STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2018AP000873-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

EDWARD L. BRANSON, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE LACROSSE COUNTY CIRCUIT COURT, THE HONORABLE SCOTT L. HORNE PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

ZALESKI LAW FIRM
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net
Attorney for Defendant-Appellant

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ISSUE PRESENTED

Did Branson receive ineffective assistance of counsel in that trial counsel failed to object at trial and move for a mistrial due to the admission of testimony from law enforcement regarding body language and nonverbal cues exhibited by Branson and a co-actor during their respective interviews?

The trial court answered: no.

Is Branson entitled to a new trial in the interest of justice?

The trial court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a particular set of facts.

STATEMENT OF THE CASE

The State of Wisconsin charged Branson with possession with intent to deliver methamphetamine,[1] Count One, and operating a motor vehicle after revocation,[2] Count Two. Ap.100. Branson entered a plea of guilty to Count Two, 51:6, and proceeded to a jury trial on Count One.[3] The jury found Branson guilty as charged. 59:158. The circuit court sentenced Branson to 5 years confinement and 4 years extended supervision. 33:1.[4] Branson filed a notice of intent to pursue postconviction relief, 35:1, and pursuant to such notice the State Public Defender

[1] A habitual criminal enhancer under Wis. Stat. §939.62(1)(c) and a second or subsequent offense enhancer under Wis. Stat. §961.48(1)(a) accompanied the charge.
[2] A habitual criminal enhancer under Wis. Stat. §939.62(1)(a) accompanied the charge.
[3] The case actually proceeded to trial on two separate occasions. The first trial ended in a mistrial prior to the conclusion of the State's case. 54:110
[4] The circuit court imposed a fine of $25 plus costs on the OAR. 51:9. The judgment of conviction does not reflect this however.

appointed the undersigned counsel to represent Branson. Branson, through counsel, filed a motion for new trial based on the issues presented in this appeal. 40:1-8. After holding an evidentiary hearing on Branson's motion, the trial court denied the motion and entered a written order to such effect. Ap.123-124. Branson, through counsel filed a notice of appeal, 62:1, and these proceedings follow.

STATEMENT OF FACTS

Branson does not intend this statement to be a recitation or summarization of all facts related at trial. Instead, Branson intends here to merely highlight those facts which are contextually and materially relevant to the issues in this appeal.

Facts pertaining to Branson's arrest.

At trial, Officer Dan Ulrich of the LaCrosse Police Department testified that he and his partner[5] observed a vehicle driven by a person who was not wearing a seat belt. 59:2,33. The vehicle also had a very flat left rear tire. 59:33. Ulrich and his partner stopped the vehicle. 59:33. As Ulrich approached the passenger window, he observed the passenger making several movements with his left hand. 59:34. It appeared that the passenger was trying to shove something between the center console and his left thigh. 59:34. Ulrich made contact with the passenger and identified him as Chad Queen. 59:35. Ulrich observed Queen to be very nervous and asked Queen if there were any drugs in the vehicle or on his person. 59:35. Queen initially stated that there were not. 59:35. Queen then stated that there were no drugs on him, that the vehicle was not his, but that there was "meth" in the vehicle. 59:35-36. Queen told Ulrich that the "meth" was between the center console and where

[5] Officer Andrew Tolvstad

he was seated in the front passenger side. 59:36. After asking Queen to get out of the vehicle, Ulrich observed a large plastic bag which contained several more smaller plastic bags. 59:36. The smaller bags which contained a hard, crystal-like substance which Ulrich recognized as methamphetamine. 59:36. The large bag was between the center console and front passenger seat. 59:36. Ulrich searched the vehicle and did not find any pipes, needles, syringes, or anything used for snorting. 59:38. A different officer searched Queen's person and found only a phone. 59:39. Based on the presence of the contraband found in the vehicle, both Queen and the driver of the vehicle were taken into custody. 59:39.

Officer Tolvstad testified that he had contact with the driver of the vehicle who he identified as Branson. 59:83. After running checks on both Branson and Queen, Tolvstad arrested Branson for a traffic issue. 59:84. In searching Branson's person, Tolvstad found $1871 in two front chest pockets. 59:85. Branson told Tolvstad that he had just cashed his social security check.

