STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal Case No. 2020AP001633-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JACKY LEE,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. Whether Mr. Lee's Third, Fourth, and Sixth Issues Presented Are Adequately Developed And Otherwise Appropriate for Appeal?

II. Whether the trial court properly exercised its discretion in denying the request for a spoliation instruction where there was no bad faith in failing to preserve the potentially exculpatory video of Mr. Lee's intoximeter test?

III. Whether the trial court committed reversible error in denying the Mr. Lee's request to exclude Exhibits 6 and 7?

IV. Whether the trial court erred when it struck Exhibit 4, Officer Sandler's most recent intoximeter certification after Officer Sandler testified to its veracity?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

On November 25, 2017, Police Officer Aron Bechler pulled Mr. Lee's vehicle over after observing Mr. Lee driving about 50 miles per hour in a 30 mile per hour zone. (R. 59:28.) Ultimately, Officer Bechler arrested Mr. Lee for Operating a Motor Vehicle While Intoxicated. (R. 59:32-33, 46-54.) Following his arrest, Mr. Lee consented to a chemical breath test. (R. 59:54.) Officer Heather Sandler administered the chemical breath test after she and Officer Bechler observed Mr. Lee for the required twenty-minute observation period,

ensuring that he did nothing which would invalidate the test. (R. 59:57, 111-13, 133, 138-142.)

Based on Officer Bechler's observations and the results of the chemical breath test, on June 20, 2018, Mr. Lee was charged with Operating a Motor Vehicle While Intoxicated (2nd Offense), in violation of Wisconsin Statutes §§ 346.63(1)(a) and 346.65(2)(am), as well as Operating With a Prohibited Alcohol Concentration (2nd Offense), in violation of Wisconsin Statutes §§ 346.63(1)(b), 346.65(2)(am). (R. 2; R. 59:55.)

Defense Counsel's Request For The Spoliation Instruction

Prior to trial, defense counsel filed a request for a special jury instruction informing the jury of the automatic spoliation of the video recording Mr. Lee's intoximeter test. (R. 14.) Defense counsel neither alleged the evidence was apparently exculpatory, nor that there was bad faith – merely that the "material evidence" was not preserved. (R. 14:3-4; R. 56:3-7; R. 59:186.) As a standard policy, absent a specific preservation request, the police agency only keeps videos in their system for three to six months before the videos are overwritten or destroyed to make room on the server. (R. 15:3.) However, in the current case there was a delay in issuing charges and there was no request to preserve the video within the retention period. (R. 56:6-7.) The trial court declined to include the instruction during the preliminary instructions and reserved ruling until after all the evidence was received. (R. 56:7; R. 58:3.)

At trial, defense counsel elicited testimony that the intoximeter room was equipped with audio and visual recording devices. (R. 58; R. 59:119, 152.) After both parties had rested and prior to closing argument, the court revisited the issue of the special jury instruction (R. 59:180.) In denying the instruction, the trial court outlined the relevant standard regarding law enforcement's destruction of evidence:

> There's two ways that the due process rights would be violated: One, if a - if the police department failed to preserve evidence that is apparently exculpatory; and two, whether the police department acted in bad faith by failing to preserve the evidence that is potentially exculpatory.

(R. 59:191.) The trial court found that there was no evidence that the police department acted in bad faith. (R. 59:191.) Moreover, defense counsel conceded that point, stating "I don't think it's Glendale Police Department's fault at all." (R. 59:195.) Additionally, the trial court found that the video did not have any apparent exculpatory value:

> The two police officers in this case have both testified that they observed the defendant for twenty minutes, and he did not belch, vomit, smoke, drink, regurgitate, or eat during that twenty-minute period . . . I mean, I've got those – that testimony under oath; so what I'm hearing is that it was not apparent to either of the police officers that this evidence possessed an exculpatory value, and neither has custody of it.

(R. 59:133, 135, 192-93.) Therefore, the trial court refused to give the requested jury instruction. (R. 59:196.)

