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STATE OF WISCONSIN

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

Appeal No. 2017-AP-2049 CR

(Fond du Lac Co. Case No. 2013CF402)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT NUTTING,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE FOND DU LAC COUNTY COURT, THE HONORABLE RICHARD J. NUSS PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

RULES

OTHER AUTHORITIES

ISSUES PRESENTED

1. **Did the trial court err by not requiring that a record of the audo recording played to the jury, and should a new trial be granted?**

Trial Court Answered: No.

2. **Was trial counsel ineffective for failing to object to the audio recording and for failing to require requiring that a record of the audo recording played to the jury?**

Trial Court Answered: No.

3. **Did the trial court err refusing to allow a jury instruction advising that the offer to take a ie detector test may be an indicia of innocence?**

Trial Court Answered: No.

4. **Did the State violate Brady and should the defendant be granted a new trial?**

Trial Court Answered: No.

5. **Should a new trial be granted in the interests of justice because the defendant did not receive a fair trial?**

Trial Court Answered: No

STATEMENT ON ORAL ARGUMENT/PUBLICATION

Neither oral argument nor publication are requested.

STATEMENT OF FACTS

On June 6, 2013 Nutting was charged in Fond du Lac County Case No. 2013-CF-278 with one count of 2nd Degree Sexual Assault pursuant to Wis. Stats. §948.02(2) and alleged offense date of December 28, 2011. The alleged victim was P.K. Nutting was represented by Attorney Laurel Munger. A preliminary hearing was held on August 8, 2013, and the court denied the State's request for bind over. On August 9, 2013 the State recharged Nutting in this case (1:1-2), and a preliminary hearing was held on August 16, 2013. (118:1-14) The court granted the State's request for bind over.

On August 16, 2013 the State provided to defense counsel discovery consisting of one CD of an audio interview of Nutting and paper discovery consisting of 88 pages. On August 29, 2013 Attorney Timothy Hogan was appointed subsequent counsel.

The discovery materials consisted of Fond du Lac Police Department reports, and indicated on page 2 of said materials "On 12/29/11 at about 1917 hrs I took a sexual assault complaint at 198 E. 1st St (case #11-14662). The victim was a fourteen year old female named P.K. While taking her statement she informed me she met another male two days before on a dating site.....named Scott."

Upon information and belief, at no time did Attorney Hogan request copies of the police records or discovery that related to Fond du Lac Police Case 11-14662 (defendant

E.B.). Appellate counsel has obtained those records consisting of 22 pages. Such discovery documents indicate the following:

That P.K. gave and signed a statement dated 12/29/2011 and in that statement indicated that yesterday "Scott and I had sex once at the hotel. Scott did not use a condom and did ejaculate inside me." (E.B. Discovery p. 14)

That the discovery materials of Nutting's indicated the following:

That on January 6, 2012 Officer Brian Bartelt was assigned to investigate the sexual assault involving Nutting. That in his report he indicates that "It should also be noted that I will have attached a copy of a report that initiated another sexual assault regarding P.K.; that case number will be attached and is 11-14662". (Discovery p. 6) (The referenced attachment is not included in the discovery materials and upon information and belief was never requested by trial counsel.)

- That according to Nutting's discovery P.K. indicated that she and Nutting had sex one time. (Discovery p. 2)
- P.K. indicated that Nutting "stuck his penis into her vagina and they had sex" (Discovery p. 7)
- P.K. indicated that she and Nutting had sex for about three hours. (Discovery p. 7; 121:172, 190)
- P.K. indicated that Nutting "pulled his penis out of her vagina and he came on her chest." (Discovery p. 7)

On January 19, 2012 Nutting was interviewed by Officer Bartelt, and such interview was audio recorded. (103:Exh.1:1-78) During the audio recording Nutting

indicated that he did not have sexual intercourse with P.K. and emphatically stated that he "did not put my penis into her vagina". (103:Exh.1:19) Nutting continues to deny sexual intercourse throughout the interview.

Near the end of the interview the officer questions if there is DNA are they going to find anything, and Nutting asks if there is DNA. The officer indicates the he isn't going to say for sure. (103:Exh.1:50) Nutting nonetheless makes a comment to the effect if there is DNA that "I'm good....that will help me". (103:Exh.1:51) During the interview Nutting also asks if there are officers available to administer a lie detector test, and then upon questioning by the officer indicates that he 'absolutely' wants to take a lie detector test. (103:Exh.1:46)

On December 18, 2013 Attorney Hogan filed a Defendant's Motion to Introduce Offer to Submit to Polygraph. (27:1-2) That motion was heard on December 20, 2013. At that hearing Attorney Hogan made an offer of proof indicating that

> "I think from what I stated in the motion it is clear under the case law that it would be admissible at trial for the reasons put forth. I think the context of when the offer is made does reflect Mr. Nutting's at least belief at the time that if any results or any analysis, although not admissible, I think does show his mental state that it would have been admissible. I think particularly when he's confronted with the allegations and he tells the officers that he needs the officers to essentially prove his innocence and says I want to take a polygraph, I want to take a lie detector. I think it does show in that context that he believed that a lie detector test would show something and would be admissible to help him as he asked the officers to do."

(120:4-5)

The court openly disagreed with controlling case law:

> When you look at relevancy, you really look at probative worth. You really look at whether or not it tends to cast any light upon the subject of the inquiry. So it goes to the whole truthfulness of that particular issue. And I have a real concern that on the one hand the Supreme Court is saying it's taboo, it ain't coming in under any circumstance, but in the same breath they turn around and say, well, if somebody offers to do it, now apparently that's relevant and that can come in. To me I think it's inconsistent. I don't like it.

(120:6)

> On its face it's inadmissible and to me if that's inadmissible, anything that has to do with polygraph in my opinion ought to be not relevant because the Supreme Court said the test is not relevant, it's so unreliable. Given that then, how can we say in the same breath that certain aspects leading up to that now are relevant? You know, I don't understand the logic of that.