59:85. Tolvstad also found a carton of cigarettes and a cellular phone which appeared to be a "Tracfone" on Branson's person. 59:85.

Facts pertaining to Queen's trial testimony.

At trial, Queen testified that he had known Branson for the better part of a year. 59:57. Branson was like a family member to him and he trusted Branson with his life. 59:57-58. Queen was in the vehicle with Branson when it was pulled over by the police. 59:59. Branson was driving the vehicle and pulled over immediately. 59:59. Branson appeared nervous and pulled out a bag of drugs from his pants area and told Queen to take it. 59:59. Queen responded, "Fuck you, I'm not taking that," and knocked the bag back towards Branson. 59:60. Branson dropped the bag in Queen's lap and Queen swiped at it. 59:65. Branson picked it up and then dropped it between the center console and the side of the passenger seat. 59:59,65. Queen then tried to use his hand to knock the bag towards the backseat of the vehicle so it would not look like it was in his possession or Branson's. 59:59,61.

Queen testified that the baggie with the white substance was not his, 59:61, and that if it had been his, he would have "taken the fall," 59:61. Queen testified that he had not been charged by the district attorney's office and that he had not been promised anything in exchange for his testimony. 59:62.

Facts pertaining to Branson's decision to not testify.

Branson elected not to testify. 59:121.

Facts pertaining to interviews of Queen and Branson.

At trial, Tolvstad testified regarding interviews with both Queen and Branson. After both Queen and Branson were transported to the police station, they were placed in two separate interview rooms. 59:87. Tolvstad interviewed Queen first. 59:87. Tolvstad testified that the information provided by Queen during the interview was consistent with his trial testimony. 59:87-88. Tolvstad testified that Queen had the same story from the day of the incident throughout the criminal

proceedings. 59:87-88. The prosecutor specifically asked Tolvstad about Queen's demeanor during the interview:

Q: Can you describe some of the observations about Mr. Queen's demeanor while you were interviewing him?

A. Yeah, he's very talkative. ***He would look me in the eye****, he seemed concerned about the incident. He would answer all of my questions. I asked him if I can look through his phone to find—see if I can find any kind of drug talk or anything else, which would be indicative of him selling methamphetamine for profit, and I did not find any looking through his phone. I looked through his text messages, his phone, his Facebook Messenger; I didn't find any.*

Q: So Mr. Queen, we heard earlier, was very nervous when you guys approached the vehicle. Was his demeanor different once you got back to the police station?

A: I guess I didn't have contact with him out—out at the squad car. From when he was inside, he was—he was calm, ***he looked me in the eye****. Like I said, he seemed more than happy to help clear things up.*

Q: So would you describe him as cooperative?

A: I would. 59:88. Emphasis added.

The prosecutor then contrasted Queen's body language with that of Branson:

Q: And then you went and you interviewed the defendant, Ed Branson?

A: Correct.

Q: Did Mr. Branson give you the same information that Mr. Queen gave you?

A: No, not at all. Mr. Branson seemed to act like he didn't know why were here. He said he saw Mr. Queen fidgeting, but he didn't know anything about

any sort of drug or meth in the car. As I was talking with him, ***I noticed that he wouldn't look me in the eye****. I'd ask him a question and either he would not answer it or give some sort of vague answer. 59:89. Emphasis added.*

Facts pertaining to postconviction hearing.

At the postconviction hearing, counsel asked trial counsel if he considered objecting to the line of questions regarding regarding body language or nonverbal cues exhibited by Branson and Queen during their respective interviews. Trial counsel replied, "not at that point." Ap.113, 64:4. Trial counsel testified that "had he followed up with what does that mean to you or something, I would have considered that opinion, I would have objected." Ap.113, 64:4. Trial counsel testified that "it seemed like simply an observation." Ap.113, 64:4. At the time of trial, trial counsel was unfamiliar with *State v. Echols*, 2013 WI App 58, 348 Wis.2d 81, 831 N. W.2d 768, or *United States v. Williams*, 133 F.3d 1048 (7th Cir. 1998). Trial acknowledged that there was no strategic or tactical reason for not objecting. Ap.114,64:5.