Defense's Objection to the Admission of Exhibits 6 and 7

Exhibits 6 and 7 were "120-Day Maintenance Test" logs for the intoximeter. (R. 24; R. 25.) Exhibit 6 had a test date of February 6, 2018, and Exhibit 7 had a test date of August 10, 2017. (R. 24; R. 25.) The State provided these documents to defense counsel before jury selection began on November 13, 2019. (R. 58:17.) Defense counsel moved the court to exclude the evidence. (R. 58:17.) The State explained that the documents are

> standard in any OWI case involving an Intox reading… This is nothing new. This is nothing fancy. These are just simply things stating that in the regular course of business… They're also not exculpatory, and again they're just in the regular course of business of the Intox Machine. There is nothing, really, to even check.

(R. 58:18-19.) The court pointed out that the Complaint indicated the records would be available by calling a specific number. (R. 58:19.) However, when the court asked trial counsel when she called the number, defense discussed emails with prior Assistant District Attorneys. (R. 58:18-21.) Defense counsel indicated that she did call the Department of Transportation and received a link to various maintenance records. (R. 58:23.) She stated, "I did receive records from the

DOT regarding the maintenance records, just not this specific evidence…" (R. 58:19-20.)

The trial court pointed out that defense knew about the records on the previous trial date of August 28, 2019, and on the October 22, 2019, final pre-trial date, in which the same Assistant District Attorney handling the trial had also appeared on behalf of the State and yet defense apparently did not ask the Assistant District Attorney for the records. (R. 58:24-25.) Ultimately, the court found, "if you didn't get the records, it was as much your fault as the District Attorney's Office." (*Id*.) Accordingly, the court denied defense's motion to exclude the evidence. (R. 58:24.)

In the afternoon of the second day of trial, Officer Sandler testified that Exhibits 6 and 7 were records of the tests which showed that the intoximeter was calibrated and tested according to appropriate standards. (R. 59:144.) Additionally, she testified that these exhibits were proof that the intoximeter was in working order before and after Mr. Lee blew into the intoximeter on November 25, 2017. (R. 59:145.) The court received both exhibits into evidence over defense counsel's objection. (R. 59:145.)

Officer Sandler testified that in addition to the Department of Transportation's maintenance of the intoximeter instrument, she herself has to ensure the device is working properly at the time of the test. (R. 59:149-150.) Officer Sandler also testified regarding Exhibit 5, Mr. Lee's intoximeter results. (R. 59:138.) She explained that Exhibit 5 contained a dry gas target, which would indicate to her whether the instrument was testing accurately. (R. 59:139-140.) Officer Sandler testified that the machine would tell her if it needed to be placed out of service, but that was not the case with Mr. Lee's test. (*Id*.) Officer Sandler also testified that the instrument runs another "diagnostic test to make sure all the internal components were working properly," and Mr. Lee's instrument passed that internal test. (R. 59:142.)

Officer Sandler's Intoximeter Certification And Exhibit 4

Exhibit 4 was a document that summarized Officer Sandler's training history. (R. 22.) This document stated in

pertinent part that "Heather Sandler is granted this certificate to perform the duties authorized under the issued class utilizing a breath seat instrument approved for use in Wisconsin. Issued 01-16-2019. Expires 02-28-2021." (R. 22.)

During her direct examination, Officer Sandler testified that she was certified to operate the intoximeter machine on November 25, 2017. (R. 59:131.) In describing her qualifications, she stated "the initial training is two full days, learn how the machine works. There's a practical application and a written exam in those two days, and then every two years, we have to take a two-hour course with a written and practical examination to get recertified. (R. 59:131.) Officer Sandler testified that Mr. Lee's intoximeter results contained her permit number. (R. 59:138-39.) The State also introduced Exhibit 4 into evidence after a sidebar. (R. 59:131.) Officer Sandler stated that Exhibit 4 "is a copy of my current and also indicates when I was last certified. It's a training history." (R. 59:132.) She also answered "yes" in response to the question that "It's proof that you are certified to operate the Intoximeter machine." (R. 59: 132.)

After Exhibit 4 had been received over defense counsel's objection, the following exchange occurred:

> The Court: Hold on a second. I just noticed something else, which will maybe cut this even shorter. The certification in Exhibit 4 says it was issued on January 16th, 2019, and it expires on February 28, 2021.
>
> The State: Yes. That is –
>
> The Court: How is that relevant?
>
> The State: That is her current certification.
>
> The Court: So? You've gotta prove that it was correctly occupied by a qualified person on November 25th, 2017, right?
>
> The State: I did ask her if she was certified on that date.
>
> The Court; Yeah. But Exhibit 4 doesn't – doesn't certify that.
>
> The State: Correct.

