STATE OF WISCONSIN

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

DISTRICT I

Appeal No. 17AP002480CR
Milwaukee County Cir. Court Case No. 2014CF3661

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MARTEZ C. FENNELL,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY BRANCH 30, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN PRESIDING

REPLY BRIEF AND ATTACHED SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. FENNELL HAS MET HIS BURDEN TO RECEIVE A *MACHNER* HEARING

The alleged deficiency

The key alleged deficiency is: not presenting for the jury's consideration admissible, credible, defense-critical impeaching evidence on the key issues of the case: the accuser/victim's credibility and the (un)reliability of her facial identifications of Fennell as the gunman and other testimonial statements. [1]

This allegation alone warrants a *Machner* hearing. *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct.App. 1994).

So does the allegation that deficient was counsel's failure to ensure Officer Winkelmann's availability to testify, contrary to the State's suggestion that *not* subpoenaing Officer Winkelman was reasonable, at p.11.

Officer Winkelmann's defense-critical evidence was accessible to the defense. Counsel had a copy of the Report. To introduce it into evidence, he needed only -- per standard practice -- to subpoena Officer Winkelmann pre-trial. It was unreasonable *not* to take this reasonable, standard step.

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[1] The victim's statement to Officer Winkelmann was also inconsistent with her testimony in that the victim told the Officer that the gunman "snatched" her phone from her hand (R. 40:5), but she testified that he "knocked out" the cell phone "out of her hand." (R.67:96-97, 115-116.) Because the testimony departed from the initial statement to the Officer in *multiple* ways -- so *multiple* testimonial mis-statements could be refuted/impeached by *multiple* prior inconsistent statements to the Officer -- the victim's credibility would have been effectively impeached.

"Effective defense" counsel has the duty "to do all within his power to see to it that his client and witnesses he intends to call are punctual in their attendance at court." ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Sec. 1.2, Commentary at 179 (1971).[2]

"Effective counsel" would have done "*everything in his power"* to ensure Officer Winkelmann's availability to testify, including a defense subpoena pre-trial.

Here, counsel failed to take the most basic step to secure this defense-critical witness' availability, depriving Fennell of defense-critical evidence. Such conduct, singly and cumulatively, was unreasonable.

Nor was it "strategic" to rely solely on the State to ensure the availability of Officer Winkelmann to give defense-critical testimony. *State v. Felton*, 110 Wis.2d 485, 507, 329 N.W.2d 161, 171 (1983) ("Strategy" connotes "a rational determination of a course of action based on pertinent law and facts.").[3] It was in the State's interest to *not help ensure her availability to testify for the defense*.

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[2] The Supreme Court expressly approved the 1971 ABA Project on Standards For Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function, as a measure for evaluating counsel's performance; and stated that effective counsel "must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." *State v. Harper*, 57 Wis.2d 543, 557, passim, 205 N.W.2d 1 (1973).

[3] Officer Winkelmann was on the State's Witness List and Counsel told the trial court that he had hoped this would make her available to be called and testify for the defense; and also "hoped" that a late during-the-trial defense subpoena would ensure the Officer's appearance – but it did not, because it was not properly served and the court lacked authority to order a body attachment. (R.69:3, 426-27; R.39:12-13.)

Defense counsel should have taken *his own standard course of action* to secure the Officer's availability: a pre-trial defense subpoena.

The alleged prejudice

The alleged prejudice is this: "all relevant facts" were not developed through the examination of "all persons who [had] relevant information." *State v. Gilbert,* 109 Wis.2d 501, 505, 326 N.W.2d 744 (1982) (identifying the core principle of the adversary system). Factual determinations were unreliable because the victim's credibility and the reliability of her identifications (and other incriminating testimony) -- through eminently impeachable -- were never properly tested or impeached before the jury.

A fair trial in this adversarial system is one in which all the relevant facts are properly developed and the real controversy is fully tried. Id. This happens when the jury can reliably decide -- in light of all relevant, admissible evidence bearing on this always-crucial issue -- whether the accuser-victim is credible and her identifications (and other testimonial assertions) are reliable. See *State v. Poellinger*, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990) (jury determines the weight and credibility of the testimony and of witnesses).