(120:7)

Also during the hearing it became clear that the State and the court believed that if the statements made by Nutting were elicited from Officer Bartelt that Nutting, even if he did not testify could be impeached, as a hearsay declarant. (120:5,12-13) The court engaged in lengthy commentary indicating disagreement with the case law or at the very least that the decisions regarding the relevancy and admissibility of the offer to take a lie detector test, notwithstanding the admissibility of the test itself caused the court tremendous reservation. (120:5-11) The court did not hold an evidentiary hearing on the motion, and eventually indicated it was deferring its decision for the reasons already stated. (120:21)

A jury trial was held on February 10 and 11, 2014. On the first day of trial the state called the following witnesses: P.K., and her mother S.K. P.K. testified to the following:

- P.K. testified that she currently was placed out of home living with a foster parent. (this information was not disclosed prior to the day of trial) (121:134)
- P.K. testified that the reasons she was placed out of home were "I've been acting out a lot. I've been not following the rules. I've been disobeying orders. I've been having alcohol, under the influence." (121:134-35)
- She had been placed out of home since August of 2013. (121:135)
- She indicated that she had sex with Nutting. (121:149)
- P.K. testified that she had vaginal, oral and anal intercourse with Nutting. (121:172)
- P.K. testified that she had sex with Nutting for approximately three hours. (121:190)

The State then called S.K. to the stand. The State did not disclose prior to the first day of jury trial that their office had charged S.K. on October 13, 2013 with Failure to Protect a Child pursuant to Wis. Stats. §948.02(3) in Case No. 13-CF-523. As a result of the filing of that Criminal Complaint and subsequent Information, the Fond du Lac District Attorney's Office received on October 25, 2013 a Victim Impact Statement which was completed by P.K. In this statement P.K. admitted that "I am the one that mass (sic) up by lieing (sic)..." This Victim Impact Statement was never provided to Nutting's defense counsel. S.K. testified as follows:

S.K. testified that she learned from P.K. that she had had sex with Nutting while P.K. was at the hospital. (121:225) She also testified that P.K. told her that she had had sex, oral sex and anal sex with Nutting. (121:226)

On February 10, 2014 the first day of trial, there was a discussion regarding the State's intent to play the recording of the interview of Nutting to the jury. The following exchange takes place between the court and defense counsel, Attorney Hogan:

> THE COURT: Let me just ask this. Are we suggesting that we got a recording coming in here that we aren't going to play the whole thing and we don't have an agreement from counsel as to what portions are going to be redacted and what aren't?
>
> ATTORNEY HOGAN: When Attorney Krueger and I discussed that before the trial, we discussed redacting portions Mr. Nutting indicated he was in custody and some of his prior convictions.
>
> THE COURT: All I'm asking-- I don't want to get into a big song and dance about this. All I'm asking is-- I'm understanding that there was a recording. I'm assuming we're playing the whole recording. Okay. I just assume that. You know, a person's going to redact things, a person's going to do things, we don't do that on the day of trial. All right. We do ahead of time so that the recorded document can then be redacted so that we aren't stopping and doing anything else, that the item that in fact is marked as an exhibit has already been redacted. All right. It's in the software that everybody can use and nobody's going to argue about it. We have a hearing on that because in the end maybe I don't like it and maybe I should hear it. I haven't been asked to do that.
>
> I was told there was a recording. When did I hear about that? Last week when my clerk apparently needed some equipment. I know nothing about it, don't know the contents of it, don't know what's going to be said. If somebody's suggesting that now we have a recording and the entire recording's not coming in and

somebody's taking some exception to that, that's evidentiary in nature. You know, now what am I going to do with that? I should really hear it ahead of time. I should see whether or not it's relevant. I should see whether or not it should come in or not come in. I should--I should hear what the objections might be to it. My goodness I mean that's part of case management. We don't do that on the day that I got 46 jurors sitting in a jury room waiting to come in here. My God. So what's the deal with the recording?

ATTORNEY HOGAN: Attorney Krueger wanted to introduce and play the entire recording the jury.

THE COURT: What's wrong with that?

ATTORNEY HOGAN: There's highly prejudicial information that Mr. Nutting--

THE COURT: So why didn't you bring it to my attention before today?

ATTORNEY HOGAN: I didn't know Attorney Krueger intended to play that entire recording before the jury.

THE COURT: Well, it's evidence, isn't it? You should know. Okay. It's evidence. It can come in. You know, if the State-- if somebody has-- What you do is you file a motion to exclude part of it because it could be exculpatory, culpatory, whatever the case may be. You can certainly do that. I got none of that.

So now I'm sitting here and now I'm being asked to take a recording which I never heard. As far as I'm concerned, it comes in. All right. That's I'm not going to sit there and take and compromise a panel of 43 jurors and then have to deal with this quite frankly and adjourn this case.

This case has been noted for trial. It had a speedy trial demand. I've accommodated everything. Defense has begged to have this case tried and quite frankly I'm trying to do it right now and I'm trying to do it responsibly. I tried to do it on January 2 but I was asked to change it. I did that. All right. There's no surprises in the scheduling of this. And the

> preparation of it quite frankly it falls into the attorneys' laps. If they're prepared to go, fine. If they aren't, we're still going. All right. This is their day in court.
>
> Anything else on this? State plays the recording.

(121:19-21) The trial record does not include transcribed notes of the tape as it was played, nor are there indications of what portions were played or how many portions.

