STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001633 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACKY LEE,

Defendant-Appellant.

Appeal from the circuit court Milwaukee County,
Judge Dennis R. Cimpl
Case No 2018CT000906

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

KELLY LAW OFFICE
BY ANNICE M. KELLY
State Bar No. 1001958

4623 75th St., #278
Kenosha, WI 53142
312-965-2002
Amkelly8141@gmail.com

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2. Did the court err when it failed to exclude from evidence, key discovery not produced until the first day of trial?
3. Did the court err when it instructed the jury that intoximeters are scientifically sound?
4. Did the court err when it allowed Officer Sandler to testify on the wrong intoximeter certification?
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6. Did the cumulative effect of all the court's errors deprive Mr. Lee of due process?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will fully present and discuss the issue on appeal.

The opinion in this case should not be published because it does not meet any of the criteria for publication under Rule 809.23(1)(a).

STATEMENT OF THE CASE

Seven months after being pulled over by Glendale police, Mr. Lee was charged with one count of operating a motor vehicle while intoxicated, 2nd offense under Wisc. Stat. §346.63(1)(a), §346.65(2)(am) and one count of operating with prohibited alcohol concentration, 2nd offense under Wisc. Stat. §346.63(1)(b), §346.65(2)(am). This incident occurred on November 25, 2017 but he was not charged until June 20, 2018. (App. A: R. 2).

Mr. Lee filed a Motion to Suppress in which he argued that he was illegally seized, subjected to field sobriety tests and impermissibly asked to submit to a preliminary breath test contrary to Wisc. Stat. §343.303. Further, that he was arrested without probable cause to believe he was operating a vehicle while

intoxicated. (R. 7). On November 30, 2018, a suppression hearing was held. (R. 48). The court issued its decision on January 11, 2019 and denied Mr. Lee's motion. (R. 49; 12).

A jury trial was held on November 13-15, 2019, in which Mr. Lee was found not guilty of operating a motor vehicle while intoxicated, 2nd offense and guilty of operating with prohibited alcohol concentration, 2nd. (App. B; R. 37: R. 60; 3-4). Mr. Lee was sentenced on February 14, 2020 and he received 60 days in House of Corrections, one year license revocation and ignition lock and costs. (R. 61; 29). Judgment was entered on February 17, 2020. (App. B; R. 37).

STATEMENT OF FACTS

The arrest and sobriety test

On November 25, 2017, Mr. Lee was pulled over by Glendale police for driving 50 mph in a 30 mph zone. (R. 59: 27-28). The arresting officer, Officer Bechler, testified he "paced" Mr. Lee with his squad car to determine that Mr. Lee was traveling 50 mph. (*Id.*). Officer Bechler did not see Mr. Lee weaving or driving erratically. (*Id.* at 68). Further, when Mr. Lee pulled his car over, he did not commit any driving violations. (*Id.*)

Mr. Lee informed the officer that he believed the speed limit was 40 mph. He also produced his identification without fumbling for it or having any other problem producing it. (*Id*. at 69). Officer Bechler smelt a faint to moderate smell of alcohol (*Id.* at 71) and asked Mr. Lee to exit the car. Mr. Lee did not have a problem getting out of the car and Officer Bechler did not see him stumble, become unsteady or sway. (*Id*. at 72). Officer Bechler then administered a field sobriety test and arrested Mr. Lee. (*Id.* at 43, 54).

The defense does not receive key discovery until the first day of trial

Officer Sandler, a patrol officer, operated the intoximeter to test Mr. Lee's breath. An intoximeter is a machine that chemically tests your breath for an alcohol concentration. (*Id.* at 129-130). To operate the intoximeter, you have to be

trained and certified and recertified every two years. (*Id.* at 131). The machine also has to be maintained and calibrated properly by the Wisconsin Department of transportation. (*Id*. at 142-43).

The defense had requested, as part of discovery, maintenance records for the intoximeter and Officer Sandler's certificate of training. It made the court aware that it was having trouble obtaining the records on two separate court appearances:

> Mr. Lee's case involves an Intoximeter from the Green -- Glendale Police Department. I put in a subpoena for those maintenance records for the Intoximeter. Because I think we were here on February 1st, we couldn't turn around. I -- I still don't have the records. I hope to get them by March 4th.

(R. 51; 3-4).

> Judge, unfortunately, the Defense is not ready to proceed, at this point. If the Court remembers, at the last court date and final pretrial, I did inform the Court that I was still waiting on maintenance records from the Intoximeter at the Glendale Police Department. I did put in a subpoena duces tecum. I'm not -- I haven't received -- The return date was for today.