The circuit court found that trial counsel's performance was neither deficient nor prejudicial. Ap.122, 64:14. The circuit court

determined that Tolvstad testified to the demeanor of Branson and Queen but "was never asked to go that next step and link it to observations that would indicate whether he was lying. Basically he left it up to the jury to be the—and in your words—the lie detector in this case. And I see that as a critical difference." Ap.120, 64:11. The circuit court determined that there was no prejudice because of the "more substantial evidence" against Branson including the currency in his possession, the absence of "drug talk" in Queen's phone, and inconsistent statements by Branson regarding his phone. Ap.122, 64:14.

ARGUMENT

I. Branson is entitled to a new trial because he received ineffective assistance of counsel.

A. Standard of review and applicable law.

Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7. The right to counsel includes the right to

effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *State v. Trawitzki*, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801. In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. *Strickland*, 446 U.S. at 687. The defendant must also show that he or she was prejudiced by the deficient performance. *Id.* Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.* at 688. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (1993). In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Trawitzki*, 244 Wis. 2d 523, ¶19. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo. *Id.*

B. Branson received ineffective assistance of counsel in that trial counsel failed to object at trial and move for a mistrial due to the admission of testimony from law enforcement regarding body language and nonverbal cues exhibited by Branson and a co-actor during their respective interviews.

Deficiency

The rule is long established that "[n]o witness, expert or otherwise should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Indeed, Wisconsin court's have recognized that testimony from one witness that another witness was telling the truth can interfere with the jury's role and require reversal in the interest of justice. See *State v. Romero*, 147 Wis.2d 264, 277-278, 432 N.W.2d 899 (1988) (erroneously admitted testimony from social worker and police officer that victim was being honest required a new trial in the interest of justice); see also, *State v. Echols*, 2013 WI App 58, ¶¶ 26-27, 348 Wis.2d 81, 831 N.W.2d 768 (error to deny motion for mistrial after lay witness testified that defendant stutters when lying, particularly in a case that depends substantially on a credibility assessment). *Echols* is particularly applicable to this case. In *Echols*, the court of appeals countenanced what it called "human lie detector testimony," and held that such testimony is

impermissible. *Echols*, 2013 WI App 58 at ¶24. In *Echols*, the impermissible testimony involved testimony from a witness that Echols always stuttered when he lied. *Id.* *Echols* in turn cites a Seventh Circuit Case, *United States v. Williams*, 133 F.3d 1048 (7th Cir. 1998), which held that a police officer's "human lie detector" testimony that the defendant avoided eye contact and lowered his head while being questioned about a bank robbery was inadmissible opinion testimony. *Echols* also cites *People v. Henderson*, 915 N.E.2d 473, 477-78 (Ill. App. 2009) (detective's testimony regarding defendant's body language during interview as indicating deception was inadmissible, but harmless error.) *Echols* specifically recognized that the testimony at issue in that case constituted an "implicit opinion" regarding the witness's truthfulness. *Echols,* 2013 WI App 58 at ¶26.

Haseltine, *Romero*, *Echols, and Williams* were published decisions that existed well before this case went to trial. As such, trial counsel should have known that he had a viable basis under Wisconsin and Seventh Circuit case law to object to Tolvstad's

testimony and move for a mistrial because of it. Trial counsel explained that he did not object because he viewed the testimony as "simply an observation," Ap.113, 64:4, and that if such testimony had been followed up with testimony of what those observations meant, he would have objected. Ap.113, 64:4. In finding that trial counsel was not deficient, the circuit court agreed with this explanation. Ap.120, 64:11. The circuit court reasoned that there was a "critical difference" between testimony regarding demeanor and testimony which goes the "next step" and characterizes the observations as being indicative of whether the person was lying. Ap.120, 64:11. This court should not embrace such rationale. In *Williams*, the impermissible testimony described only the suspect's demeanor and reactions during the interview, without an interpretation as to what the demeanor or reactions meant. *Williams,* 133 F.3d at 1052. In particular, the Seventh Circuit considered the following testimony by a special agent who interviewed Williams:

We told him he had been positively identified by the tellers as the unmasked robber in the bank robbery. ***At this point, he turned and began avoiding eye***

contact with us, kind of lowered his head*, and he thought about it for a moment and then said that he didn't rob a bank.*

We talked to him further about it and said that we weren't asking him whether he robbed a bank because we knew he had, but wanted to know simply why he did it…