On the second day of trial the State called Detective Bartelt and played the audio recording of a custodial interview with Mr. Nutting. Detective Bartelt testified as follows:

Detective Bartelt testified that during the custodial interview Nutting indicated when P.K. told him her actual age that he told her to get out of his car, and that the last time he saw her was walking across the parking lot, and that they never went into the hotel. (122:49) Detective Bartelt also testified that during the interview Nutting indicated that "I did not put my penis in her vagina." (122:49) He also testified that P.K. indicated that she had had sex with Nutting for three hours. (122:88) Detective Bartelt testified that Nutting indicated that he did not have sexual intercourse with P.K. (122:99)

Prior to the start of the second day of trial there was another discussion about the use of the audio recording. Attorney Hogan stipulated that he was not raising any Miranda/Goodchild issues. (122:5) Attorney Hogan did indicate concern that playing the beginning of the recording could alert the jury to the fact that Mr. Nutting was in custody at the time of the statement and asserted that such information

was prejudicial. (122:9) Attorney Hogan does not place upon the record any objections that information contained in the recording could be prejudicial or inadmissible for other content. District Attorney Krueger indicates that he intends to play the entire recording with two redactions, but does not identify those redactions or the nature of information he is seeking to exclude. (122:5) He indicates he will put the 'time frames' into the record. (122:5)(the trial record is devoid of any indication of what portions of the recording were played to the jury). A lengthy discussion ensues about whether or not the beginning portion of the recording where Nutting is read is Miranda rights should or should not be played. (122:11-12) There is no consensus reached on the record.

After the testimony of Detective Bartelt the State then played the audio recording of the custodial interview of Nutting. There is no record of what portions of the recording were played for the jury. However, Attorney Krueger tells the court: "It's my intent with the agreement of Mr. Hogan to play the majority of the recorded interview that took place between Bartelt and Mr. Nutting." (122:110) The audio is played to the jury and it is not transcribed by the court reporter. (122:114-15). A CD of the audio is marked as Exhibit 16. (122:114) No transcript was offered into evidence by the State. No notations are in the record of what portions of the recording were or were not played for the jury.

District Attorney Krueger indicates to the jury that "[t]he State intends to pay a copy of the majority of the recording that took place between Brian Bartlet and Scott Nutting on January 19, 2012". (122:116) There is no indication in the transcript that the recording was stopped and

started, or that there were any explanations given that certain parts of the recording were being omitted. (122:116)

During post conviction proceedings the audio recording was transcribed and marked as evidence. (103:Exh.1:1-78)

> p. 5. - Nutting indicates that he did two years for theft, indicates that he is on parole, and been in prison for 43 months for two cases
> p. 6 - Nutting indicates that he did two years for attempted possession of child pornography
> p. 22 - Nutting: "I had just got done doing 43 months in prison for something that I did not do. Okay. I never sat down and searched for child porn. I never looked at it."
> p. 22 - Nutting: "I'm telling the truth now again. I already know what is going to happen. I'm going to go right up the damn river this time and I did nothing this time. I did it the right way."
> p. 35 - Nutting: "Well, no technically according to my sex--my sex offender rules I'm not allowed to have sex unless approved by an agent."
> p. 35 - Nutting indicates, when asked, that having placed the profile pictures on the website is probably a rule violation of his probation.
> p. 45 - Nutting: "Because I'm already a sex offender, so my credibility is just shot. You know, I'm just a -- I'm just a piece of shit, you know, I'm just a pedophile. I'm -- that's a fear that I have when people look at me because of my track record, you know."

POSTCONVICTION FACTS

On February 13, 2017 a postconviction hearing was held, at which the defendant's trial counsel, Attorney Timothy Hogan testified.

Attorney Hogan testified that he did not file any motions in limine regarding the audio recording prior to trial. (126:15) Attorney Hogan recalled that he had not anticipated

that the State would be playing the recording at trial. (126:15) He also testified that he "didn't have any legal reason to believe it could not, I just did not anticipate that it would be played." (126:14). Attorney Hogan identified his notes and indicated that they contained notations of certain portions of the recording that were concerning to him. (126:18). Attorney Hogan also testified that he compared his notes with a note sheet of Attorney Krueger, to make sure that he wasn't going to play the portions of the interview that he remembered being an issue for the jury. (126:19).

When questioned about the portion of the recording during which the defendant had indicated he had 'just gotten done doing 43 months in prison for something I did not do' and a reference to 'child porn' (126, Exhibit 1, p. 22), Attorney Hogan indicated that he had "not specifically" noted that as a concerning issue, and that he did "remember at the beginning of the interview there was some discussion of what he had been in prison for. I don't think I took a specific note of it at later parts of the interview." (126:19) Attorney Hogan conceded that the statements made by the defendant regarding that he had been in prison for 43 months for something he did not do and had never sat down and searched for child porn were prejudicial. (126:21) Attorney Hogan also conceded that this information was not noted in the materials he had wanted excluded from the jury. (126:21)

Attorney Hogan also testified that references to the defendant's sex offender rules would be prejudicial to the jury. (126:21) And that the defendant's statements that placing his profile pictures on a website was a rule violation would also be prejudicial. (126:21). Attorney Hogan also indicated that the defendant's statements that he already was

a sex offender and that his credibility was shot would be extremely prejudicial as well. (126:21-22)

Even though he had not anticipated the state utilizing the recording, Attorney Hogan also testified that he did not consider requesting an adjournment once he learned that the recording was going to be played. (126:22) He also indicated that he had no specific recollection of whether the prejudicial statements had been played to the jury. (126:22).

Attorney Hogan also testified that he did not know if he was aware of the prosecution of S.K. prior to the start of trial. (126:23). He also indicated that he had not been provided with the victim impact statement that had been signed by the victim in this case, P.K. (126:23) Attorney Hogan also indicated that having the document prior to the start of trial would have probably been helpful in the preparation for trial. (126:25). Upon cross examination Attorney Hogan indicated that he believed the victim impact statement was "a statement that goes to her (P.K.'s) credibility." (126:30)

ARGUMENT

I. Trial court erred by not requiring that a record be made of the audio recording played to the jury comply with Wis. S.C.R. 71.01(1)(e) and related statutes, and because the defendant has a colorable need for a complete transcript, this court should grant the defendant a new trial.

