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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

REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. The record has not been reconstructed to the requisite level of 'beyond a reasonable doubt' and this court should grant a new trial.

The following is conceded by the State:

1. The tape played to the jury during trial was not transcribed, nor were there notations made of any portions that were allegedly played. (State's Brief at 21)
2. The defendant has established a "colorable need". (State's Brief at 16).
3. The jury at a minimum heard prejudicial references to prior convictions regarding "child porn" and having "served 43 months" (State's Brief at 17).[1]

The State has argued that the record has been adequately reconstructed, and that the trial court's determination to that effect should be reviewed pursuant to an erroneous exercise of discretion. (State's Brief at 13). This is the correct standard when reviewing the trial court's finding of facts, but is not the correct standard in determining whether the trial court properly applied the law. In reviewing whether the trial court properly applied the law this court reviews such a determination de novo. ***Betthauser v. Medical Protective Co.***, 172 Wis.2d 141, 146, 493 N.W.2d 40, 41 (1992). (Issues

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[1] The relevant portion of the audio indicates: "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." (103:Exh.1:22)

involving the interpretation of statutes and the application of statutory and case law to the facts of the case are reviewed de novo, owing no deference to the trial court's conclusions.) The law requires that the record to be accurately reconstructed to a confidence of beyond a reasonable doubt, See ***State v. DeLeon***, 127 Wis. 2d 74, 82, 377 N.W.2d 635, 639-40 (Ct. App. 1985)

In ***State v. Perry***, the Wisconsin Supreme Court held that "Whether a transcript is sufficient under appropriate standards to serve its necessary purpose on appeal is ultimately a matter of law for the appellate courts. Moreover, the transcript being a "document," it may be evaluated as well by the appellate court, perhaps better than by the original tribunal. ***State v. Perry***, 136 Wis. 2d 92, 97, 401 N.W.2d 748, 750-51 (1987) citing ***Delap v. Institute of America, Inc.,*** 31 Wis. 2d 507, 143 N.W.2d 476 (1966). Therefore, whether the record has been accurately reconstructed beyond a reasonable doubt is a matter of law reviewed de novo by this court.

Although the State relies heavily the on the trial court's determination, the State fails to acknowledge that the trial court itself had a very faulty memory as to the original trial despite the court's assertions to the contrary. During the September 30, 2016 post conviction hearing, the court while summarizing the issues for post conviction hearing asserted as follows:

> "…there was an additional collateral matter having to do with a very abbreviated audio recording that was – that was offered at trial that was presented on the second day of trial that included – that involved, given the court's very clear recollection, a very abbreviated short question.

(125:4)

The district attorney corrected the trial court indicating "I think that the – maybe the characterization of the recording being brief may not be accurate, but there were excerpts played, they weren't identified…" (125:5) The audio recording was quite lengthy as established by the transcript, which reflects that the audio recording exceeded an hour with a total length of 1:06:38. (103:Exh.1:1-78)

The State has argued that the trial court's post-trial ruling should be upheld because the trial court 'relied on its own recollection' in determining that the record was adequately reconstructed and that defendant suffered no prejudice. (State's Brief at 16). However, the District Attorney's correction of the trial court's recollection during the post conviction proceedings (125:5), makes clear that the trial court's recollection is not accurate, and thus should not be afforded the weight and confidence that the State has argued.

More troublesome, is that trial court asserted before the record was even reconstructed that no prejudicial information came before the jury: "In the end, the record in this case speaks for itself. I'm not going to question the fact that there's no transcript, there's no markings. Okay. But I presided over this and I was the judge and as I indicated previously I'll reaffirm now that there was nothing prejudicial that was addressed." (126:10) Of course, the difficulty with that assertion is that there is no means by which Nutting can assess or challenge the recollection of the court.

The State then argues that the testimony of trial counsel, Attorney Hogan, confirms that no prejudicial information came before the jury. But this is not what the

record presents. (Nutting's Brief at 12 and 13) In fact Attorney Hogan testified that he had no specific recollection of whether the prejudicial statements had been played to the jury. (126:22).

II. Trial counsel was ineffective and a new trial should be granted.

The State argues that there was no ineffectiveness because there was no 'legal reasons that the State could not play the recording'. (States Brief at 23) However, this statement fails to recognize that prejudicial evidence, even if admissible and even if relevant, should be excluded when it threatens to influence the jury by improper means. See ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. (See also Nutting's brief at 15-16). And Attorney Hogan's failure to recognize that was deficient.

