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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CASE NO. 2020AP108-CR

CIRCUIT COURT CASE NO. 2018CM1454

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

RICHARD BRIAN LOPEZ,
Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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On Appeal from Milwaukee Circuit Court Branch 46
Hon. David Feiss, Presiding

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Lopez requests oral argument to clarify the issues and respond to any of the Court's concerns.

STATEMENT REGARDING PUBLICATION

Mr. Lopez requests that the decision not be published as there is already guidance to the Circuit Court and Counsel on these issues.

STATEMENT OF CASE

On April 5, 2018, Mr. Lopez (Lopez) was arrested at his home, by the Greendale Police Department, on the allegations of his live-in girlfriend, Miranda Rykiel (Rykiel), that Lopez had punched her twice in the face (left eye and left lip area) and when she tried to call the police Lopez tried to take her cellphone from her to prevent the report. Photographs of Rykiel's injuries were taken while the police were on the scene on April 5, 2018.

Subsequent to his arrest, Lopez was charged with one count of misdemeanor battery with a domestic abuse modifier (§§940.19(1) and 973.055(1)), one count of intimidation of a victim with a domestic abuse modifier (§§940.44(2) and 973.055(1)) and once count of disorderly conduct with a domestic abuse modifier (§§947.01(1) and 973.055(1)). On April 24, 2018, nineteen days after his arrest, Lopez appeared before the Court for a pre-trial conference for during which

his Attorney, Fred Richardson, received the discovery from the State pursuant to *Milwaukee County Circuit Court Rule 4.27(D)* (Local Rule 4.27).

On January 23, 2019, two hundred and seventy-four days after receiving discovery from the State and just prior to the case being called for trial, the State turned over additional discovery to the defense consisting of photographs of Rykiel's injuries, taken by the Greendale Police Department on or about April 10, 2018 (five days after the incident for which Lopez was arrested). Defense counsel, Attorney Fred Richardson, properly objected to the introduction of these new photographs into evidence on the grounds of prejudice to the defendant. *Tr.* p.4. The State responded that it did not believe that the defendant was prejudiced because the photographs only showed the progression of the bruising that had been photographed on the date of the incident. And that in any event Rykiel would testify as to the progression on the injuries over that period of time. *Tr.* pp.5-7. The Court denied Attorney Richardson's motion to exclude the photographs.

At trial, the theory of defense was that Lopez acted in self-defense. Although Lopez did not testify, the Court gave the jury the self-defense instruction. The jury convicted Lopez of the charges and he appealed.

QUESTIONS PRESENTED

QUESTION #1: DID THE COURT ERR IN FAILING TO EXCLUDE THE SECOND SET OF PHOTOGRAPHS DUE TO A VIOLATION OF THE DISCOVERY OBLIGATIONS BETWEEN THE PARTIES?

QUESTION #2: DID THE COURT ERR IN FAILING TO EXCLUDE THE SECOND SET OF PHOTOGRAPHS BECAUSE THE PHOTOGRAPHS WERE UNFAIRLY PREJUDICIAL?

ANSWERS

QUESTION #1: YES. The Milwaukee Circuit Court Rule 4.27(D) acts as a continuing discovery demand on both prosecution and defense triggering the requirements of §971.23 Wis. Stats.

QUESTION #2: YES. The Court erred in admitting the second set of photographs because the photographs had low probative value and were unfairly prejudicial towards the defendant because they had little to no probative value in determining whether Lopez committed the offense charged.

STANDARD OF REVIEW

As these are issues of law the Court's standard of review is DeNovo. *State v. Anderson*, 219 Wis.2d 739, 746 (1998).

ARGUMENT

**A. THE COURT ERRED IN FAILING TO SUPPRESS THE PHOTOGRAPHS
PRESENTED TO THE DEFENSE ON THE DAY OF TRIAL.**

**I. The Proper Remedy for a Violation of the
Discovery Statute is suppression of the
evidence.**

**a) The state failed to comply with the
discovery statute by failing to turn
over the relevant discovery within a
reasonable time before trial.**

The criminal discovery statute, §971.23(1) Wis.

Stats., provides that:

Upon demand, the district attorney shall,
within a reasonable time before trial,
disclose to the defendant or his or her
attorney and permit the defendant or his
or her attorney to inspect and copy or
photograph all of the following materials
and information, if it is within the
possession, custody and control of the state.

It should be undisputed that the state failed to
disclose the photographs of Rykiel taken on or about April
10, 2018 on the date of trial. The state presented the
photographs to the defense and explained the discovery
violation to the court indicating that the investigating
officer has just provided them to her. *Tr. of Jury Trial*
January 23, 2019 at p.4-5.

