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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Respondent,

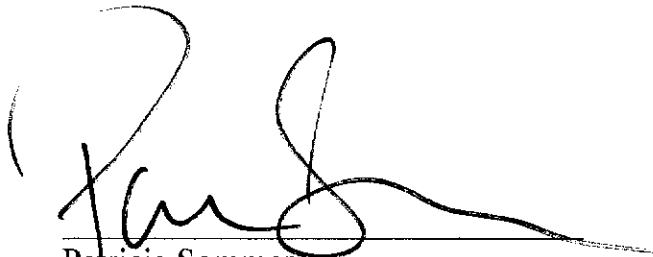
vs.

Appeal No. 2019AP000802-CR

SAMUEL L. NICHOLS, JR.,
Defendant-Appellant.

DEFENDANT-APPELLANT SAMUEL L. NICHOLS, JR. REPLY BRIEF

Appeal from judgment of the circuit court for Monroe County,
the Honorable Todd L. Ziegler, Judge.



Patricia Sommer
State Bar No. 1031925
Attorney for Samuel L. Nichols, Jr.

Sommer Law Office, LLC
509 Nova Way
Madison, WI 53704
(608) 957-4959

ARGUMENT

A. There Was No Probable Cause to Seize Nichols' Phone.

1. *Exigent Circumstances Did Not Support the Seizure of the Phone Because There Was No Probable Cause to Believe that the Phone Contained Evidence of a Crime.*

As the State explained, exigent circumstances only justify the warrantless seizure of property when there is probable cause to believe 1) that the property contains evidence of a crime and 2) that there is a risk evidence will be destroyed if the property is not seized. State's Resp. Br. at 12-13 (citing *State v. Carrol*, 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1). Here, there was no probable cause that the phone contained evidence of a crime. The State argues that it is enough that BB accused Nichols and that Nichols told Arenz that he had his phone at the party. State's Resp. Br at 14. But Arenz did not see any images on Nichols' phone linking Nichols to the alleged illicit photographs. In fact, Nichols told Arenz where the photos would be, and all Arenz saw were nonsexual images. Arenz had no cause to conclude that there were evidentiary photos on the phone and no probable cause to seize Nichols' phone.

2. *The Independent–Source Doctrine Does Not Apply Because the Unlawful Search and the Search Warrant Were Based on the Same Information, which Lacked Probable Cause.*

The State relies on *State v. Gant*, 2015 WI App 83, 365 Wis. 2d 510, 872 N.W.2d 137, to argue that even if the seizure of Nichols' phone were unlawful, the independent-source doctrine precludes application of the exclusionary rule. State's Resp. Br. at 18. But the source of information supporting the warrant in *Gant* was truly independent of

the seizure. Gant's computer was seized while police were investigating his wife's suicide. *Id.* ¶¶ 2-4. Several months later, police received information that Gant had child pornography on his computer and obtained a warrant to search it. *Id.* ¶¶ 5-6. Thus, the information justifying the initial seizure had nothing to do with the information supporting the search warrant.

In contrast, here, there was no independent information to support the search warrant. The State views Arenz' report as new information supporting the search warrant. But Arenz' report, which formed the basis for the warrant, is nothing more than his memorialization of the interviews he had conducted before he seized the phone.

R.28: 2-3. There is nothing new or independent on which to support a search warrant.

The independent-source rule does not apply.

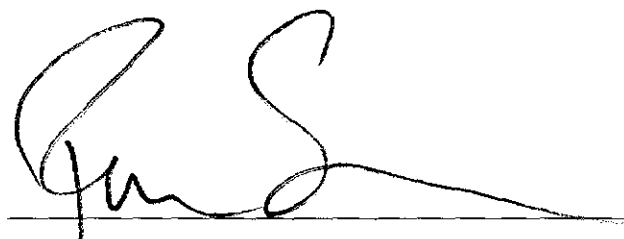
B. Nichols' Prior Sexual Offense Should Have Been Excluded.

As stated in the brief-in-chief, the circuit court erred in ruling that the other acts evidence could come in as proof of identity. The other crime occurred in 1998 and this incident occurred in 2015. The other crime involved an underage victim, this incident involved a grown woman. The other crime involved touching, but this crime involved photographs. There are no similarities sufficient to identify Nichols as the perpetrator in this 2015 crime based on his 1998 conviction. While the State contends that the similarities between the incidents justify admission, Nichols respectfully disagrees.

CONCLUSION

The wrongfully admitted evidence was the State's entire case. Nichols is entitled to a new trial based on the circuit court's errors in admitting the contents of Nichols' phone and admitting evidence of Nichols' 1998 conviction.

Dated this 9th day of October, 2019.

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Patricia Sommer
SBN 1031925
Attorney for Samuel J. Nichols, Jr.

Sommer Law Officer, LLC
509 Nova Way
Madison, WI 53704
(608) 947-4959

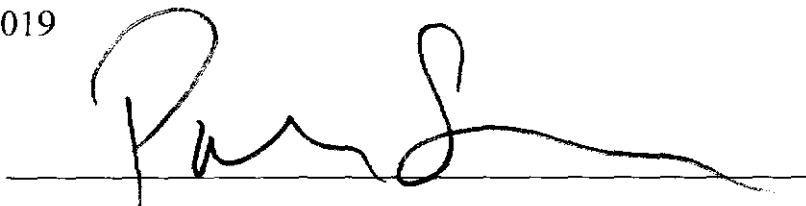
CERTIFICATION

I certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: October 9, 2019

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Patricia Sommer

SBN 1031925
Sommer Law Office, LLC
509 Nova Way
Madison, WI 53704
(608) 957-4959

CERTIFICATION OF COMPLIANCE WITH WIS STAT. § 809.19(12)(f)

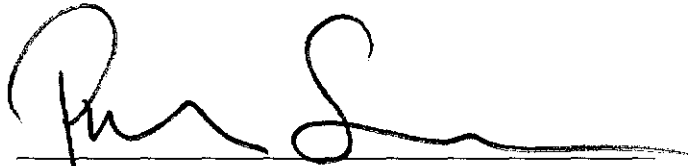
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I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12)(f).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

A handwritten signature in black ink, appearing to read 'Patricia Sommer', written over a horizontal line.

Patricia Sommer

SBN 1031925
Sommer Law Office, LLC
509 Nova Way
Madison, WI 53704
(608) 957-4959