(R. 52; 3-4).

Maintenance records for the intoximeter and Officer Sandler's certification, were not turned over until the afternoon of the first day of trial. (R. 58; 15). The defense moved to exclude the late discovery noting that the case had been pending for two years and defense counsel had requested this discovery three time. (*Id.* at 17, 24). Further, the government had received the maintenance records on September 5, 2017, two years before trial. (R. 25).

> Because I have not had an adequate amount of time to look over the maintenance records as well as verify and double-check with my own expert, I don't think that -- I think that that's unfair prejudice to the Defense. So we would be objecting to the use of that evidence due to the late disclosure as well as the jury instruction indicating an -- that -- that the law recognizes that the testing device is a scientifically sound method of measuring the alcohol concentration because I did not -- I have not had the chance to obviously verify the reliability of the maintenance records that were just tendered today.

(R. 58 at 18).

However, the court denied the motion finding that the defense "did not follow up" on the requests. (*Id.* at 24.). The defense again objected when the state moved these trial exhibits, Tr Ex 4-7, into evidence. (R. 59 at 145-46: R. 22-25). Defense renewed its objection at the close of the state's case (*Id.* at 162-163).

During the preliminary instructions, the court instructed the jury on the requirement of the state to prove the qualifications of Officer Sandler and the working condition of the intoximeter:

> The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability method used by the testing device. However, the State is required to establish that the testing device is in proper working order and that it was correctly operated by a qualified person.

(*Id.* at 11).

The state questions Officer Sandler on her incorrect certification to operate the intoximeter

When the government began questioning Officer Sandler on her certification to operate the intoximeter, (R. 22: Tr Ex 4), the defense objected and asked for a side bar. (R. 59; 131-132: R. 22). However, the side bar did not take place until after Officer Sandler's testimony and the admittance into evidence of the certification, Tr Ex 4. (*Id.* at 159). Prior to the side bar, the defense argued that Tr Ex 4 was a 30 page document which had not been provided to defense even though it had been provided to government prior to trial. (*Id.* at 132, 148).

During the side bar, the defense again argued that it had not been provided Tr Ex 4 prior to trial. (*Id.* at 161-162). The government admitted that it dropped the ball. (*Id.* at 162). The prejudice of this fact became evident when the court realized that Tr Ex 4 was not even the certification for the relevant time period. It was the certification for the period January 16, 2019 through February 28, 2021, (*Id.* at 166). The court struck Tr Ex 4 for this reason. (*Id.* at 166, 204). However, the jury had already heard the testimony concerning it and the court did not strike the testimony. (*Id.* at 166-67).

The maintenance records for the intoximeter

Officer Sandler testified that there is a separate certification for the intoximeter but she did not have any records that established that it was working correctly. (*Id.* at 149). The defense raised its objection again to Tr Exs 6 and 7, the certifications for the intoximeter, when the government began questioning Officer Sandler on these exhibits. (*Id.* at 143.). She testified that according to Tr Exs 6 and 7, the intoximeter was working properly on the relevant date. (*Id*. at 144).

Tr Ex 7, was certified by the Wisconsin Department of Transportation on August 25, 2017 and expired on January 24, 2018. (R.25) It also is stamped as "Received" by the Milwaukee District Attorney on September 5, 2017. (*Id.*). This is over two years prior to the start of the trial.

During the side bar, as to Tr Ex 6 and 7, the defense argued:

> So this test result is obviously material evidence. We have given the jury instructions regarding putting it in a higher regard as far as whether or not Mr. Lee was impaired. The Defense has every right and should have an opportunity to investigate whether or not the device -- the testing device was in proper working order and that it was correctly operated -- operated by a qualified person.
>
> The fact that the testing device was in proper working order, that evidence submitted to and in evidence right now, was submitted to Defense counsel today, at, I believe it was, 10:00 a.m. Defense counsel did not have the time, and --
>
> THE COURT: You're talking about Exhibits 6 and 7?
>
> ATTORNEY AL-HENAEY: Correct. Yes. Exhibit 6 and 7. And -- and I know that we had already discussed this, but I just wanted to put in -- into my argument --
>
> THE COURT: I've already ruled on that.

(R. 59; 163-164: R. 24, 25).

The court went on to note:

> We even have a court rule that says nobody has to file a demand for discovery anymore.
>
> I think it's incumbent upon the State of Wisconsin to get these certifications to the Defense in every drunk driving case as part of the discovery.