During Fennell's trial, contrary to the principles of fairness in this adversary system, the jurors were unable to reliably assess the credibility of all relevant witnesses, thus reliably to decide "all relevant facts" -- in light of all relevant, fully-presented evidence. The victim's credibility was not fairly tested (by the defense) or assessed (by the

jury), because *the crucial credibility-material defense-critical* evidence was *withheld from the jury*.[4]

This alleged layered prejudice warrants a *Machner* hearing.

II. FENNELL'S CONVICTIONS ARE MULTIPLICITOUS.

The Response fails to deny or rebut that "vehicle" (an element of driving without owner's permission) is "property" (an element of robbery). It should be deemed admitted that these are interchangeable concepts, for the purposes of this multiplicity argument.

The Response also never rebuts or denies Fennell's arguments at pp. 14-16, that the crime in Count 1 could not have been committed without also committing the crime in Count 2, so *element-wise* Count 2 is wholly contained within Count 1; and factually, Count 2 was included within, Count 1: the same underlying conduct is alleged, occurring at the same location, date, and hour; and the "core focus" of each crime is the same.

Finally, the Response neither denies or rebuts Fennel's argument that factually the two counts were identical when the robber took -- with the vehicle -- also A.R.'s *keys* (to drive the car away) and *purse* (unnoticed behind the driver's seat); or that the *keys are part of* the vehicle: jointly they are the operable property/vehicle that

[4] In the Response, at pp. 12-13, the State argues as though the jury's inalienable prerogative -- of determining witnesses' relative credibility -- were negligible; or as though the State itself could now, retrospectively, make these determinations *in loco juris.* Because these are inalienable jury functions, crucial for fair prosecutions, these arguments fail.

was taken/driven away; or that the purse was carried away without the requisite ill intent.

Therefore, the above claims should be deemed admitted. *State v. Chu*, 2002 WI App 98, P41, 643 N.W.2d 878 (argument admitted when not rebutted or responded to).

III. THIS COURT SHOULD EXPEDITE THE SUPREME COURT'S RECONSIDERATION OF *AVILA* IN LIGHT OF THE TWO STUDIES.

The Response does not deny or rebut that the Two Studies *disprove* the factual determinations of the Wisconsin Supreme Court in *State v. Avila*, 532 N.W.2d 423, 429 (1995);[5] or Fennell's factual assertions about the validity of the Two Studies' scientific methodologies; the import of the Two Studies' conclusions, etc. These facts and assertions should be deemed admitted. *Chu*, 2002 WI App at P41.

The State expressly admits, at pp. 3, 23-24, that the Supreme Court alone may reconsider/overrule *Avila*.

In light of the above admissions, Fennell asks this Court to help present *Avila* for the Supreme Court's review (in light of the Two Studies) in *this* case, and expedite such review by certifying this issue to the Supreme Court.

The Two Studies now show, in a scientifically-valid manner, that the Dual Directives have a burden-reducing effect -- a different effect than the Supreme Court concluded them to have in *Avila*. [6]

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[5] Based on a linguistic/legal analysis, the *Avila* court determined that "it is not reasonably likely" that JI-140 (including the Dual Directives) would reduce the State's burden of proof. Id. at 429.

[6] Notably, the State does not deny or refute the merits of these claims claim about the substance or import of the Two Studies, thus

The Supreme Court should promptly exercise its judicial prerogative of clarifying whether the Two Studies require that *Avila* be amended or overruled. Wisconsin deserves clarity in the law; and to have jury instructions comporting with constitutional due process *as well as empirical data*.

Fennell asks this Court to expedite the review of *Avila* by certifying this issue. [7]

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admits Fennell's . *State v. Chu,* 2002 WI App 98, P41, 643 N.W.2d 878 (assertion admitted when not rebutted or responded to).