It is clear from the record, that Nutting's trial counsel was caught off guard on the first day of trial, when the State indicated their intention to play the audio recording of Nutting's statement given on January 19, 2014. (121:19-21) On the second day of trial, December 11, 2014, the audio recording was played for the jury at the request of the State. (122:116) The State did not prepare a transcript of the audio recording. The State did not insure that the record sufficiently noted any start and stop times of any played portions of the audio. (122:116)

The recording was over one hour long, and contained following statements:

(103:Exh.1:1-78)

> p. 5. - Nutting indicates that he did two years for theft, indicates that he is on parole, and been in prison for 43 months for two cases
> p. 6 - Nutting indicates that he did two years for attempted possession of child pornography
> p. 22 - Nutting: "I had just got done doing 43 months in prison for something that I did not do. Okay. I never sat down and searched for child porn. I never looked at it."
> p. 22 - Nutting: "I'm telling the truth now again. I already know what is going to happen. I'm going to go right up the damn river this time and I did nothing this time. I did it the right way."
> p. 35 - Nutting: "Well, no technically according to my sex--my sex offender rules I'm not allowed to have sex unless approved by an agent."
> p. 35 - Nutting indicates, when asked, that having placed the profile pictures on the website is probably a rule violation of his probation.
> p. 45 - Nutting: "Because I'm already a sex offender, so my credibility is just shot. You know, I'm just a -- I'm just a piece of shit, you know, I'm just a pedophile. I'm -- that's a fear that I have when people look at me because of my track record, you know."

Trial counsel admitted that he had not anticipated the State playing the recording, and conceded that there was no legal basis for him to have reached such a conclusion. (126:14)

The statement of the defendant, regardless of its voluntariness or compliance with Miranda, contained several statements that were more prejudicial than probative. Wis. Stats. 904.03. That is beyond dispute.

The repeated references to child pornography, Nutting's sex offender status, Nutting's probation status, the term pedophile and sex offender rule violations while on parole were inadmissible pursuant to Wis. Stats. §904.03 because these references were clearly prejudicial and such prejudice overruled any probative value that the State may have asserted. Recently, this court addressed a similar issue in ***State v. Lewis***, 2016 WI App16, 366 Wis. 2d 808, 874 N.W.2d 346 (unpublished) (App. 206-11). In ***Lewis***, the trial court had denied the defendant's request to present testimony of his employer, because the State had indicated that upon cross-examination they would question whether the employer had done a back ground check and learned that the defendant was the sex offender registry[1]. Upon appeal, the trial court's determination was upheld. This court recognized in ***Lewis*** the clearly prejudicial effect that such evidence would have regardless of its permissible use (impeachment of the witness' credibility):

> Under Wis. Stat. § 904.03, when excluding relevant evidence when its probative value is substantially

[1] "The State was not going to impeach Lewis with his criminal past had the State cross-examined Bradley, but rather, it was the State's intent to impeach Bradley, who was involved in hiring a man listed on the sex offender registry." ***Lewis***, 366 Wis. 808 at ¶20.

> outweighed by danger of unfair prejudice, "[p]rejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means.'" ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399 (citations and one set of quotations omitted).
>
> Under the test for unfair prejudice, there can be no question that the jury would view Lewis's listing on the sex offender registry as a strong indicator of guilt in this case. In other words, the jury would have been influenced by improper means because ordinarily a jury would only be told the number of times an accused was convicted of a crime, not the actual crime.

Lewis, 344 Wis. 2d 808 at ¶18-19. So too in this case, the references in the audio recording of prison, prior convictions, child porn, and the term pedophile are so prejudicial that a fair trial cannot and could not be had.

Moreover, the indirect references to prior convictions, and the direct references to the prior prison terms and the nature of prior crimes are inadmissible under Wis. Stats. §904.04(2)(a) as prohibited other acts evidence. Wis. Stats. 904.04(2)(a) allows the admission of prior acts only in limited circumstances: "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Although the State has sought to supplement or reconstruct the record and thereby claims the most offending parts of the recording were not played, even accepting the State's claims it is clear that evidence of prison terms of 43 months and reference to child pornography[2] absolutely did go before the

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[2] Nutting's statements on p. 22 of the audio transcript (103:Exh 1:2) are not encompassed in the State's asserted portions of redaction. (103:Exh. 4) Those statements included: "I had just got done doing 43 months in prison for something that I did not do. Okay.

jury, and the law is clear that such was not admissible under the 904.04 exceptions.

The admission of the evidence was prejudicial to the defendant because from it the jury could have concluded that he was simply a 'bad' man and deserving of conviction regardless of his actual guilt. Legal prejudice "is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which is now charged." ***State v. Fishnick,*** 127 Wis. 2d 247, 261-62, 378 N.W.2d 272 (1985) (citing ***State v. Tarrell***, 74 Wis. 2d 647, 657, 247 N.W.2d 696 (1976).

This prejudice is compounded by the fact that there is no assurance beyond a reasonable doubt that the jury did not hear even more prejudicial evidence. And these errors are magnified by the rhetoric employed by the District Attorney. During closing arguments he referred to Nutting as an "evildoer" (122:160, 162, 164, 167, 190). Perhaps the State will argue such terminology is simply a persuasive tool of advocacy. Maybe that could be said in another context. However, when the jury has been exposed to prejudicial information that relates to prior prison terms and child porn and arguably to comments about sex offender registry, parole violations, sex offender rules, child pornography and the term pedophile…it is no longer an issue of persuasion but one of propensity, and such is not a permissible basis for the finding of guilt.

> I never sat down and searched for child porn. I never looked at it." And "I'm telling the truth now again. I already know what is going to happen. I'm going to go right up the damn river this time and I did nothing this time. I did it the right way."

Since no transcript or adequate notation in the record was made regarding the portions played, there is no certainty that prejudicial evidence was not improperly presented to the jury. The lack of an adequate record also makes it difficult for this court to determine if trial counsel was ineffective or if Nutting was denied his due process to meaningfully appeal.