Nor can it reasonably be disputed that the photographs
the state sought to introduce at Mr. Lopez's trial had been
in the "possession, custody and control" of the state. As
the Wisconsin Supreme Court said in *State v. Delao*, 2002 WI

49 ¶23, 252 Wis.2d 289, 302 (2002) "For the purposes of the criminal discovery statutes, we view an investigative police agency which holds relevant evidence as an arm of the prosecution."

It matters not, as the prosecution argued, that she was unaware of the evidence until just prior to turning it over to Attorney Richardson. As the Court explained in *Delao*, "the State's discovery obligations may extend to information in the possession of law enforcement but not personally known to the prosecutor. *Delao* ¶21, p. at 301. *Delao* at p.302 cited the test laid out in its decision in *Jones v. State*, 69 Wis.2d 337, 349 (1975):

The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence [the prosecutor] should have discovered it.

The Court *Delao* Court, citing *Jones* at p.349 (and *Wold v. State* 57 Wis.2d 344, 349-50 (1973) which adopted the American Bar Association (ABA) Standards Relating to the Prosecution Function and the Defense Function) clearly stated that the prosecuting attorney's obligation under the ABA standards extend to not only members of his or her staff but to others that have participated in the investigation or evaluation of the case and who either

regularly report or with reference to the particular case have reported to his or her office.

On April 5, 2018 Officer Ryan Borkowski of the Greenfield Police Department was one of the officers who responded to the altercation between Lopez and Rykiel and who took the original photographs (the ones disclosed to Attorney Richardson through the discovery process). *Tr. of Jury Trial A.M. Jan. 24, 2019* pp. 43-44. Officer was also the officer who met with Rykiel on April 9, 2018 and indicated that he took the additional photographs (that were not turned over to Attorney Richardson until the day of trial). *Tr. Jan 24, 2019 A.M.* at pp. 46-47. Officer Borkowski's statements that he had participated in the investigation of the case makes the prosecutor, not the officer or anyone else, ultimately responsible for failing to provide the evidence to the defendant at a reasonable time before trial as required by §971.23(1).

**b) Milwaukee Circuit Court Local Rule
4.27(D) acts as a continuing discovery
demand.**

It is true that §971.23(1) requires that Attorney Richardson must "demand" the discovery for the discovery statute and the sanctions to apply. It is also clear that no discovery demand was filed. However, Milwaukee County Circuit Court Rule 4.27(D) specifically states that:

Discovery demands, including without limitation demands made pursuant to Wis. Stat. §971.23(1), And motions relating to them, shall not be filed unless the demand is contested and the defendant Requests that the demand or motion be heard by the court. *Milwaukee County Circuit Court Rules, Part 4: Rules for Felony and Misdemeanor Divisions, §4.27(D)*

Attorney Richardson could not file a discovery demand under the Local Rule 4.27. Therefore, given the Local Rule's specific mention of §971.23(1), the Court itself has created what can only be described as a continuing discovery demand between the defense and prosecution in accordance with the requirements of §971.23(1) and subjects the parties to the sanctions outlined in the discovery statute for failure to comply with the requirements of the statute. That is especially true since the evidence in question is covered by §971.23(1)(g) which specifically references any physical evidence that the state intends to offer at trial.

c) The photographs taken on April 9th were unfairly prejudicial.

1. The Proffered Evidence was not Relevant Pursuant to §904.01

Mr. Lopez takes the position that the evidence sought to be admitted was not relevant or, if it was, it has such low probative value that the danger of unfair prejudice substantially outweighs whatever probative value it possesses. Relevant evidence is defined in §904.01 Wis.

Stats. as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The state introduced the photographs of taken on April 9th for the purposes of highlighting the injuries to Rykiel allegedly caused by Lopez. *Trans. of Jan. 23, 2019* at pp.6-7. The injuries sustained on the date of the incident, and photographed by Officer Borkowski, are arguably relevant to proving the bodily harm element of misdemeanor battery. But the bodily harm element only requires the causing of physical pain or injury, illness, or any impairment of physical condition. *Wis JI-Criminal 1220* (2001). To prove a battery there is no need to demonstrate the lingering effects or the progression of whatever injury is caused. Therefore the April 9th photographs were not relevant for the purported purpose that the state was introducing them, the progression of the bruising to prove the element of the offense.