> The Court: So, therefore, I'm striking Exhibit 4 on the record. It's irrelevant, and I will tell the jury.
>
> Defense Counsel: Okay. And strike any testimony relating to that.
>
> The Court: No. She's allowed to testify that she was certified on November 25th, 2017. There's just no documentation that proves it other than her words.

(R. 59:166-67.) After the parties had rested and before closing arguments, the parties revisited the issue of admitting Exhibit 4 into evidence:

> The State: Well, for 103, is that when you will instruct them that Exhibit 4 is no longer in evidence?
>
> The Court: No. I'm gonna tell them that when they come out here –
>
> The State: All right.
>
> The Court: -- Before -- you've rested formally, but before I ask the Defense if they have any case.
>
> Defense Counsel: No objection. . . . So you're just gonna make the statement regarding I'm taking this exhibit out of the evidence?
>
> The Court: I'm -- I'm gonna tell them straight out, before we even get into your case, that, after discussion, the Court has decided that Exhibit 4 is not relevant because it talks about the certifications of Officer Sandler from January 16th, 2019. And it's not relevant to this case, and that, therefore, the only evidence as to her qualifications is her testimony.
>
> Defense Counsel: Okay. That's fine.

(R. 59:200-01.) The court proceeded to instruct the jury:

> Before we proceed, Exhibit 4, which is the certification of Officer Sandler of the test of doing the Intoximeter test, is being stricken by the Court. The reason being is that that certification was issued January 16th, 2019, and expires February 28th, 2021. It's not relevant whether or not she was certified on November 25th, 2017, and that's the reason I'm striking this document and this exhibit for the record. However, she testified under oath that on

> November 25th, 2017, she was certified, and that's in evidence. You just don't have any documentation to that effect. Now, with that, the State has already rested.

(R. 59:204.) The parties then proceeded to closing arguments without further objection on this issue. (R. 59:218.)

Verdict

The jury came back with a not guilty verdict on Count 1: Operating a Motor Vehicle While Intoxicated, and a guilty verdict on Count 2: Operating With a Prohibited Alcohol Concentration. (R. 2; R. 60:3-4.) Mr. Lee's appeal follows.

ARGUMENT

Mr. Lee's raises six issues in his "Issues Presented for Review," but raised only three in his two arguments. (Appellant Br. at 1, 8-12.) Issues number 3, 4, and 6 are underdeveloped or otherwise not appropriate for appeal.[1] Therefore the State will not address those issues on the merits.

Mr. Lee concedes the intoximeter video was merely potentially exculpatory and that there was no bad faith in its destruction. (Appellant Br. at 8-10.) Because he fails to cite any legal authority which stands for the proposition that he is entitled to relief absent a due process violation, he fails to show how the trial court erroneously exercised its discretion. Mr. Lee's remaining arguments are also conclusory and unsupported by legal citations. However, even *if* the court erred in admitting Exhibits 6 and 7, any error was harmless. Also, the court's handling of Exhibit 4 was forfeited by trial counsel and harmless given the court's curative instruction.

I. Mr. Lee's Issues Three, Four, And Six Are Underdeveloped or Otherwise Inappropriate For Review.

While Mr. Lee raises six issues in his "Statement of Issues Presented for Review," Mr. Lee's arguments as to Issues 3, 4,

[1] As indicated later in this brief, the State asserts that all of Mr. Lee's claims are either underdeveloped, conceded, or forfeited. However, the State will address the appropriateness of review of the spoliation instruction and admission of the exhibits under separate sections.

and 6 are underdeveloped, do not comport with § 809.19(1)(e), or have been forfeited. (Appellant Br. at 1, 8-12.) *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633, 642 (Ct. App. 1992) (refusing to address arguments which do not comport with the requirements of § 809.19(1)(e) governing the arrangement of argument in the order of the statement of issues; also refusing to address arguments that are supported by only general statements and unsupported by developed themes or legal authority); *Mercado*, 2021 WI 2, ¶ 34, 391 Wis. 2d 304, 941 N.W.2d 835 (finding arguments which were not raised during trial and arguments raised for the first time on appeal forfeited). Therefore, the State will not address their merits.