And based on my training in interviews and interrogations, I used such tactics as trying to emphasize and minimize and sympathize with him and made remarks to the effect that, you know, no one was hurt; that we all do things that we regret later, and you know, we think that if you could turn the clock back you'd probably agree that this wasn't the right thing to do and we're sure you wouldn't do it again, and you wouldn't have done it in the first place if you were able to, as I said, turn the clock back. ***And while I'm making these statements he has-had his head held down and he was nodding as if in agreement with these statements. Id****. at 1052-1053. Emphasis added.*

With no additional testimony by the agent to interpret the meaning of the suspect's demeanor or reactions, the Seventh Circuit concluded that such testimony in itself improperly bolstered other government evidence and required reversal. *Id.* at 1053. The Seventh Circuit specifically stated the following about the testimony regarding demeanor:

The admission of this testimony also presents some concerns. After a government or police detective has just informed a person in custody that he has been identified as a suspect in a robbery and explained to him that the police have no doubt that he is the defendant, what person would not be nervous, agitated, and unwillingly to make eye contact with his interrogator? Williams denied that he participated in the robbery, yet Special Agent Johnson purports to be a human lie detector in observing Williams' demeanor. ***These observations are improper characterizations of the defendant and useless in the determination of innocence or guilt, and in fact, they tend to prejudice the jury. It is Williams' denial of guilt that is important and not the manner in which he communicates it.*** *Id. at 1053. Emphasis added.*

Tolliver v. State, 922 N.E.2d 1272 (Indiana Ct. App 2010), is another case where "body language testimony," without an explicit interpretation of the body language, was held to be improper. In *Tolliver*, an officer testified that based on the suspect's body language, he appeared to be uncooperative and "closed up." *Id.* at 1278. In citing *Williams* and *People v. Henderson*, the court stated "[w]e are similarly skeptical of body language testimony and join those courts in expressing our disapproval of such evidence." *Id.* at 1278. In *People v. Henderson*, supra, the Illinois Court of Appeals, similarly criticized body language testimony and stated as follows:

> *…testimony regarding defendant's body language was useless in the determination of guilt or innocence. An investigator's testimony should be presented only to communicate what was said during an interrogation. Using such witness as a "human lie detector" goes against the fundamental rule that one witness should not be allowed to express his opinion as to another witness's credibility. People v. Henderson, 915 N.E.2d at 753-754.*

Like the testimony at issue in *Williams* and *Tolliver*, Tolvstad's testimony here did not expressly interpret Queen's or Branson's demeanor or reactions. Nevertheless, like the testimony in *Williams and Tolliver*, it too was improper. Trial counsel should have recognized the testimony as such, and objected and moved for

a mistrial. Trial counsel's failure to do so was objectively unreasonable and deficient.

Prejudice

Trial counsel's failure to object and move for a mistrial was also prejudicial. In this respect, the jury's determination depended substantially on an assessment of the credibility of Queen and Branson and the veracity of their statements. Other than Queen's own self-serving statements, there was no other evidence to support the allegation that the methamphetamine was Branson's and not his. There was no confession, no eyewitness testimony, no "controlled buy" evidence, no physical evidence, and no evidence of communications regarding the sale of drugs involving Branson. The entirety of the State's case came down to a credibility contest between Branson and Queen. Not surprisingly therefore, the prosecutor emphasized the issue of credibility in her closing argument. 59:135,140-141. In particular, the prosecutor specifically attempted to contrast the features of Branson and

Queen which bore upon the credibility of each individual. Primary among these was features was Tolvstad's testimony about who kept "good eye contact." The prosecutor emphasized "eye contact" three times in her closing argument, twice in reference to Queen's purported "good eye contact" and once in reference to Branson's purported lack of eye contact. 59:135,140. It cannot therefore be reasonably argued that Tolvstad's testimony about the merits of each individual's level of eye contact was insignificant given that the State mentioned it three times during closing argument. Nonetheless, Tolvstad's observations were, like those criticized in *Williams*, "useless in the determination of innocence or guilt," and "tend(ed) to prejudice the jury." Scientific research supports the Seventh Circuit's criticism of body language and demeanor evidence. See G. Gudjonsson, "False Confessions and Correcting Injustices," 46 New Eng. L.Rev. 689, 696 (2012) ("[c]oncerns have been raised that the [Reid behavioral analysis interview] indicators represent little more than common-sense beliefs about deception that are contradicted by scientific studies and place