The trial court in this case "accept[ed] responsibility" for the failure to adequately note portions played upon the record. (108:2) This combined with the trial court's assertion at trial that it would not have the court reporter transcribe the recording presents clear error. (122:114-15)

The State cannot overcome, and record makes clear that neither the District Attorney or the court complied with Wis SCR 71.01:

"Reporting" means making a verbatim record.

> All proceedings in circuit court shall be reported, except for the following:
> (e) Audio and audiovisual recordings of any type, if not submitted under par. (d), that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, ***the part played shall be precisely identified in the record***. The court may direct a party or the court reporter to prepare the transcript of a recording submitted under this paragraph. (emphasis added)

Wis SCR 71.01(1)(e).

The burden of proving no prejudice occurred is on the beneficiary of the error, here the State. The State must establish that there is no reasonable possibility that the error contributed to the conviction. ***State v. Sullivan,*** 216 Wis. 2d

768, ¶73, 576 N.W.2d 30 (1998) Absent such proof the only remedy is for this court to grant a new trial.

The State sought to supplement the trial record during the post conviction proceedings with a note that the State has implied identifies the portions of the audio record that the jury heard. (103:Exhibit 4) This exhibit was entered over objection of the defense. (126:50-51)

First, the State seeks to improperly supplement the record. It is improper to supplement the record with exhibits that were not previously entered before the court, and such action can be subject to sanction. ***State ex rel. Campbell v. Township of Delavan***, 210 Wis. 2d 239, 244, 565 N.W.2d 209 (1997). Second, permitting the State to enter into the record a belated notation of the portions of recording supposedly played to the jury converts the District Attorney to a witness in order to substantiate such notation. This is particularly true given that Attorney Hogan was unable to authenticate Exhibit 4. (126:38-40) Third, permitting the State to now, at this late date after the recording recording has been transcribed and provided, to belatedly identify the portions allegedly previously played to the court with no independent verification violates the defendant's right to due process. This court should ignore the supplementation entirely.

If this court finds that the admission of Exhibit 4 (108:Exh. 4, App. 205) to supplement or reconstruct the record was proper, Nutting still asserts that the requisite burden of a beyond a reasonable doubt has not been met. The defendant concedes that in a situation where the a portion of the record is missing, such as in the case of a missing transcript due to lost or corrupted court reporter notes, the

court may attempt to reconstruct the record. However, Nutting does not agree that such a process applies in this context, where the record was never made.

> In determining whether the trial court can resolve the dispute between the parties, the trial court must be satisfied to the same level of proof as required during the trial stage. In other words, in a criminal matter, the trial court must be satisfied *beyond a reasonable doubt* that the missing testimony has been properly reconstructed. In a civil case, the applicable level of proof must be met. We realize the substantial obligation this places on the trial court and recognize that a reconstructed record, after a lapse of several months, may be the exception rather than the rule. We also recognize that this is not a normal fact-finding process but is actually a process for refreshing recollection where the trial court is asked to accept one version over another. We conclude that this is all the more reason why a procedural safeguard is necessary to protect the appellant's right to a meaningful review. We therefore hold that if a trial court is unable to make a finding, using the requisite burden, the court should set aside the judgment and order a new trial.

State v. DeLeon, 127 Wis. 2d 74, 82, 377 N.W.2d 635, 639 (Ct. App. 1985)

The court may "rely on its own recollection and notes or materials from the parties as an aid to reconstruction" as well as "conduct hearings or consult with counsel" in making its determination. ***Id.*** It may not, however, "speculate about what the testimony probably was or might have been." ***DeLeon***, 127 Wis. 2d at 81. Rather, the court's "duty is to establish what the testimony was." ***Id.***

> Of course, every step of the heretofore described procedure is reviewable on appeal. Appellate courts may conclude, for instance, that the trial court abused its discretion in concluding that the missing portion of the transcript could be reconstructed. Should the trial court make a finding of fact and it is disputed by the appellant, the standard of review for reviewing this alleged error is the clearly erroneous rule. *See* sec. 805.17(2), Stats.

> Even if an appellate court finds error in the trial court's findings, harmless error may be found. See sec. 805.18(1), Stats.

State v. DeLeon, 127 Wis. 2d 74, 82, 377 N.W.2d 635, 639-40 (Ct. App. 1985)

Because there is no mechanism by which this court can be assured that highly prejudicial evidence was not presented to the jury, and because it is unrebutted that certainly the jury heard references to child pornography and prison terms of 43 months, a new trial must be granted to the defendant.

II. Trial counsel was ineffective for failing to anticipate that the audio of the defendant's interview would be played at trial and for failing to object to the playing of the audio recording as more prejudicial than probative, and to insure that an accurate record of the audio recording was made.

Trial counsel clearly did not anticipate that the State would be playing the audio recording of the defendant's statement at trial. (121-19-21) As the trial court quickly pointed out, he should have, because after all it was evidence.

> THE COURT: So why didn't you bring it to my attention before today?
>
> ATTORNEY HOGAN: I didn't know Attorney Krueger intended to play that entire recording before the jury.
>
> THE COURT: Well, it's evidence, isn't it? You should know. Okay. It's evidence. It can come in. You know, if the State-- if somebody has-- What you do is you file a motion to exclude part of it because it could be exculpatory, culpatory, whatever the case may be. You can certainly do that. I got none of that.

> So now I'm sitting here and now I'm being asked to take a recording which I never heard. As far as I'm concerned, it comes in. All right. That's I'm not going to sit there and take and compromise a panel of 43 jurors and then have to deal with this quite frankly and adjourn this case.
>
> This case has been noted for trial. It had a speedy trial demand. I've accommodated everything. Defense has begged to have this case tried and quite frankly I'm trying to do it right now and I'm trying to do it responsibly. I tried to do it on January 2 but I was asked to change it. I did that. All right. There's no surprises in the scheduling of this. And the preparation of it quite frankly it falls into the attorneys' laps. If they're prepared to go, fine. If they aren't, we're still going. All right. This is their day in court.
>
> Anything else on this? State plays the recording.