(*Id.* at 168). Despite this, the court still denied the defense's request as it related to Tr Exs 6 and 7.

The administration of the intoximeter test and the spoilation of the video

Officer Sandler testified two adequate samples are necessary to get a reading. (*Id.* at 136). Prior to administering the test, the individual has to be observed for 20 minutes to make sure they do not smoke, drink, vomit, eat and regurgitating, as these functions interfere with the test. (*Id.* at 134-135). According to Officer Sandler, Mr. Lee did not provide an adequate sample the first time. (*Id.* at 136). Mr. Lee eventually tested at .10 (*Id.* at 158).

These tests are videoed and would show if they are administered properly. (*Id.* at 152). However, no video of the test existed as of the trial date. (*Id.* at 159). The video did not exist because Glendale police only keep the videos for 3-6 months. (R. 56; 6).

Defense had filed a special jury instruction and motion in support requesting a jury instruction on the failure of the Glendale police to retain a copy of the video of the administration of Mr. Lee's breathalyzer test. (R. 14: R. 15). At the final pretrial, the defense argued that the video of the test did not exist anymore because the state took approximately 7 months to charge Mr. Lee and the Glendale police only keeps videos for 3-6 months. (R.56; 6). The court delayed the decision on the motion until the trial and stated that the instruction would not be part of the preliminary instructions and he will decide if he will give the instruction after the close of evidence. (*Id.* at 7).

On the first day of trial, defense renewed its motion and the court ruled:

> We had a conference in the back, mainly on the defendant's request for special jury instruction. I've determined I'm not gonna give that in the preliminary instructions. We'll see what the evidence says, and then, whatever the evidence -- how the evidence comes in, I'll determine whether or not to give that special jury instruction, something like it or nothing like it. And that -- Obviously, we're gonna have to argue about that, if and when the evidence comes in, because the State's opposed to that special jury instruction.

(R. 58: 3).

At the close of evidence the court heard arguments on the issue and ruled:

> So the question is, one, is it evidence that possessed an exculpatory value that was apparent to those who had custody of the evidence?

(R. 59; 192).

> *[Munford]* says it's gotta be evidence that's apparent to the custodian of the evidence that was destroyed. That's the Glendale Police Department.
>
> ...
>
> And I don't see any law that says, in the spirit of fairness, that I have to do it; so I can't do it. So I'm not going to give any instruction.

(*Id.* at 196). During the closing instructions, the court again noted the reliability of the intoximeter:

> The law recognizes that the testing device -- device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.

(*Id.* at 211).

The verdict and sentencing

The jury found Mr. Lee not guilty of operating a motor vehicle while intoxicated and guilty of operating a motor vehicle with a prohibited alcohol concentration as charged in count two of the complaint (R. 60; 3-4).

At sentencing, the court noted:

> This is a little bit difficult because the jury found that he was not intoxicated, but that he blew a PAC, and that -- that's significant, in the Court's mind, because he was, in effect, convicted by a machine, not by what the officer observed.

(R. 61; 25). He received 60 days in House of Corrections, one year license revocation and ignition lock and costs. (*Id.* at 29).

ARGUMENT

A. THE COURT'S FAILURE TO INSTRUCT THE JURY ON THE SPOILATION OF THE VIDEO AND THE FAILURE TO BAR THE LATE DISCOVERY REMOVED ANY ABILITY MR. LEE HAD TO ATTACK THE STATE'S EVIDENCE AND TO PRESENT A DEFENSE.

In the present case, as the trial court noted, Mr. Lee was convicted solely on the intoximeter test. Therefore, both testing that it was properly functioning and that it was properly administered, was the only way for the government to prove its case and also the only defense for Mr. Lee. However, only the government had access to the pivotal documents and to the video that would have shown the administering of the test. Because the government destroyed the video and failed to produce the pivotal documents, Mr. Lee was deprived of his ability to present a defense and therefore was denied due process. As such, this Court should grant Mr. Lee a new trial on count two as charged in the complaint.