[7] The State submits, at Footnote 3, p. 24, that this Court should not aid the review of this issue by the Supreme Court, because the Supreme Court should review the *Avila* decision in a case where JI-140 is first unsuccessfully challenged in trial court and a "factual record is fully developed in the trial court." No valid rationale exist for this suggestion, where the factual questions to be "developed" in the "factual record" are: how do the Dual Directives *in empirical fact* -- developed in the Two Studies -- cause jurors to understand the State's burden of proof and cause them to cast guilty/non-guilty votes (hereafter "the Factual Issue"). Such "*factual record" regarding the Two Studies cannot be reasonably developed in trial court or the court of appeals*. Regarding the factual data available through the Two Studies – of how the Dual Directives *in empirical fact* cause jurors to understand the State's burden of proof and cause them to cast guilty/non-guilty votes -- those lower tribunals must, and will, defer to the Supreme Court's findings and determinations in *Avila*. *Cook v. Cook*, 208 Wis. 2d 166, 189-190, 560 N.W.2d 246 (1997). As in Fennell's case, so in all other cases addressing this issue: the trial and appellate courts must defer to the findings and determinations of *Avila*. Id. *Stare decisis* guarantees that no factual record can be developed on the Factual Issue in courts lower than the Supreme Court. There is also no point in first presenting the Factual Issue for Supreme Court review in a case where it is raised and denied in trial court and/or court of appeals, on stare *decisis* grounds. Neither of those courts will address or independently resolve the merits of the Factual Issue. Id. So there is

IV. THE SENTENCING COURT ERRONEOUSLY EXERCISED SENTENCING DISCRETION

The Response does not rebut or deny that the sentencing court failed to perform individualized sentencing or give any weight to mitigating factors. These claims are deemed admitted. *Chu,* 2002 WI App P41.

The Response, pp. 24-27, claims that the sentencing court properly exercised discretion simply because it relied on the primary sentencing factors.

But minimal compliance with this *most basic* tenet of sentencing discretion -- without any individualization or consideration of mitigating factors -- does not satisfy the law. See e.g. *State v. Gallion*, 2004 WI 42, ¶ 29, 48, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996).

Fennell has not received individualized sentencing or a sentence stemming from a proper consideration of the applicable mitigating factors. He deserves a re-sentencing.

V. NEW TRIAL IN THE INTEREST OF JUSTICE IS WARRANTED IN THIS EXCEPTIONAL CASE.

A. <u>This is an exceptional case that warrants a new trial in the interest of justice.</u>

This is an exceptional case that warrants a new trial in the interest of justice, *Vollmer v. Luety,* 156 Wis.2d 1, 11, 456 N.W.2d 797 (Wis., 1990), because:

- Fennell's assertions of innocence are supported by the evidence, *except for the refutable identification of Fennel as the gunman by the impeachable victim*;
- Fennell was a young African-American male with no prior criminal record, convicted of armed robbery

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no use in waiting for another case than this to present this issue "properly" for Supreme Court's review.

and sentenced to 12 years I.C. based on his *proximity to* the looted property and the "wrong crowd" of thieves in Milwaukee's inner city; *and on refutable, unreliable facial identifications by an impeachable victim*;

- The jury never heard *all* admissible evidence directly addressing the key issue here: the credibility and veracity of the one witness who connected Fennell to the *robbery*. Therefore the jury could not reliably determine whether the victim was credible, her identifications reliable, and Fennell involved in the robbery as she claimed.

Fennell's defense was that the victim *mistakenly* identified him as the robber-gunman. To present this defense Fennell needed to introduce into evidence the victim's original statement to Officer Winkelmann, which was plainly inconsistent with future facial identifications and other victim testimony. [8]

Fennell did *not* present that defense. That *issue -- of mistaken, unreliable identification by a witness of impeachable credibility -- was not fully or fairly tried*: the sole witness who could testify regarding the victim's prior inconsistent statements was not available to testify.

Fennell asserts that this scenario epitomizes "miscarriage of justice," entitling him to a new trial in

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[8] The victim's statement to Officer Winkelmann was also otherwise insistent with her testimony. The victim told the officer that the gunman "snatched" her phone from her hand (R. 40:5), but she testified that he "knocked out" the cell phone "out of her hand. (R.67:96-97, 115-116.) Because the testimony departed from the initial statement to the Officer in *multiple* ways -- so there were *multiple* testimonial mis-statements to be refuted by *multiple* prior inconsistent statements to the Officer -- the victim's credibility would have been effectively impeached.

the interest of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

It is settled law that impeaching the testimony of a witness tends to make the factual assertions of the witness less probable than they would be without the impeaching testimony. 3A Wigmore, Evidence, § 874, (Chadbourn rev. 1970).