(121:20-21)

In Wisconsin, the standard for a claim of ineffective assistance of counsel is that counsel's representation was not equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to a client who had privately retained his services. ***State v. Davis***, 114 Wis. 2d 252, 255, 338 N.W.2d 301, 302-03 (Ct. App. 1983); ***State v. Felton***, 110 Wis.2d 485, 500-01, 329 N.W.2d 161, 168 (1983).

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 711 (1985). An attorney's performance is deficient when it falls below an objective standard of reasonableness. ***Strickland*** at 686. To

demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

The determination of whether counsel was ineffective involves a mixed question of fact and law. ***Davis,*** 114 Wis. 2d. at 256, 338 N.W.2d at 303. The trial court must first make findings of fact regarding trial counsel's actions. Next, the trial court must find what an ordinarily prudent lawyer would have done. ***Id.***

During the investigation the defendant was interviewed by investigators and an audio recording was made of that interview. On the day of trial defense counsel indicate surprise that the State intended to submit the recording as evidence and play it for the jury. There was no transcript prepared by either the State or defense counsel. The defense objected to the court permitting that the entire recording be played because the recording contained prejudicial information that was likely not relevant and therefore inadmissible, and if admissible was too prejudicial to be probative. There were discussions that perhaps the State and defense would reach an agreement of the portions of the recording to be played. On the second day of trial, February 11, 2014, the recording was played to the jury. The record notes that the State intended "to play a copy of the majority of the recording that took place between Brian Bartelt and Scott Nutting on January 19, 2012 at about 8:00 a.m." (122:114)

Although the trial court's post conviction decision indicated that "trial counsel should be commended for his due diligence and exemplary representation of the defendant"

(108:3), it is clear that prior to trial the court clearly found that trial counsel had dropped the ball. The audio recording was provided to the defense as part of discovery. There was no reason for trial counsel to assume that the recording could not be played to the jury absent objection. Trial counsel recognized that the recording contained prejudicial information (although he did not note all of the prejudicial portions). Counsel did not file a motion in limine to address the admissibility of the recording prior to trial. At trial, counsel did not specifically address the prejudicial portions (other than the mention that the defendant was in custody) with the court, once it became clear that the recording would be offered by the State. This is clearly deficient performance.

Recently this court addressed a similar failure on behalf of trial counsel to contemporaneously object to testimony which was both prejudicial and inadmissible as other acts. In ***State v. Pritchard***, 2016 WI App 88, 372 Wis. 2d 458, 888 N.W.2d 246 (App. 212-17) this court found that trial counsel's failure to object to impermissible character testimony required a new trial.

In ***Pritchard***, the defendant was charged with battery by a prisoner, repeater. The defendant, when being moved within an institution, allegedly struck an officer with his elbow. A videotape was entered into evidence and played to the jury. This court found that the videotape was not conclusive evidence of guilt or innocence, and thus did not adopt the trial court's finding of harmless error.

During testimony, one correctional officer testified that when he learned of the disturbance in the facility and that it involved the defendant made the following statements:

> When I heard it was Mr. Pritchard, because of past dealings with Mr. Pritchard I knew what precautions I had to take. I told my lieutenant to go down and address the situation. I went to the institution armory on Unit 18 and obtained the Taser…and that based on past experience I've had with the individual.

Pritchard, 372 Wis. 2d 458 at ¶4.

This court found that those unobjected to and impermissible comments, particularly given that there was no curative instruction given, and compounded by the district attorneys references to the inference of dangerousness, were prejudicial and required a new trial. ***Pritchard,*** 372 Wis. 2d 458 at 29.

The very same errors and concerns are present here in this case. Counsel did not anticipate and did not object to the admission of the recording. Once it became clear that the recording was going to be offered by the State, counsel's only voiced concern was that he didn't want the jury to learn that Nutting had been in custody at the time of the interview. Counsel did not note later prejudicial information contained in the recording (126:19) or request a curative instruction. Just as this court found the performance of trial counsel in ***Pritchard*** deficient, so too this court must find Nutting's trial counsel deficient. There is no credible basis on this record to find otherwise.

Counsel's deficient performance was also prejudicial. While the analysis is made on a case by case basis, again the ***Pritchard*** case provides helpful guidance. This court determined that the error, combined with the lack of a curative or guiding instruction from the court to the jury, along with the state's reference of the impermissible evidence

constituted prejudice requiring reversal. ***Pritchard,*** 372 Wis. 2d 458 at 29.

Those same errors and concerns are present here. There was no objection, there was no instruction, and the District Attorney's repeated reference to Nutting as an 'evildoer' only highlighted the prejudice that the admission of references to 43 months in prison and child porn created. As noted previously, even if this court accepts the State's assertions that Exhibit 4 (103:Exh. 4) accurately identifies the portions of the audio recording played at trial (an assertion which the defendant vehemently challenges), it is unrefuted that at a minimum the jury heard the following statements: Those statements included: "I had just got done doing 43 months in prison for something that I did not do. Okay. I never sat down and searched for child porn. I never looked at it." And "I'm telling the truth now again. I already know what is going to happen. I'm going to go right up the damn river this time and I did nothing this time. I did it the right way."

It is well settled law that the trial court must determine whether counsel's representation fails to match that of the ordinarily prudent lawyer. This determination is a question of law, and an appellate court on review owes no deference to the trial court on a question of law. ***Davis*** at 256, 338 N.W.2d at 303. Therefore, regardless of the trial court's determination that trial counsel performed admirably, it is clear that he did not.