**2. Even if the Photographs of April 9th had
Some Relevance Under §904.01 Stats.
the Probative Value was low.**

The photographs taken on April 9th show that Rykiel had

injuries to her face. Whatever relevance those photos had in demonstrating that Rykiel had been battered are greatly reduced when one considers that just four days earlier Officer Borkowski had taken the first set of photographs cataloging the injuries to Rykiel's face. \$904.03 Stats. bars otherwise relevant evidence if outweighed by a number of factors, two of which are relevant to this discussion.

i) The proffered evidence was unfairly prejudicial.

Unfairly prejudicial evidence has been defined as proffered evidence that has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *State v. Payano*, 209 WI 86, ¶89 320 Wis.2d 348 (2009) (citing *State v. Sullivan*, 216 Wis.2d 768, 789-90 (1998)).

In this instance there can be no other reason why the prosecutor sought to introduce this evidence. The prosecutor's statement that "there are no additional facts that are being alleged. These are just photos that show the progression of bruising to the victim's face." *Trans. January 23, 2019 (Doc. 54)* at 5, clearly demonstrates that

the prosecutor wanted the jury to see the progression of the bruising, solely to arouse the jury's sense of horror and provoke its instinct to punish Lopez. Those photographs serve no other purpose considering the photographs taken four days prior, at the time of the incident. That is especially true given that Lopez was charged with a misdemeanor battery where the state need only prove bodily harm, defined by *WI JJ-Criminal 1220* as physical pain or injury, illness or any impairment of physical condition. It is clear that the bodily harm element of the battery offense was capable of being demonstrated by the testimony of Rykiel and the photographs taken on April 4. The only reason for introducing the April 9th photographs was to inflame the passions of the jury and have them decide the case on something other than the established propositions of the case.

ii) The proffered evidence was cumulative.

The statement by the prosecutor that "there are no additional facts that are being alleged", also serves as a basis for excluding the April 9th photos on the grounds that they are cumulative. Cumulative evidence is defined as evidence which tends to prove a fact which is supported by other evidence that has been previously received. *Black's*

Law Dictionary p. 380 (6th ed. 1990). Rykiel testifies that Lopez had struck her twice in the face and identified the injuries she suffered in photographs marked as exhibits 1 and 2 (the April 5th photographs). *Trans. Jan. 24, 2019, Jury Trial A.M.*, pp. 12-13. Then proceeded to supplement the previously received evidence with the photographs taken on April 9, 2019 (exhibits 4 and 5). *Trans. Jan 24, 2019, Jury Trial A.M.*, pp.17-19 showing the advanced state of the bruising and eliciting testimony from Rykiel to the effect that her co-workers had seen the bruising. In short, the April 9th photographs and accompanying testimony added nothing to the state's case other than inflaming the passions of the jury, which was exactly why the photographs were introduced.

d) The sanction for a discovery violation is exclusion of the evidence under §971.23(7m) .

Attorney Richardson properly objected to the introduction of the April 9th photos on the grounds that they had not been disclosed as required by statute and the local rule. §971.23(7m)(a) states that:

The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or continuance.

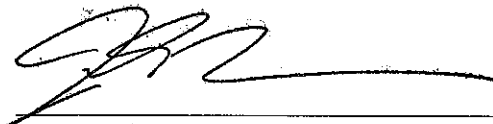
Given Attorney Richardson's timely objection to the introduction of the April 9th photographs, the Court should have excluded the evidence or offered the defense an extension of time so he could prepare to meet this new evidence. The Court did neither and prejudiced the defendant as described below.

CONCLUSION

For all the reasons stated above, Mr. Lopez prays that this Court finds that the Circuit Court erred in admitting the photographs taken April 9th on the grounds that they violated §971.23(1) and §904.03 and vacate the convictions in this matter, returning the case to the Circuit Court for a re-trial.

Dated this 6th day of August, 2021.

CABRANES LAW OFFICES LLC

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(b), (bm) and (c) meets the form requirements for a brief. The length of this brief is 17 pages.

Dated this 6th day of August, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2) (a)

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

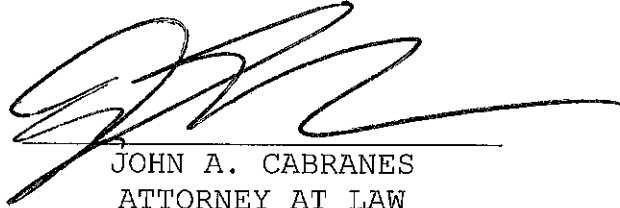
I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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

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Dated this 6th day of August, 2021.

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