment on age…" (83:179-180, 181).

also *State v. Moats*, 156 Wis. 2d 74, 96-97, 457 N.W.2d 299 (1990) (statement admissible if declarant still under stress of the event.)

Second, Aumer could have been called to testify. She would either admit she was the driver or deny it. If she denied it, Chad's testimony would be admissible as a prior inconsistent statement. See Wis. Stat. § 908.01(4)(a) ("Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony,…."). See also Wis. Stat. § 906.13(2)(a)3 (extrinsic evidence of prior inconsistent statement not admissible *unless* "[t]he interests of justice otherwise require.")

Trial counsel's failure to investigate these witnesses and have them testify prejudiced Tanya. A defendant is prejudiced when "the evidence that was omitted … due to the deficiencies in counsel's performance[,] undermined confidence in the outcome of the case, given the totality of the evidence that was adduced at…trial." *Cooks*, at ¶54, citing *Thiel*, 2003 WI 111 at ¶80. The State's evidence was weak and circumstantial. The evidence from Korn and Chad would have been highly exculpatory. The proffered evidence more than "undermines confidence" in the result.

3. The circuit court failed to apply the proper legal standards and assumed facts contrary to or unsupported by the record.

The circuit court's post-conviction decision merits a specific response because it relies on speculation and factual assumptions contrary to or unsupported by the record.

The circuit court assumes Tanya was at fault for providing the witnesses' names to Nelson only "one week before trial." (66:2 (A:2)). Her case "had been pending for years and had been previously scheduled for trial on two different dates." (66:3 (A:3)). To the contrary, Nelson was unable to recall when Tanya told him about Korn. He believed it was near trial, but could have been days before trial or

two weeks before trial. (89:43, 52; 90:14). More importantly, Tanya did not know Korn had seen Aumer exit the vehicle until Korn told her. According to Korn, this occurred "about two weeks before trial." (89:25). Tanya did not, as the circuit court implies, withhold this information for "years." Rather, it appears Tanya told Nelson almost immediately after she found out. Nelson was also uncertain about when Tanya told him about Chad, but believed it was "well before" she told him about Korn. (91:33).

The circuit court is also wrong when it states that "Schmit failed to provide anything substantive about their anticipated testimony. She identified the names of two witnesses, but little more." (66:3 (A:3)). Nelson never stated his discussions with Tanya were limited to his recollection. Rather, he testified he didn't remember "exactly what Ms. Schmit told me." He knows Tanya: "told me about Holly, and I know Holly was there, and I know she told me that Holly had factual observations that she could relay. *The extent of what those were, I don't remember*." (emphasis added) (91:5). It's hard to believe that Tanya would have discussed Korn as a potential witness and told Nelson to contact her without mentioning what Korn told her.

The circuit court concluded, nonetheless, that a "reasonably prudent attorney would not have been able to respond to Schmit's untimely and vague revelations of new witnesses." (66:3 (A:3)). Tanya "presented no evidence that Nelson could have investigated these witnesses and have them served with a subpoena within a week."

The circuit court fails to explain *why* trial counsel would have been unable to respond or serve a subpoena. These were cooperative witnesses. They lived or worked in Somerset, only a few miles from the courthouse in Hudson. (89:11; 29). Tanya was well-acquainted with both Korn and Chad and knew how to contact them.[5] There was

5 Tanya presumably knew how to contact Chad, her estranged husband and business partner, and Nelson testified that Tanya may have provided him with Korn's contact information. (90:15). As Korn had worked for Tanya and remained an acquaintance (89:9, 17), there's no reason to believe it would have

no logistical reason either of these witnesses would have been difficult to find or interview by phone or in person very quickly, within hours possibly, and there's no reason to believe a subpoena would have been difficult to serve assuming one were even necessary.

The circuit court further concludes that even if Nelson had called Korn and Chad to testify at trial, the Court "probably would have excluded them because their disclosure was untimely" and "would have prejudiced the State…." (66:5 (A:5)). The court does not explain how the State would be prejudiced; nor does it give any consideration to Tanya's due process rights.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The exclusion of defense evidence violates an accused's right to present a defense "'where the restriction is arbitrary or disproportionate to the purposes' [it is] designed to serve, and the evidence implicate[s] a sufficiently weighty interest of the accused." *State v. Lynch*, 2016 WI 66, ¶58, 371 Wis. 2d 1, 885 N.W.2d 89, citing *Harris v. Thompson*, 698 F.3d 609, 626 (7th Cir. 2012). A defendant's right to present a defense may in some cases require the admission of testimony which would otherwise be excluded under applicable evidentiary rules. *State v. Pulizzano*, 155 Wis. 2d 633, 648, 456 N.W.2d 325 (1990). Striking a witness is "an extreme remedy and should not be used lightly or prematurely." *Irby v. State*, 60 Wis.2d 311, 322, 210 N.W.2d 755, 761 (1973). The "favored" remedy is to grant a continuance. *Id*.