The trial court erred when it found any error to be harmless. The trial court found that even if counsel's performance was deficient, even if it was error to fail to make a record of the audio recording, any errors were harmless. (108:2) The court then relies on what it describes as the

'compelling and persuasive DNA evidence[3]" to support such a finding. The problem with that rationale, is three fold: first, the DNA evidence was not placed before the jury, second the DNA results were not conclusive, and third Nutting abandoned the claims related to the testing of the SANE kit.

It is clear that the errors of counsel and of the trial have prejudiced Nutting. This court can have no confidence of just how much prejudicial information the jury heard. And there can be no credible argument that it was not ineffective of assistance of counsel for trial counsel to presume that an audio recording of Nutting's statement would not be proffered by the State. The failure of counsel and the court to meaningfully address the inadmissibility of the prejudicial statements undermines any confidence that the verdict should stand. In this case, it was a case of he said/she said. References to prison and child pornorgraphy – which are prejudicial, irrelevant and inadmissible – are the very prejudicial errors that impermissibly tip a verdict. This court, as it did in ***Pritchard*** should order a new trial.

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[3] During the post conviction proceedings Nutting had initially made a claim under Wis. Stats. 974.07 regarding the testing of a SANE kit. (This claim was later abandoned once the testing was completed). The State had the SANE materials tested in advance of the hearing (denying the defendant the opportunity for third party testing). Eventually the SANE test results were compared against Nutting's standard. The results found that Nutting's Y-STR DNA was consistent with a mixed Y-STR DNA profile from the kit. The Y-STR DNA profile was not expected to occur more frequently than 1 in every 494 in the Caucasian population. (108:8-9) The population of Green Bay, Wisconisin, as of the 2010 census, was 104,057 (https://en.wikipedia.org/wiki/List_of_United_States_cities_by_population); of which 78% were Caucasian (http://worldpopulationreview.com/us-cities/green-bay-population/).

III. The trial court erred and did not follow the law when it denied the defendant's request for an instruction advising the jury that the offer to take a lie detector test may be an indicia of innocence.

The trial court erred when it disallowed evidence of Nutting's offer to take a lie detector test. Trial counsel asserted that the court should have instructed the jury that Nutting's offer to take a lie detector test could be considered an indicia of innocence. (27:1-2) The Wisconsin Supreme Court has held that when a defendant makes an offer to take a lie detector test is made, that the offer to take such a test (whether one was actually taken or not) may be admissible to show the defendant's state of mind. ***State v. Hoffman,*** 106 Wis. 2d 185, 217, 316 N.W.2d 143, 160 (Ct. App. 1982). While trial counsel made the requisite motion, the trial court did not apply the law properly and erred in denying the defendant's request[4].

The trial court although cognizant of the case law, expressed repeated disagreement with the Wisconsin Supreme Court rulings and did not follow either the procedure or the test to determine if the jury should be instructed that the defendant's offer to take a lie detector test could be considered as an indicia of innocence.

Had the court followed the law, an instruction should have been offered that advised the jury that they could, but

[4] Also, if this court adopts the State's version of what portions were allegedly played to the jury (103:Exh. 4), then the offers made by Nutting to take a lie detector test and/or DNA test were not played to the jury, which Nutting asserts compounds the cumulative prejudice of the errors in this case. See ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

were not required to consider the offer to take a lie detector test as an indicia of innocence. The following is an example of a proposed instruction that would be given to the jury regarding the offer to take the lie detector test:

- Evidence has been presented regarding the defendant's offer to take a polygraph (lie detector) test. Whether a polygraph (lie detector) test was taken and what the results of that test maybe are not admissible under law.[5] You may consider that the offer to take a polygraph (lie detector) test as an indicia of innocence[6], but you are not required to do so.

Because the court did not follow the law and because the error was prejudicial, this court must reverse.

IV. The trial court applied the wrong analysis in denying the defendant's motion for a new trial based on Brady violations, and this court should grant a new trial.

It matters not whether the State acted in bad faith or good faith, the failure to turn over favorable evidence denied Nutting due process and requires a new trial. It cannot be better explained than by the U.S. Supreme Court, which held in ***Brady v. Maryland,*** 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963):

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[5] ***State v. Ramey***, 121 Wis. 2d 177, 359 N.W.2d 177 (Ct. App. 1984); ***State v. Dean***, 103 Wis. 2d 228, 307 N.W.2d 628 (1981)

[6] ***State v. Santana-Lopez***, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918, ***State v. Hoffman***, 106 Wis. 2d 1185, 316 N.W.2d 143 (Ct. App. 1982)

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.

Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)(internal citations omitted.)

The State has argued that the failure to turn over the Victim Impact Statement and other evidence that would have impeached the credibility of P.K., or provided a motive for either P.K. or her mother S.K. to lie, was not Brady material simply because the defense had already placed the credibility of the victim P.K. at issue during the trial. This argument has no support in the law and is not sound logic. In other words the State is asserting that any time a defendant places the credibility of the victim at issue, any information in the State's possession that impeaches the victim and therefore is favorable to the defendant thus constituting Brady material (***State v. Harris,*** 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737), suddenly loses is "Brady" nature simply

because the defense has already attacked the credibility of the victim. If this were the law, then the State would merely need to wait until a defense attorney cross examines a officer during a preliminary hearing seeking to cast doubt on the credibility or accuracy of the complaining victim's statements to be relieved of their statutory and constitutional duty to turn over Brady material.

Impeachment evidence has been recognized to fall within the Brady rule in ***Giglio v. United States,*** 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972). The court held: "When the 'reliability of a given witness may well be determinative of guilt or innocence', nondisclosure of evidence affectivity credibility falls with this general rule. ***Id,*** (quoting ***Napue v. Illinois,*** 360 U.S. 263, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1950)). This type of evidence has been referred to as 'exculpatory impeachment' evidence. ***United States v. Ruiz,*** 536 U.S. 622, 628, 153 L. Ed. 2d 586, 122 S. Ct. 2450 (2002).