Specifically as to Issue 3, the State was only able to locate two passing remarks regarding the standard instruction of the scientific soundness of intoximeters, neither of which explaining how the instruction provided an erroneous recitation of the law. (Appellant Br. at 10, 12.) Therefore, any argument concerning the standard jury instruction is underdeveloped, unsupported by legal authority, and fails to comport with § 809.19(1)(e). As to Issue 4, it appears that the argument developed really is whether the court erred in striking Exhibit 4 after it had been admitted and testified about, as opposed to before. (Appellant Br. at 12.) Therefore, any claim that the court erred in failing to strike the officer's testimony is underdeveloped. Furthermore, because trial counsel did not object to Officer Sandler's testimony regarding Exhibit 4 based on the year of the certification, any such claim is forfeited on appeal. Wis. Stat. § 901.03(1) (requiring the statement of the specific ground of objection); *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730 (issues are forfeited and not subject to consideration on appeal unless they were first raised before the trial court.); *State v. Mercado*, 2021 WI 2, ¶ 34.

As to Issue 6, the State was only able to locate one line regarding any cumulative effects and it is underdeveloped and unsupported by legal authority, and also not conforming to the requirements of § 901.03(1). (Appellant Br. at 12.) Moreover, there was no error, therefore there is no cumulative effect requiring reversal.

II. Because There Was No Due Process Violation, The Trial Court Properly Exercised Its Discretion In Refusing to Instruct the Jury on the Spoliation of the Intoximeter Video.

A. Standard of Review.

"A circuit court has broad discretion in deciding whether to give a requested jury instruction." *State v. Coleman*, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996); *State v. Jones*, 228 Wis. 2d 593, 597, 598 N.W.2d 259, 261 (Ct. App. 1999). This Court "will affirm so long as the instructions fully and fairly explain the relevant law." *State v. Schultz*, 2010 WI App 124, ¶ 19, 329 Wis. 2d 424, 433, 791 N.W.2d 190, 195.

Whether police conduct implicates a constitutional standard is a "question of constitutional fact that this Court reviews de novo." *State v. Greenwold*, 189 Wis.2d 59, 66, 525 N.W.2d 294 (Ct. App. 1994). This court applies the constitutional principles to the facts as they were found. *Id.*

B. The Destruction Of Potentially Exculpatory Evidence Does Not Violate Due Process Where There Is No Bad Faith.

The United States Constitution Due Process Clause and Wisconsin Statute § 971.23(1)(e) generally require that prosecutors disclose evidence that is material to either guilt or punishment. *See State v. Harris*, 2004 WI 64, ¶ 15, 272 Wis.2d 80, 98, 680 N.W.2d 737, 747 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

However, the duty to preserve evidence is not absolute. *California v. Trombetta*, 467 U.S. 479 (1984). "Whatever duty the Constitution imposes on the States to preserve evidence must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488. In other words, for evidence to have constitutional materiality, it must be apparently exculpatory before its destruction *and* be of a nature that the defendant was unable to obtain comparable evidence through other reasonable means. *Id.*

In *Arizona v. Youngblood*, the Supreme Court of the United States further refined this standard, distinguishing

"potentially useful evidence" from "exculpatory evidence." 488 U.S. 51, 57-58 (1988). It held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Id*. at 58.

Thus, a two pronged due process analysis has emerged: "A defendant's due process rights are violated if the police: 1) failed to preserve the evidence that is **apparently** exculpatory; or 2) acted in bad faith by failing to preserve evidence which is **potentially** exculpatory." *State v. Greenwold*, 189 Wis.2d 59, 67 (emphasis added). This approach weighs the defendant's interest in having access to evidence of significance against the unreasonableness of compelling law enforcement to retain and preserve all evidence that might have significance. *Youngblood*, 488 U.S. at 58.