Fennell asserts that impeaching the testimony of an accuser-victim with testimonial and documentary evidence from a *police officer* tends to make the victim's accusations *even less probable* (than they would with impeachment by evidence from a non-officer).

The defense would argue that the Officer was credible and truthful (more than the victim), because she had had special training and experience in reliably interviewing victims. See e.g. *State v. Secrist*, 224 Wis.2d 201, 216, 589 N.W.2d 387 (Wis., 1999) (officers' training and experience are "special considerations" in making a credibility assessments of officers who detect the smell of marijuana: "It is *important in these cases to determine the extent of the officer's training and experience in dealing with* the odor of marijuana or some other controlled substance. . . .). Based on such argument, the jury would reasonably find Officer Winkelmann more credible than the victim, leading to acquittal.

The State often argues that officers' training and experience support finding the officers credible. See e.g. *State v. Romero*, 432 N.W.2d 899, 147 Wis.2d 264, 271 (Wis., 1988) (prosecutor in closing about his officer-witnesses: "…These are . . . professionals who are trained to investigate this type of case, professionals who had years

and years of training and experience in screening out false statements, incorrect statements, mistaken statements."). [9]

Having so argued in *Romero*, the State should agree that the jurors would reasonably find Officer Winkelmann more credible than the victim; and would *not* believe that Fennell was the gunman. He would be acquitted of robbery, because all remaining evidence proved only that Fennell had legitimately used the same house in which the loot was stashed.

"The first, and probably the most effective and most frequently employed, is an attack by proof that the witness on a previous occasion has made statements inconsistent with his present testimony." McCormick, Law of Evidence, § 33 (2d Ed. 1972); see also, Anderson, 2 Wharton's, Criminal Evidence, § 430 (13th Ed. 1972).

Here, the lack of Officer Winkelmann's credibility-impeaching testimony clinched the failure of this "most effective" attack on the victim's identifications of Fennell -- an attack that trial counsel attempted, but botched.

This case is analogous to *State v. Cole*, 165 Wis.2d 511, 478 N.W.2d 595 (Ct. App. 1991) (Supplemental App. 1-9.) [10] The *Cole* court *sua sponte* remanded for a new trial in the interest of justice upon concluding

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[9] The quoted closing argument of the State in *Romero* -- which was un- objected-to and was allowed -- is here invoked to show that parties do support the credibility and veracity arguments by claiming (to those who make credibility determinations) that persons with special training and experience are more credible and their statements more reliable, because training and experience are valid factors in accessing credibility. Therefore, Fennell submits that the trial counsel here also could have validly -- and persuasively -- argue that Officer Winkelmann was credible and reliable, and more credible and reliable than the victim, due to her Officer's raining and experience; and the jury would have agreed, and the victim's credibility would have been impeached.

[10] This decision is unpublished and is here offered as persuasive authority supporting the requested relief.

> that the veracity and credibility of each witness were major factors in the determination of Cole's guilt or innocence. *The jury was unable to assess the veracity and credibility of [witnesses] Soderberg and Winston because it did not have the evidence of* the special consideration promised to [them]. . . . *Because veracity and credibility were major issues and a criminal trial is a search for the truth, we hold that the real controversy was not fully tried*.

Cole, 165 Wis.2d at passim. (Supp. App. 2.) [11]

The same injustice occurred here: "the jury was unable to assess the veracity and credibility" of the sole witness who connected Fennell to the *robbery*. And here too: "*Because veracity and credibility were major issues and a criminal trial is a search for the truth, we hold that the real controversy was not fully tried*. Therefore, [this Court should] hold that [Fennell] is entitled to a new trial in the interest of justice." Id.