At trial, the evidence presented a classic 'he said, she said' case. There was no DNA evidence offered, no eye witnesses, no confession. The defendant denied that the assault occurred. P.K. asserted that an assault occurred. Clearly both P.K. and Nutting could not be telling the truth. Credibility was and remains the crucial factor in determining guilt. In determining the credibility of a witness the jury is to consider whether 'witness has an interest or lack of interest in the result of the trial'. Wis JI-Criminal 300. In this case the State's failure to disclose to the defense that P.K. had been placed out S.K.'s home prevented the defense from being able to meaningfully impeach both P.K. and S.K., since both of them had a motive to cooperate with the State in the hopes of eventual reunification. The Wisconsin Supreme Court has

found that evidence of a victim's credibility, can warrant a new trial. See ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305.

The jury is also to weigh all facts that tend to either support or discredit a witness' testimony. Wis JI-Criminal 300. In this case the State withheld a Victim Impact Statement authored by P.K. in support of S.K., in which P.K. indicated that she was the one who had 'mass (sic) up by lieing (sic)'. The State argues that since the defense had raised the issue of credibility at trial, the undisclosed Brady material was no longer useful, and that therefore the failure to disclose it was not a violation. But this argument fails to recognize that determining the weight of evidence is not a mathematical equation. "The weight of evidence does not depend on the number of witnesses on each side." Wis JI-Criminal 190.

As indicated above, S.K. was the mother to P.K. The State did not disclose prior to the first day of jury trial that their office had charged S.K. on October 13, 2013 with Failure to Protect a Child pursuant to Wis. Stats. §948.02(3) in Case No. 13-CF-523. As a result of the filing of that Criminal Complaint and subsequent Information, the Fond du Lac District Attorney's Office received on October 25, 2013 a Victim Impact Statement which was completed by P.K. In this statement P.K. admitted that "I am the one that mass (sic) up by lieing (sic)..." This Victim Impact Statement was never provided to Nutting's defense counsel as it should have been.

This information constituted Brady material, because it called into question the credibility of the main complainant, P.K., based upon her voluntary, written admission that she had been lying. This case was based upon the testimony of

P.K. who asserted that vaginal, anal and oral sexual assault had occurred. This assertion stood in stark contrast to the statement of Nutting given to officers that no sexual contact took place.

This statement constituted favorable information to the defendant because it constituted evidence that would have cast doubt on the credibility of the State's primary witness. Failure to provide this information violates Wis. Stats. §971.23 and constitutes a Brady violation. See ***State v. Harris***, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737. A prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf. ***Kyles v. Whitley,*** 514 US 419, 437, 115 S. Ct. 1555 (1995). Furthermore, the District Attorney is presumed to know the contents of his file, even if he actually overlooked them. ***U.S. v. Agurs,*** 427 U.S. 97, 110, 96 S. Ct. 2392 (1976).

State did not explicitly inform the defense that the alleged victim had written a statement indicating she was responsible for the situation because she was lying, that the victim was placed out of her parental home because of her behaviors and did not inform the defense that the victim's mother had been charged with a crime. Nutting asserts that the cumulative effect of the State's failure to provide what is at a minimum potentially exculpatory evidence can only be remedied by the grant of a new trial.

V. This court should grant a new trial in the interests of justice because there can be no confidence that there was a fair trial.

This case is replete with errors. First an audio recording was played to the jury and we have no record of

what was or was not heard by them. Trial counsel clearly was taken aback by the State's intention to play the audio tape, and was ineffective for not having anticipated that the tape would be proffered as evidence. So on the day of trial, there was no meaningful analysis of what portions should or should not be played. While trial counsel believes he would have objected had he heard anything prejudicial (although he cannot remember what portions were or were not played), this assertion should give this court little confidence.

These errors are compounded by the trial court's failure to follow the law and meaningfully address the request for a jury instruction regarding the offer to take a lie detector test. In a case such as this where the real essence is 'who do we believe and why', the jury should have been instructed that they could have viewed the offer to take the lie detector test as an indica of innocence, but did not have too.

And there are the Brady violations. Information was known to the government, under the control of the government and was never provided to the defense. The State never provided the victim's written admission that she 'mass up by lieing'. And only at trial did defense counsel learn that the government had placed P.K. out of her mother's home, and that both P.K. and S.K. were under court orders. What greater motive is there for fabrication than the desire for a mother and daughter to reunite?

Even if this court finds that these errors, each one by itself does not warrant a new trial, collectively viewed a new trial must be granted. Individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect. See, e.g., ***United States v. Dwyer***, 843 F.2d 60, 65 (1st Cir. 1988); ***Dunn v. Perrin***, 570

F.2d 21, 25 (1st Cir.), cert. denied, 437 U.S. 910, 57 L. Ed. 2d 1141, 98 S. Ct. 3102 (1978); cf. ***United States v. Samango***, 607 F.2d 877, 884 (9th Cir. 1979) (employing cumulative error doctrine to invalidate results of grand jury proceeding)).

The Wisconsin Supreme Court has specifically addressed the issue of how to calculate prejudice arising from multiple deficiencies when the specific errors, evaluated individually, may not satisfy the prejudice standard:

> Several circuits of the United States Court of Appeals have addressed the appropriateness of looking at the cumulative effect of multiple instances of deficient performance by counsel when assessing prejudice. The consensus appears to hold that when a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. See ***Washington v. Smith***, 219 F.3d 620, 634-35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under ***Strickland***, rather than the individual errors."); ***Harris v. Wood***, 64 F.3d 1432, 1439 (9th Cir. 1995). Although some circuits have decided to the contrary, we adopt the reasoning of the courts that have held that prejudice should be assessed based on the cumulative effect of counsel's deficiencies.

State v. Thiel, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." ***Brady***, 373 U.S. at 87.

Dated this 24th day of August, 2018.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,207 words and 36 pages.

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INDEX TO APPENDIX

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

I have submitted an electronic copy of this brief/petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of August, 2018.

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