Evidence is potentially exculpatory when "'no more can be said of its value' … than that it might be useful to establish innocence … it is only 'potentially useful.'" *State v. McEssey*, No. 2011AP2668, 2012 WL 4121684, ¶26, (Wis. Ct. App. Sept. 20, 2012) (citing *Illinois v. Fisher*, 540 U.S. 544, 548 (2004)). *See e.g. State v. Luedtke*, 2015 WI 42, ¶¶ 63, 79, 362 Wis. 2d 1, 36, 46, 863 N.W.2d 592, 610, 615 (finding no due process violation where blood sample was destroyed after laboratory's internal retention policy passed and prior to the filing of charges). In contrast, evidence is apparently exculpatory when "'it possess[ed] an exculpatory value that was apparent to those who had custody of the evidence'… and… 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, 794 N.W.2d 264, 269 (citation omitted).

It is the defendant's burden to prove that this evidence was apparently, rather than just potentially, exculpatory. *State v. Munford*, 2010 WI App 168, ¶ 21. It is also the defendant's burden to prove that the potentially exculpatory evidence was not preserved in bad faith. *State v. Greenwold*, 189 Wis.2d 59, 69-70. Negligence does not constitute bad faith, rather a defendant must show that the officers were aware of the potentially exculpatory value and had "official animus" or a "conscious effort" to destroy it. *Id*. at 68-69.

Due process is not violated when the evidence was merely "potentially exculpatory" and "defense does not argue that the State destroyed [the evidence] in bad faith. *See e.g. State v. Munford*, 2010 WI App 168, ¶ 25.

C. The Court Acted Within Its Discretion In Refusing A Special Instruction Where There Was No Bad Faith In Failing To Preserve Potentially Exculpatory Evidence.

Mr. Lee claims "[i]n the present case, the video is potentially exculpatory…" (Appellant Br. at 9.) He does not allege that the evidence at issue is *apparently* exculpatory, and thus concedes it is not. *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 493, 588 N.W.2d 285, 293 (Ct. App. 1998) ("when a party fails to argue an issue in its main appeal brief, the appellate court may treat the issue as having been abandoned…). Accordingly, under *Greenwold*, the issue is whether police acted in bad faith by failing to preserve the potentially exculpatory evidence. 189 Wis.2d at 67.

However, trial counsel has forfeited any claim of bad faith. (R. 59:195.) *See State v. Mercado*, 2021 WI 2, ¶ 34. Moreover, on appeal Mr. Lee does not allege bad faith, thus conceding that there was none. (Appellant Br. at 9-10.) *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d at 493. Because Mr. Lee does not provide any legal authority which supports the proposition that he would be entitled a jury instruction for potentially exculpatory evidence absent a showing of bad faith, the claim is underdeveloped and this Court need not consider it. *State v. Pettit*, 171 Wis.2d 627, 646.

However, should this court overlook the forfeiture and concession, the record clearly demonstrates that the court did not err in refusing to provide a spoliation instruction because the video was destroyed pursuant to the police agency's standard retention policy, not because of any bad faith. (R. 15:3; 56:6-7; 59:192-93, 195.) Nowhere in the record is there any evidence of "official animus" or a "conscious effort." *See State v. Greenwold*, 189 Wis.2d at 68-69. Furthermore, given the officer's testimony, the video was inculpatory, and only potentially exculpatory at best. *See State v. Luedtke*, 2015 WI

42, ¶ 56, (requiring bad faith to warrant relief on due process grounds because the evidence is much more likely to provide inculpatory than exculpatory evidence).

Therefore, because the evidence was at best only potentially exculpatory value, and because no bad faith existed in the failure to preserve it, the court properly determined that there was no due process violation requiring a jury instruction.

III. The Court Did Not Err In Admitting Exhibits 6 and 7 – the Intoximeter's Maintenance Records – And Any Error Was Harmless.

A. Standard of Review

Whether relevant evidence should be excluded is discretionary. *State v. Wollman*, 86 Wis.2d 459, 464, 272. N.W.2d 225, 228 (1979). An "appellate court will sustain a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v Bunderson,* 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). "To find an abuse of discretion an appellate court must find either that discretion was not exercised or that there was no reasonable basis for the trial court's decision." *Wisconsin Public Service Corp. V. Krist*, 104 Wis.2d 381, 395, 311 N.W.2d. 624, 631 (1981). Thus, the proper standard of review for this issue is for abuse of discretion.