1. The court violated Mr. Lee's due process rights when it failed to instruction the jury on the spoilation of the video of the intoximeter test.

a. Standard of Review

Whether Mr. Lee's due process rights were violated when the court failed to instruct the jury on the spoilation of the video of the administration of his intoximeter test, is a question of law this court reviews *de novo*. *State v. Weissinger*, 2014 WI App 73, ¶ 7, 355 Wis.2d 546, 851 N.W.2d 780, (Wis. App. 2014); *State v. Greenwold*, 189 Wis.2d 59, 67, 525 N.W.2d 294 (Ct.App. 1994). This court reviews the application of constitutional principles to facts independently of the decisions rendered by the circuit court. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625 (Wis. 2001).

b. The Destroyed Video Offered an Avenue of Investigation

The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions conform to fundamental notions of fairness and that criminal defendants are given "a meaningful opportunity to present a complete defense." *Weissinger*, at ¶ 8, 851 N.W.2d at 783; *citing, California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984). Due process also requires that the prosecution disclose material exculpatory evidence to the defense. *Id. Citing, Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

"A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory…" *Greenwold*, 189 Wis. 2d at 67-68, (citing *Trombetta* and *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988)). Evidence is deemed apparently exculpatory when (1) "the evidence destroyed 'possess[ed] an exculpatory value that was apparent to those who had custody of the evidence....before the evidence was destroyed,' and (2) the evidence is 'of such a nature that the defendant is unable to obtain comparable evidence by other reasonably available means." *State v. Munford*, 2010 WI App. 168, ¶21, 330 Wis. 2d 575, 584-85, 794 N.W.2d 264.

Evidence is potentially exculpatory if it offers "an avenue of investigation that might have led in any number of directions." *Hubanks v. Franks*, 392 F.3d 926, 931 (7th Cir. 2004) (citing *Youngblood*, 488 U.S. 51, 57 n.* (1988)).

In the present case, the video is potentially exculpatory as it offered an avenue of investigation for the defense that could have led in any number of directions. The record shows that irregularities existed during the test as Mr. Lee's first sample was inadequate. What led to these irregularities? Why was the sample inadequate? The video would have shown if Officer Sandler incorrectly operated the machine or if Mr. Lee ate or drank within the 20 minute time period, or if the machine wasn't working properly.

The government's evidence in count two of the complaint consisted solely of Officer Sandler's testimony regarding the accuracy of the machine and

procedure of the intoximeter breath tests. The government made no attempt to preserve the video of that material evidence. Thus, the ability for Mr. Lee to have an "alternative means of demonstrating [his] innocence," such as attacking the reliability of the test procedure, was denied him. As such, the jury should have been given the proffered jury instruction. This is especially material given that 1) the court instructed the jury both in the preliminary and closing instructions that the intoximeter test is scientifically reliable, over defense counsel objection, and 2) the failure of the government to disclose the maintenance records for the machine.

In *Trombetta,* the respondents challenged their convictions for drunk driving after police had destroyed samples of their blood alcohol content before they could be independently tested. *Trombetta*, 467 U.S. at 483, 104 S. Ct. 2528. The Supreme Court upheld the convictions, in part because the respondents had "alternative means of demonstrating their innocence," such as attacking the reliability of the testing. *Id.* at 490, 104 S. Ct. 2528; *Weissinger*, at ¶ 9, 851 N.W.2d at 783. Mr. Lee had no such opportunity in the present case, as argued below.

The trial court denied Mr. Lee his right to due process by not instructing the jury on the spoliation of the video and Mr. Lee should be granted a new trial.

2. **The trial court erred, and Mr. Lee's due process rights were violated, when it failed to bar the government from introducing the maintenance records for the intoximeter and Tr Ex 4.**

a. Standard of Review

This court reviews the trial court's evidentiary decisions for an erroneous exercise of discretion. *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264. To properly exercise discretion, a trial court should "delineate, with sufficient detail, the factors that influenced its decision." *State v. Hunt*, 2003 WI 81, ¶ 44, 263 Wis.2d 1, 666 N.W.2d 771. "We will uphold the trial court's evidentiary rulings if it 'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a

reasonable judge could reach.' " *State v. Mercer*, 2010 WI App 47, ¶ 43, 324 Wis.2d 506, 782 N.W.2d 125 (citation omitted).

However, evidentiary rulings must also comport with a criminal defendant's constitutional right to present a defense. *See State v. Campbell*, 2006 WI 99, ¶ 33, 294 Wis.2d 100, 718 N.W.2d 649. Whether an evidentiary ruling infringes upon a criminal defendant's right to present a defense is a question of constitutional fact this Court reviews independently. *Munford* at ¶ 28. *Citing*, *State v. Tucker,* 2003 WI 12, ¶ 28, 259 Wis.2d 484, 657 N.W.2d 374.

b. The failure to bar the maintenance records and Tr Ex 4, deprived Mr. Lee the opportunity to attack the accuracy of the intoximeter test.