innocent…suspects at risk of being misclassified and giving a false confession"); R. Leo, "False Confessions: Causes, Consequences, and Implications," 37 J.Am. Acad. Psychiatry L. 332, 334 (2009)("[S]ocial scientific studies have repeatedly demonstrated across a variety of contexts that people are poor human lie detectors and thus are prone to error in their judgment about whether an individual is lying or telling the truth. Most people get it right at rates that are no better than chance [that is, 50 percent] or the flip of a coin. Moreover, specific studies of police interrogators have found that they cannot reliably distinguish between truthful and false denials of guilt at levels greater than chance; indeed, they routinely make erroneous judgments. The method of behavior analysis taught by [one well established] police training firm…has been found empirically to lower judgment accuracy, leading [two researchers] to conclude that the [foregoing method of behavior analysis] may not be effective and, indeed, may be counterproductive as a method of distinguishing truth and deception…" [Citations, footnotes, and

internal quotation marks omitted.] Given the inherently unreliable nature of body language and demeanor evidence, the State's introduction of it through Tolvstad and reliance on it during closing argument, deprived Branson of a fair deliberation of properly admitted evidence and made the result of the trial unreliable. For these reasons, trial counsel's failure to object and move for a mistrial was prejudicial.

II. Branson is entitled to a new trial in the interest of justice.

In support of this argument, counsel incorporates all factual and legal arguments made in section I as they are relevant to this argument as well. This court has the authority under Wis. Stat. §752.35 to grant a new trial in the interest of justice when it appears that the real controversy has not been fully tried. *In re the commitment of R.D.S.,* 2010 WI App 166, ¶37, 330 Wis.2d 628, 795 N.W.2d 456, review denied, 331 Wis.2d 47, 794 N.W.2d 900. The party seeking a new trial on this ground need not show a probable likelihood of a different result

on retrial. *Id.* The real controversy has not been fully tried when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *Id.* Such is the case here. The jury had before it improper testimony by Tolvstad which clouded a fair and proper jury determination of the credibility of statements made by Queen and Branson. In *Romero*, a similar circumstance required a new trial:

> *The sole issue in this case is whether the complainant or the defendant was telling the truth. There was no evidence of guilt in this case beyond E.B.'s testimony. The other state witnesses merely testified about what E.B. had told them. It was simply E.B.'s word against Romero's, a one-on-one battle of credibility.*
>
> *This credibility issue was clouded by the admission of the testimony of Rice and Krimbill. Their testimony, and the prosecutor's use of it, pervaded the entire trial. There is a significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime. Therefore, it may be fair to say that the real controversy was not fully tried. We find in this case, as we found in a similar case, Lorenz v. Wolff, 45 Wis. 2d 407, 426, 173 N.W.2d 129 (1970), that the "circumstances of this trial prevented a fair trial of the factual issues of this case." We, therefore, reverse and remand for a new trial…State v. Romero*, 146 Wis.2d at 280.

Similar to *Romero*, there is a significant possibility here that the jurors, when faced with the credibility contest between Branson

and Queen, simply deferred to Tolvstad's testimony regarding the nonverbal cues, particularly eye contact, offered by Branson and Queen during their respective interviews. As discussed earlier in this brief, there was no confession, no eyewitness testimony, no "controlled buy" evidence, no physical evidence, and no evidence of communications regarding the sale of drugs involving Branson. Tolvstad found $1871 on Branson's person, 59:85, but Branson explained that he had just cashed his social security check. 59:85. The entirety of the State's case came down to a credibility contest between Branson and Queen. As in *Romero*, the admission of improper testimony prevented the real controversy from being fully tried. This court should therefore grant Branson a new trial.

CONCLUSION

For the reasons stated above, this court should reverse and remand the case for a new trial.

Dated this _____day of August 2018.

Respectfully submitted,
BY:_____/s/_____
Zaleski Law Firm
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 4299 words.

Dated this ___day of August 2018.

THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant

CERTIFICATION

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

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the 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 _____day of August 2018.

THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)

Attorney for Defendant-Appellant