However, even if there is an erroneous exercise of discretion, the error "does not necessarily lead to a new trial." *Martindale v. Ripp*, 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 88, 629 N.W.2d 698, 706. Rather, the reviewing court engages in a harmless error analysis. *State v. Weed*, 2003 WI 85, ¶ 28, 263 Wis. 2d 434, 456, 666 N.W.2d 485, 495. *See also Wis. Stat. § 901.03* ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected…); *State v. Koopmans*, 202 Wis.2d 385, 396, 550 N.W.2d 715 (Ct.App.1996) (review of discovery violations are subject to harmless error analysis). Harmless error is reviewed *de novo*. *State v. Carnemolla*, 229 Wis. 2d 648, 653, 600 N.W.2d 236, 239 (Ct. App. 1999).

B. Mr. Lee's Argument Is Conclusory And Underdeveloped

Mr. Lee cites no legal authority in subsection 2(b) of his brief to support his position. (Appellant's Br. at 11-12.) Accordingly, the court should disregard the underdeveloped arguments in their entirety. *State v. Pettit*, 171 Wis.2d at 646 ("Arguments unsupported by references to legal authority will not be considered.") Additionally, Mr. Lee merely makes conclusory statements that the admission of Exhibits 6 and 7 impacted his trial attorney's ability to adequately prepare for trial. (Appellant's Br. at 11.) For instance, he states that there was no opportunity for an expert to review the documents for "inconsistencies or discrepancies," yet he presents no facts or expert affidavit in support of his appeal stating that there are any such "inconsistencies or discrepancies." (*Id.*) Similarly, he states that there was inadequate time to prepare for cross-examination of Officer Sandler, yet he makes no offer of what could have occurred differently if he had been granted more time. (*Id*.) This court need not address arguments which are merely supported by general and conclusory statements. *State v. Pettit*, 171 Wis.2d at 646.

Furthermore, the record demonstrates that Exhibits 6 and 7 contain no such value – they merely state the intoximeter instrument was working at the time of Mr. Lee's breath test. (R. 59:144-45.) If trial counsel truly needed more time to review these maintenance records, she could have requested an adjournment instead of their exclusion. (R. 58:17.) "The less drastic and more favored remedy than exclusion of evidence for the State's violation of the criminal discovery statute is for the circuit court to grant a continuance or recess." *State v. Harris*, 2008 WI 15, ¶ 96 n. 47, 307 Wis.2d 555, 597, 745 N.W.2d 397, 417. A jury had not yet been empaneled in at the time defense received these records, yet defense did not seek a continuance. (R. 59:27.) This is indicative of the minimal utility of these types of exhibits, even had trial counsel had more time to review them.

C. The Court Did Not Err, And Any Error Was Harmless

The trial court did not err in admitting Exhibits 6 and 7. Trial counsel had equal access to Department of Transportation records, which were neither exculpatory nor created specifically for a party or in connection with any particular case. *See State v. Konkol*, 2002 WI App 174, n. 2, 256 Wis. 2d 725, 731, 649 N.W.2d 300, 304 (*dicta*; blood alcohol chart was not "within the custody and control of the State" since it was equally accessible to parties, nor was it "physical evidence" under the discovery statute since it was not created specifically for a party in connection with a particular case). Trial counsel indicated that she was able to communicate with the Department of Transportation and was granted access to a number of maintenance records. (R. 58:19-20, 23.) Therefore, because trial counsel had equal access to the records from the Department of Transportation, they were not in the possession or control of the State for purposes of the discovery statute. *See* Wis. Stat. § 971.23. Further, the exhibits are standard maintenance logs with such limited usefulness that turning them over prior to the start of trial is "reasonable time" under § 971.23, especially given they were not introduced until the afternoon session the following day. (R. 58:18-19; R. 59:144.) Given the nature of the exhibits, defense's ability to use the exhibits was just as effective as it would be today, as indicated by Mr. Lee's lack of supporting facts for his current conclusory claims. (Appellant's Br. at 11.) Accordingly, the trial court did not err in denying trial counsel's motion to exclude Exhibits 6 and 7.