The State then argues that there was no prejudice because the trial court determined that there was no prejudicial evidence played to the jury. (State's Brief at 25) This ipse dixit rationale provides the sole basis for the State's claim that no prejudice occurred. But this circular reasoning cannot bear the test of rational objective review.

The State's argument highlights that the trial court's memory is not infallible (as discussed above) and under these circumstances it is un-testable. This is the very reason why reconstructed records are the exception rather than the rule, and why in this case prejudice should be presumed because there is no objective means by which we can determine what was and was not heard by the jury.

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

The State strains reason when it asserts that Nutting never addressed with the court whether a jury instruction regarding the offer to take a lie detector/DNA test be offered. (State's Brief at 28). Prior to requesting such an instruction, the evidence at trial must support such a request. Nutting made such a request in the form of a motion that was heard by the court. (27:1-2; 120:4-6) It is clear on the record that trial counsel did request that the court permit the defense to offer evidence of Nutting's offer to take the lie detector/DNA test. (Nutting's Brief at 4-5; 120:4-6). The court acknowledged the controlling case law, did not grant the motion, and as a result Nutting was denied a reasonable and powerful defense…that he had offered to take a lie detector/DNA test and that such an offer was an indicia of innocence.

For this court to adopt the State's reasoning, that Nutting waived this argument because he never requested a jury instruction…despite having requested that the court permit the entry of the very evidence which would substantiate such a jury instruction request…would elevate form over substance and semantics over justice.

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.

The State asserts that there was no Brady violation because the evidence that was withheld was not "favorable or material". (State's brief at 30) This assertion is without

foundation. A statement by the victim that she "massed (sic) up by lieing (sic)" and evidence that the victim was placed out of home at the time of trial, and evidence that the victim's mother (a key state witness at trial) was subject to criminal charges arising from the alleged conduct at issue, is both favorable and material. All of this evidence is relevant to credibility, is evidence of a motive to lie and fabricate, and evidence of coercion to cooperate with the State for purposes of achieving reunification (in the CHIPS case) or a lighter criminal sentence (for the victim's mother). Simply because witness credibility was challenged in the context of cross-examination by other means, does change the Brady character of the withheld evidence nor alleviate the State of its duty to turn over the evidence.

Our Supreme Court has recognized and reached a conclusion different than that advanced by the State:

> The United States Supreme Court has recognized that "when the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the Brady] rule." The Court has stated that 1our cases make clear that Brady's disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness.

State v. Harris, 2004 WI 64, ¶29, 272 Wis. 2d 80, 680 N.W.2d 737 (internal citations omitted).

The State claims that Nutting has not established how the withheld Brady evidence could have changed the result of the trial. (State's Brief at 31). The State fails to recognize that the determination of credibility is often a weighing of competing evidence. And in a case such as this, where the claim is solely based upon the credibility and believability of two claimants…a victim who says "he did" and a defendant

who says "he did not", evidence that the victim has both admitted to being untruthful and evidence that the victim may feel coerced to cooperate with the State, is relevant.

The culmination of this Brady evidence along with the impeachment of the victim's testimony at trial, reasonably undermines any confidence in the verdict. This court should grant a new trial, because the cumulative effect of the State's failure to turn over the Brady evidence kept from the jury important, additional discrepancies that related to the very core of the verdict…was the victim's claim of sexual assault true? ***State v. Thiel***, 2003 WI 111, ¶¶73-74, 264 Wis. 2d 571, 665 N.W.2d 305.

The State withheld information that was key to the defense, and did not inform the defense that the victim had admitted in writing to lying, had been placed out of her home and that the victim's mother was subject to criminal charges at the time of her testimony. The State argues that this information isn't relevant and wouldn't have changed anything, but in a case such as this…reasons to lie do change the perception of a witness's testimony…and it is upon the sole issue of credibility that a verdict in this case turns.

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.

The State's primary argument in this case rests on a repeated refrain "even if"…even if the jury heard prejudicial evidence, even if the Brady information had been turned over, even if counsel was deficient…they then conclude that because Nutting 'is' guilty there was no prejudice. It is this very type of reasoning, that fails to address the repeated errors of both procedure and law, that undermines both the

confidence and pride that we as citizens invest in our justice system.

Dated this 7th day of January, 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 2,263 words and 8 pages.

Dated this 7th day of January, 2018.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

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 7th day of January, 2018.

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