The circuit court also concluded that had Nelson needed a continuance to subpoena Korn and Chad, it would have "probably" rejected that request as well. The circuit court's assumption it would reject a motion that hasn't been made, has no factual context, and gives no consideration to the defendant's due process rights, is at the very least premature. At a minimum, the circuit court is required to consider "whether the testimony of the absent witness is material,

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been difficult for Nelson to find her.

whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." *State v. St. George*, 2002 WI 50, ¶16, 252 Wis. 2d 499, 643 N.W.2d 777, citing *Elam v. State*, 50 Wis. 2d 383, 390, 184 N.W.2d 176 (1971). When an adequate showing is made with respect to these elements, "the moving party is ordinarily entitled to a continuance …." *Id*. In addition, the circuit court's authority to issue a discretionary ruling on a procedural issue may not be exercised until it accommodates the accused's due process rights to present a defense. *St. George*, 2002 WI 50 at ¶16, citing *State v. Johnson*, 118 Wis.2d 472, 479, 348 N.W.2d 196 (Ct. App. 1984).[6]

The court also suggests a strategic reason may have been at play, despite Nelson's testimony to the contrary. According to the court, Nelson had sought a continuance but withdrew it for the same strategic reasons that would have been present had he known Korn and Chad were available as witnesses:

> Nelson withdrew the continuance request because he "did not believe that the State was going to be able to lay the foundation for the surveillance video, which was a central part of the State's case. A continuance would have given Schmit the ability to produce Aumer (and investigate Korn and Chad), but it also meant that the State could solve its evidentiary problems with the video. They believed that the harm from the video outweighed the benefits from Aumer's testimony. Nelson and Schmit decided to try the case because they perceived a tactical advantage, thinking that the State would be unable to have the video admitted. It stands to reason that if Schmit was prepared to try the case without Aumer, "the actual driver," then she was prepared to try the case without Korn and Chad.

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6 While a motion for continuance is committed to the trial court's discretion, a defendant's Sixth Amendment right to present a defense is a question of constitutional fact, subject to de novo review. *State v. Dodson*, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998).

(66:3-4 (A:3-4)). Nelson testified, however, that from a tactical perspective his continuance motion "had nothing to do with witnesses on our side." (91:25). Rather, Nelson filed the motion in response to the State's decision to use surveillance photos without naming an authentication witness. The motion was filed on June 17, 2016, the day after the State provided these photos to Nelson. (91:25). Nelson withdrew the motion on June 19, 2016, the day before trial, because he believed the State would be unable to establish a foundation for their admissibility. (91:25).

Regardless of whatever reasons Nelson may have had for filing the continuance motion or its withdrawal, knowledge of Korn and Chad's potential testimony would have changed the strategic analysis completely. Korn and Chad's evidence far outweighed any benefit Tanya would have received from excluding the surveillance photos. The value of having Aumer's testimony would have also increased significantly with her admission to Chad in hand. The surveillance photos added little, if anything, to the State's case. At best, they corroborated some of Hill's testimony. Indeed, the photos merely replicated Hill's testimony as he provided the "eye-witness" foundation for them. (see e.g. 83:187-188). While Nelson did prefer the photos be excluded, there was little at stake in their admission.

Finally, the circuit court concluded that Korn's testimony was of "limited probative value" and Chad's testimony was "inadmissible hearsay." (66:5 (A:5)).

Korn's testimony had "limited probative value" because "she only saw Aumer exit the vehicle after it had been parked for an unknown duration. Korn never saw the vehicle in operation, much less see Aumer in control of it." (66:5 (A:5)). While the timing of Korn's observation was not precisely established, her testimony, coupled with the surveillance tapes, put her at the gas station at about the same time or shortly after the SUV arrived. (89:10; 14 (A:11, 12)). There was no evidence, moreover, that either Tanya or Aumer exited the driver's side of the vehicle a second time after they disembarked.

The circuit court dismisses Aumer's admission to Chad as "inadmissible hearsay." (66:5). Aumer's admission, however, would have qualified under the evidence code as an excited utterance (Wis. Stat. § 908.03(2)); or a prior inconsistent statement. (Wis. Stat. § 908.01(4)(a)). (see prior section, p. 16).

CONCLUSION

This Court should reverse the conviction for OWI 3rd and remand for a new trial.

Respectfully submitted this 7th day of August, 2017.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 6318 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 s. 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.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)(b)

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 s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of 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.

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Dated this 7th day of August, 2017.

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CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on 7th day of August, 2017. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 7th day of August, 2017.

MILLER APPELLATE PRACTICE, LLC

By_____

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APPENDIX OF DEFENDANT-APPELLANT

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