However, even if this Court finds error, any error was harmless. Defense was not surprised by the production of Exhibits 6 or 7. (R. 58:18-21.) In fact, such records are standard in OWI trials. (R. 58:18-19.) Moreover, as indicated above, they had limited value given they merely indicated that the intoximeter instrument was functioning at the time of Mr. Lee's breath test. (R. 59:14-45.) Nor were Exhibits 6 and 7 the only evidence of this fact – Officer Sandler also testified that she personally ensured the device was working properly and the device passed all of its internal diagnostic tests. (R. 59: 139-140, 142, 149-150.) The jury's acceptance of Officer Sandler's certification to operate the intoximeter absent corroborating evidence is further indication that any error in the admission of Exhibits 6 and 7 is harmless. (R. 59:131, 166-67.) Therefore, even if there was an error, any error was harmless.

IV. Mr. Lee Is Not Entitled Relief Where The Trial Court Struck Exhibit 4 – Officer Sandler's Current Intoximeter Certification - And Instructed the Jury It Was Not Relevant.

A. Standard of Review

As indicated in Section III (A) above, the admission or exclusion of evidence falls within the trial court's discretion, *State v. Wollman*, 86 Wis.2d at 464, and is reviewed for an abuse of discretion. *Wisconsin Public Service Corp. V. Krist*, 104 Wis.2d 381, 395, 311 N.W.2d. 624, 631 (1981).

B. Mr. Lee's Argument Is Conclusory, Underdeveloped, Forfeited, and Without Merit.

Similar to his argument regarding Exhibits 6 and 7, Mr. Lee cites no legal authority in subsection 2(c) of his brief to support his proposition that it was error for the court to strike Exhibit 4, or that he is entitled to relief because of this error. (Appellant's Br. at 11.) Again, this Court need not address the argument because it is comprised of only general statements and is unsupported by legal authority. *State v. Pettit*, 171 Wis.2d at 646. Mr. Lee asserts what the trial court should have done without citing reasoning for why it should have done so or how the trial court's course of action is reversible error.

Furthermore, Mr. Lee forfeited any claim by failing to object to the trial court's proposal of striking the exhibit and instructing the jury of its irrelevance. Specifically, when the court indicated it was striking Exhibit 4, trial counsel responded, "okay." (R. 59:166-67.) When the court indicated it would instruct the jury, trial counsel indicated "No objection," and "Okay. That's fine" (R. 59:166-67.) Because trial counsel forfeited the claim, this Court need not consider it. *State v. Mercado*, 2021 WI 2, ¶ 34; *State v. Fawcett*, 145 Wis.2d 244, 256, 426 N.W.2d 91, 97 (1988) ("Alleged errors not objected to at the trial court level are deemed waived.").

Further, the court did not error in originally admitting the exhibit where the specific objection of relevancy based on

the certification's year was not originally raised. *Wis. Stat. § 901.03* (requiring the statement of the specific ground of objection); *Holmes v. State*, 76 Wis. 2d 259, 271-72, 251 N.W.2d 56, 62 (1977) (the principal that objections to evidence must be raised with specificity or be forfeited). However, even if there was error, any error was harmless given the court's corrective actions of striking the exhibit and providing a curative instruction. Jurors are presumed to follow instructions. *State v. Miller*, 2012 WI App 68, ¶ 22, 341 Wis. 2d 737, 749, 816 N.W.2d 331, 336.

Should this Court construe Mr. Lee's brief as raising the issue as to whether the circuit court erred in allowing Officer Sandler to testify to her certification at the time of trial, and also determine that the claim is adequately briefed and was not forfeited, there was no such error. Officer Sandler's certification status at the time of the trial was relevant given the fact that she was interpreting Mr. Lee's results for the jury. Moreover, even if it was error, any error was harmless given her testimony that she was also certified at the time of Mr. Lee's test. (R. 59:131.) Therefore, the record shows Mr. Lee is not entitled to relief.

CONCLUSION

For the reasons therein, because there were no due process violations warranting relief, the State requests that this Court deny Mr. Lee's request for a new trial on all grounds.

Dated this 3rd day of February, 2021.

Respectfully submitted,

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Electronically signed by:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 5321.

Electronically signed by:

February 3, 2021_
Date

s/Mark O. Thomson_____
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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 3rd day of February 2021.

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WISCONSIN COURT OF APPEALS
CERTIFICATE OF FILING

Re: *State of Wisconsin v. Jacky Lee*
Case Number 2020AP001633
District I

I hereby certify that on February 3, 2021, the **Brief and Supplemental Appendix of State of Wisconsin** was electronically filed with the Clerk of Wisconsin Court of Appeals.

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