In C*ole* "the full controversy was not fully tried" because the jury "was mistakenly not given the chance to hear, weigh and consider important testimony that bore on an important issue;" one of two factual scenarios justifying remand in the interest of justice. (Supp. App. 6-7.) [12]

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[11] The *Cole* case, as available via the Wisconsin Bar's research option FASTCASE and included in the Attached Appendix here, does not include page breakdowns for either reporter. Therefore counsel is unable to provide pin-point citations to the specific pages in either reporter, to pages on which specific findings, determinations, or analyses are made by the *Cole* court. Therefore, Fennell is only able to cite to sections of this opinion by using the "passim" denotation, and is unable more precisely to indicate on which page(s) the cited matter appears.

[12] The *Cole* court noted that new trial had been granted "in the interest of justice" in cases where "the important issues were credibility and veracity of the witnesses and the jury was not able to hear all the relevant and important testimony going to credibility,"

Like in *Cole*, here too: "the full controversy was not fully tried" because the jury "was mistakenly not given the chance to hear, weigh and consider important testimony that bore on an important issue:" the testimony and Report of Officer Winkelmann.

Like in *Cole*: "The jury [here] was not obligated to believe those who put [Fennell] at the scene of the [robbery], no matter how many corroborating and impeaching witnesses were presented [by either party]. However, *the testimony omitted from the record should have been considered in weighing the respective credibility of witnesses*." (emphasis added) (citation omitted). (Supp. App. 9.)

Fennell asks this Court to apply the same reasoning as was applied by the *Cole* court, in reliance on there-cited authorities:[13] that "the administration of justice and the search for the truth" demand remand for a new trial in the interest of justice, to enable "examination of *all* persons who have relevant information [so as to] develop *all* relevant facts and will lead to justice." *Gilbert*, 109 Wis.2d at 505 (citation omitted).

As in *Cole*, remand is proper here to create "greater confidence in the result of a new trial that include[s] *all the relevant and admissible evidence embracing the credibility and veracity of all witnesses*. . . [and] the administration of justice will be enhanced and the search for the truth will be

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including *State v. Baker*, 16 Wis.2d 364, 369, 114 N.W.2d 426 (1962) (emphasis added). (Supp. App. 7.)

[13] The cited authorities include *Strivarus v. DiVall*, 121 Wis.2d 145, 158, 358 N.W.2d 530, 536 (1984), and *State v. Gilbert*, 109 Wis.2d 502, 505, 326 N.W.2d 744, 746.

strengthened in a new trial is ordered in this case." (emphasis added). (Supp. App. 9.) [14]

B. Justice has miscarried in multiple ways here.

This Court's judicious exercise of its discretionary reversal powers is consistent with its roles as an error-correcting court *and* the court of last resort in most cases. See *State v. Schumacher*, 144 Wis.2d 388, 407, 408, 424 N.W.2d 672, 679 (1988).

Fennell brings this "last gasp of hope" argument to this Court because he is, unjustly, convicted of a robbery he was uninvolved in, where the competent evidence showed only that the spoils were stashed in a house Fennell was validly checking on for his Grandma; *and* that the perpetrators were family and Fennell could not prevent the crime or avoid interactions with them.[15]

Fennell stands convicted of this armed robbery because one summer, aged 17, he agreed to check on his Grandma's house and dog, where he had previously spent time with Grandma's blessing. This summer commitment caused Fennell's "guilty association:"

(1) with the "*wrong crowd*:" street-running cousin John Davis and friends, who forced entry and took over the house;

(2) at the "*wrong place*:" in that unsecured home in a high-risk urban area adjacent to the notorious 53206 zip code, which Fennell could not effectively supervise;

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[14] Reversal and remand for a new trial in the interest of justice are specially warranted here, when they were held warranted in a "close case" like Cole's, where the court could not "hold that there [would be] a different result after the jury [could] fully consider and properly balance the credibility of each witness." (Supp. App. 9.)

[15] The State states, at p. 29, that Fennel's "interest of justice" argument is his "last gasp hope to obtain relief."

(3) at the "*wrong time*:" with Grandma gone for weeks that summer, the house was taken over by street-running kids as a hideout.[16]

Fennell has always asserted innocence of this robbery and testified to it at length. (69:5-24.)[17] He solemnly re-asserts that he did not participate in the robbery in *any* way.

