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COURT OF APPEALS

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 REPLY BRIEF

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

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OTHER AUTHORITIES CITED

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INTRODUCTION

The State of Wisconsin in its brief, takes the position that this Court should affirm the underlying conviction on two grounds. First, under *State v. Harris*, 2008 WI 15, 307 Wis.2d 555 (2008) that the admission of the photographs in question was harmless error and second, that the issue was not properly preserved for review under *State v. Caban*, 210 Wis.2d 597 (1997) because defense counsel waived any objection by failing to object to the introduction of the evidence under *Caccitolo v. State*, 69 Wis.2d 102 (1975). The defendant responds to the State's arguments as follows.

~~I. ADMISSION OF THE PHOTOGRAPHS WAS NOT HARMLESS ERROR~~

The State cites *State v. Harris*, 2008 WI 15, 307 Wis.2d 555 (2008) for the proposition that the defendant must prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. (State's Brief at p.7) What the State is really urging is that the Court depart from the less restrictive standard put forth in *State v. Dyess*, 124 Wis.2d 525, 543 (1985) and recognized as valid precedent in *State v. Johnson*, 2012 WI APP 21 ¶14 which establishes the test for harmless error as "whether there is a reasonable possibility that the error contributed to the outcome. Further, that the standard for evaluating harmless error is the same whether the error is constitutional, statutory or otherwise. An error is

harmless if it does not affect the defendant's substantial right. Johnson ¶14.

In this case, the State has conceded a violation of the discovery statute and the defendant asserts that this violation impacted his due process rights under the Federal and State constitutions. The defendant must therefore show that there is a reasonable possibility that the error contributed to the outcome.

II. DEFENDANT WAS DENIED A FAIR TRIAL BY THE ADMISSION OF THE PHOTOGRAPHS.

The defendant has argued in his brief in chief, that the Admission of the photographs violated §904.03 Stats. in that they were 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. Why? Because she knew that the jury's sense of horror and provoke its instinct to punish Lopez would be aroused. 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 JI-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. Given the prejudicial nature of the photographs, there is absolutely a "reasonable possibility that the error contributed to the outcome."

III. THE ISSUE WAS PROPERLY PRESERVED FOR REVIEW

The State argues, in its brief, that the issue was not properly preserved for review. In support of this proposition it argues that the defendant did not object to the photographs admission. A legitimate argument if one ignores the facts.

First, there was the discovery violation which the State has already conceded. Second, there was the Motion in Limine filed by the defendant which requested the exclusion of the evidence, invoking §971.23(1) Stats., which the State also acknowledges. Then there was Attorney Richardson's request (Tr. Doc. 54 pp.3-4) to the Court that the photos be excluded, followed by the Court's denial of the request (*Id.* P.7). The record is very clear that defendant's counsel asked for the exclusion of the evidence both in his Motion in Limine and on the day of trial.

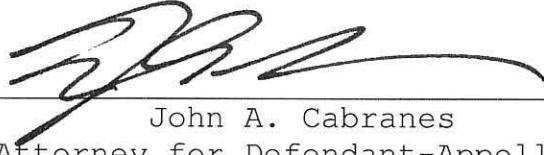
The Wisconsin Supreme Court in *State v. Corey J.G. (In the Interest of Corey J.G.)*, 215 Wis. 2d 395, 405 (1998) followed the well established proposition that an objection or motion is sufficient to preserve an issue for appeal if it apprises the court of the specific grounds upon which it is based, but also stated that when the basis for the objection is obvious, "the specific ground of objection is not important." (citing *Champlain v. State*, 53 Wis. 2d 751, 193 N.W.2d 868 (1972)). In this case counsel for the defendant made the objection based on the discovery violation and while he does not specifically mention prejudice, the prejudicial effect of undisclosed evidence is obvious. It matters not that he did not continue to argue the issue with the Court when the photographs were published to the jury and admitted into evidence. The objection had already been made and ruled upon.

CONCLUSION

For the reasons stated, the defendant requests that the Court vacate the conviction in the above matter and return the matter to the Circuit Court for a re-trial.

Respectfully Submitted this 11th day of October, 2021.

CABRANES, DURKIN AND LONGDIN

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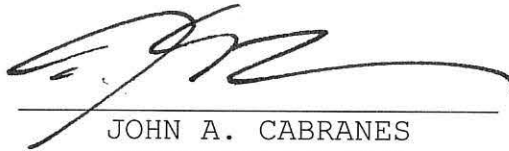
John A. Cabranes
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CERTIFICATIONS

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(4), and meets the form requirements for a brief. The length of this reply brief is 8 pages.

Dated this 11th day of October, 2021.

CABRANES DURKIN & LONGDIN

A handwritten signature in black ink, appearing to read 'J. Cabranes', is written over a horizontal line.

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