Mr. Lee was convicted solely on the intoximeter test. The only way the government had to prove its case was through Tr Exs 4, 6-7 and the only way for Mr. Lee to present a defense was through Tr Exs 4, 6-7. However, only the government had access to these exhibits and Mr. Lee was in effect barred from presenting a defense. As such the court committed error.

The court blamed the defense for "not following up" on its discovery request as its reason for not barring the exhibits. In so ruling, the court went against its own understanding of the law. It noted:

> We even have a court rule that says nobody has to file a demand for discovery anymore.
>
> I think it's incumbent upon the State of Wisconsin to get these certifications to the Defense in every drunk driving case as part of the discovery.

(R. 59; 168). The court denied defense's request even though it was incumbent upon the government to get the certifications to the defense.

The defense had no opportunity to have an expert review the records or find inconsistencies or discrepancies in the records as to how the machine should be calibrated and certified. It had no opportunity to prepare its cross examination of Officer Sandler. This is especially material given the preliminary and closing jury

instructions the court gave concerning the reliability of the test. The court should have struck these instructions, as defense requested.

The court did not examine the relevant facts, such as the fact that the defense had made numerous requests for the documents. It did not apply the appropriate law, such as it is the government's obligation to produce the discovery, as the government admitted. This is error and no reasonable judge would have reached the same conclusion.

c. Striking Tr Ex 4 after Officer Sandler had already testified concerning it, was error.

The trial court allowed Tr Ex 4 to be admitted into evidence and allowed Officer Sandler to testify that it proved that she was certified to operate the intoximeter.

Q. So it's proof that you are certified to operate the Intoximeter machine?

A. Yes.

(R. 59; 132). Only after the government rested did the court strike the exhibit because it was not relevant. This was error. The court had the opportunity to strike it before trial and at the time the government started to question Officer Sandler on it. However, the court waited until the government rested and then struck the exhibit. By this time the damage had been done. Waiting to bar Tr Ex 4, only after it had been admitted, was error.

Each of these errors warrants a new trial. These evidentiary errors interfered with Mr. Lee's ability to present a defense and the cumulative effect deprived Mr. Lee of his due process rights.

CONCLUSION

Mr. Lee was convicted solely on the intoximeter test. Therefore, both testing that it was properly functioning and that it was properly administered, was the only way for the government to prove its case and also the only defense for Mr. Lee. However, only the government had access to the pivotal documents and

to the video that would have shown the administering of the test. Because the government destroyed the video and failed to produce the pivotal documents, Mr. Lee was deprived of his ability to present a defense and therefore was denied due process. As such, this Court should grant Mr. Lee a new trial on count two as charged in the complaint.

Dated this 30th day of November, 2020.

Respectfully submitted,

Electronically signed by:

/s/ Annice M. Kelly
ANNICE M. KELLY
State Bar No. 1001958
4623 75th Street #278
Kenosha, WI 53142
312-965-2002
Amkelly8141@gmail.com
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this 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 4739 words.

Dated this 30th day of November, 2020.

Electronically Signed:

/s/ Annice M. Kelly
ANNICE M. KELLY
State Bar No. 1001958
4623 75th Street #278
Kenosha, WI 53142
312-965-2002
Amkelly8141@gmail.com
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 30th day of November, 2020.

Electronically signed by:

/s/ Annice M. Kelly
ANNICE M. KELLY
State Bar No. 1001958
4623 75th Street #278
Kenosha, WI 53142
312-965-2002
Amkelly8141@gmail.com
Attorney for Defendant-Appellant

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 30th day of November, 2020.

Electronically signed by:

/s/ Annice M. Kelly
ANNICE M. KELLY
State Bar No. 1001958
4623 75th Street #278
Kenosha, WI 53142 312-965-2002

Amkelly8141@gmail.com
Attorney for Defendant-Appellant

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Electronically signed by:

/s/ Annice M. Kelly
ANNICE M. KELLY
State Bar No. 1001958
4623 75th Street #278
Kenosha, WI 53142

312-965-2002
Amkelly8141@gmail.com
Attorney for Defendant-Appellant

John Barret
CLERK OF CIRCUIT COURT
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen Loebel
Deputy District Attorney
821 W. State Street
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Jacky Lee
1229 S. 21st St.
Milwaukee, WI 53204

CLERK COURT OF APPEALS
P.O. Box 1688
Madison WI, 53701-1688