But he was *unjustly* convicted and sentenced to 12 years initial incarceration, when the *sole* evidence tying him to the robbery came from an impeachable witness, whose identifications were unreliable, but whose credibility was never impeached before the jury. Here lies the miscarriage of justice Fennell is asking this Court to remedy.

The victim's identifications of Fennell– although refutable with the victim's prior statement to police, inconsistent with facial identifications -- ultimately were unrefuted in the jury's eyes. The victim's credibility also ultimately was untested and unimpeached before the jury, as Officer Winkelmann's testimony about the prior inconsistent statement *or* the Report memorializing it was never presented.

Had the identifications been properly rebutted and the victim's credibility impeached with her prior statements to Officer Winkelmann, reasonable doubt as to Fennell's involvement in the *robbery* would remain.

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[16] See Criminal Complaint pp. 2-3 (stating that the door/lock of the house was broken; and that Fennell was asked to check on the house, and Fennell's "first cousin," John Davis, was found at the house by Grandma, with the loot lying around; and Fennell associated with cousin John Davis and his friends).

[17] At those pages Fennell testified that Grandma had asked him to check on her house and dog in her absence, but not to allow others use the house. A cousin (and other kids) broke the locks and used the house at will, contrary to Grandma's desires. Fennell knew those kids were up to no good but was unable to prevent them or avoid commingling with them. He never knowingly participated in any criminal activity with those kids. He had left his YMCA I.D. at Grandma's house some time prior to that summer. (69:5-24.)

The above creates a substantial probability of a different result on retrial, when the victim's credibility is impeached by testimony of Officer Winkelmann, and the unreliability of the victim's identifications is exposed. *Vollmer*, 156 Wis.2d at 16.

The court remanded for a new trial in the interest of justice in *State v. Romero*, 147 Wis.2d at 269, 432 N.W.2d at 901, where a social worker's un-objected-to opinion testimony about the "honesty" of the complaining witness "clouded" the credibility issue (of key witnesses). Id. at 279, passim, 432 N.W.2d at 905, passim.

Analogously here: the issue of the complaining victim's credibility (and the reliability of her identifications of Fennell) was "clouded" by:

- *absence of* the relevant, admissible *evidence* of victim's prior inconsistent statements to Officer Winkelmann;
- trial counsel's cross-examination of the victim about the prior inconsistent statements to Officer Winkelmann *despite failure to introduce any evidence* of such statements;
- the victim's testimonial denials of having made the inconsistent statements, and
- trial counsel's failure to impeach the victim's denials with the reliable and credible evidence of the statements: Officer Winkelmann's testimony and Report.[18]

[18] Ironically, trial counsel's failed attempt to impeach the victim's credibility *bolstered* that credibility. The victim's testimonial denials of prior inconsistent statements were never rebutted/impeached by *any evidence* supporting that the victim had made the statements.18 Those denials rang loud and clear, and were the *last words in evidence* on the weighty subjects of the victim's credibility and the reliability of her identifications. They left the jurors with an untested, unreliable picture of the victim (as credible) and her perceptions/recollections (as reliable) -- enabling "guilty" verdicts.

As in *Romero*: the lack of Officer's Winkelmann's testimony -- which would impeach the victim's credibility and expose the unreliability of her identifications -- "clouded a crucial issue [of victim credibility and her identification of Fennell] that it may be fairly said that the real controversy was not fully tried." *Romero*, 147 Wis.2d at 276, 432 N.W.2d at 904 (quotation omitted).

CONCLUSION

For the reasons stated in his Brief and above, Fennell respectfully asks this Court to set aside his convictions and order a new trial in the interest of justice or on any other ground asserted by Fennell or known to this Court.

Dated this 10th day of October, 2018.

Respectfully resubmitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this **reply 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 **2955** words.

Dated this 10th day of October, 2018.

Signed:

URSZULA TEMPSKA
State Bar No. 1041496

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 § 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 10th day of October, 2018.

Signed:

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SUPPLEMENTAL A P P E N D I X

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A P P E N D I X

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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.

Dated this 10th day of October, 2018.

Signed:

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