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

REPLY BRIEF OF DEFENDANT-APPELLANT

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A. The trial court's error in admitting Exhibits 6 and 7[1] affected a substantial right and therefore was not harmless error.

1. Harmless Error Standard of Review.

Whether the trial court's erroneous inclusion of evidence was harmless presents a question of law that this court reviews independently. *State v. Hunt*, 2014 WI 102, ¶ 21, 360 Wis. 2d 576, 851 N.W.2d 434. The appellate court must conduct a harmless error analysis to determine whether the error affected the substantial rights of Mr. Lee. Evidentiary errors are "subject to a harmless error analysis," and an error "requires reversal or a new trial only if the improper admission of evidence has affected the substantial rights" of the defendant. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996).

For an error to be harmless, the party who benefitted from the error must show that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis.2d 278, 816 N.W.2d 270, (quoting *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis.2d 442, 647 N.W.2d 189). "[A]n error is harmless if the beneficiary of

[1] The State fails to recognize the accepted practice of analyzing the facts of the case to the standard of law, when it dismisses Mr. Lee's arguments concerning Exhibits 4, 6-7 as conclusory and underdeveloped. (Gov. Br. at 14, 16). Further, the State's argument in III.C. is underdeveloped and conclusory as the State does not cite to any authority to support its position. (Gov. Br. at 14-15). Accordingly, this court should disregard the underdeveloped arguments in their entirety. *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. (internal quotations omitted). To conclude that the error was harmless, this court must determine that "the jury would have arrived at the same verdict had the error not occurred." *Id*. (citations omitted).

The Wisconsin Supreme Court outlined factors to guide the analysis: "the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." Id. at ¶ 46.

2. **The State has not met its burden that the Exhibits did not contribute to the verdict or that the jury would have reached the same conclusion without the Exhibits.**

The importance of the admitted evidence cannot be overstated; it goes to the heart of the State's case and Mr. Lee's defense. The issue for the jury was whether Mr. Lee had a prohibited alcohol concentration and the only way to prove it was with the intoximeter test. To this end, without proof that the intoximeter was properly working and maintained, the State has no case. Instead the State ignores the standard of review and argues any error was harmless because the defense was not surprised by these Exhibits and these Exhibits had limited value. (Gov. Br. at 15). This court should ignore these arguments as irrelevant. However, even if these arguments were relevant, such forms may be standard evidence in OWI trails, however, what the forms say are unique to each case. And what the forms

say about the maintenance of the intoximeter is crucial to establishing the State's case, that is why they are standard evidence. If the machine is not maintained, the State does not have a case. That is why the defense was prejudiced by not receiving these Exhibits before the trial. Therefore the State has not met its burden and the trial court's error was not harmless.

The State incorrectly points to Officer Sandler's testimony, as a secondary means of proof. However, this argument fails for two reasons: 1) the State cannot prove that the jury was not persuaded by the Exhibits or that they did not contribute to the verdict; and 2) Officer Sandler provided no corroboration that she was qualified to administer the test or was able to vouch for the working and maintenance of the machine. Additionally, the jury could have rejected her testimony just as it did the testimony of Officer Bechler. The State has the burden to prove harmless error and it cannot meet it.

The State has not meet its burden that the Exhibits did not contribute to the verdict or that the jury would have reached the same verdict had the admitted evidence been excluded.

B. The State ignores the standard of review for trial court error in admitting Exhibits 6 and 7 and provides no analysis of the trial court's decision.

The State attempts to cover up the deficiencies in its argument when it presents arguments that do not comport with the standard of review.[2] Instead of analyzing the trial court's ruling, that blamed the defense for "not following up", the State argues that the trial court did not err because: 1) Exhibits 6 and 7 were not relevant; 2) the defense has not made an offer of proof; 3) the defense should have asked for a continuance; and 4) defense had equal access to them. *See, Gov. Br. III.B.* As outlined in Mr. Lee's brief in chief, the trial court erred in admitting Exhibits 6 and 7 and the State has failed to rebut this argument.

1. The State does not cite to any authority that Mr. Lee must make an offer of proof to establish the court erred in admitting Exhibits 6 and 7. This argument is therefore conclusory and underdeveloped.

The court erred in admitting Exhibits 6 and 7 and the State has not presented any counter argument to this point. (Gov. Br. at 14) Instead, without any legal authority, it argues that Mr. Lee has to make an offer proof before he can

[2] "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). (Gov. Br. at 13).

establish error. In fact, the rules of evidence require an offer of proof when evidence has been excluded, not admitted.[3]

Just as with the State's argument regarding harmless error, the State ignores the established standard and makes up its own. However, contrary to the State's position, Mr. Lee has made an offer of proof. Specifically he argued that if trial counsel had been given these Exhibits in advance, she would have had time to notice the out of date certificate and cross examine Officer Sandler on it and to cross her on her ability to vouch for the intoximeter test and machine. Interestingly, the State further makes Mr. Lee's point that he was prohibited from properly preparing when in section I it argues "because trial counsel did not object to Officer Sandler's testimony regarding Exhibit 4 based on the year of certification, any such claim is forfeited on appeal."[4] (Gov. Br. at 9).

2. Exhibits 6 and 7 were not only relevant, they were crucial.

The State also incredulously argues that Exhibits 6 and 7 contained no value. "They merely state the intoximeter instrument was working at the time of

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[3] 901.03(1) (b) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

[4]The State argued: …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. (Gov. Br. at 14).

Mr. Lee's breath test." (Gov. Br. at 14). As noted in Mr. Lee's brief in chief, the trial court found Mr. Lee was convicted solely upon the intoximeter:

> 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). As such, Mr. Lee's ability to attack this evidence was crucial. This argument also begs the question, if these Exhibits have no value, why are they standard evidence in OWI trials?

3. **The defense was not required to seek a continuance**

The State's reliance upon *State v. Harris*, 2008 WI 15, ¶96 n. 47, 307 Wis.2d 555, 597, 745 N.W.2d 397, 417, is also misplaced as *Harris* does not put the burden on the defense to request a continuance, as opposed to exclusion, as the State implies. Rather *Harris* discusses the *court's option* to exclude the evidence or grant a continuance under Wis. Stat §971.23(7m) as a remedy for the State's failure to disclose evidence.[5] In this case, the trial court did neither. Once again the State does not provide any legal authority that Mr. Lee had to request a continuance to establish the trial court erred in admitting the Exhibits.

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[5] **(7m)** SANCTIONS FOR FAILURE TO COMPLY.

(a) 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 a continuance.

(b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

4. The State incorrectly relies upon case law discussing disclosing rebuttal witnesses.

The only case the State relies upon for the position that the trial court did not err because the defense allegedly had equal access to the documents, is the off point case of *State v. Konkol*, 2002 WI App. 174, 649 N.W.2d 300, 256 Wis. 2d 725. However, *Konkol*, sets out the standard for disclosing rebuttal witnesses. Moreover the cite referenced by the State does not state what it claims to state. No where does it discuss equal access as a basis to combat trial court error. Under Wis. Stat. §971.23(1)(d), rebuttal witnesses do not have to be disclosed. As such, this court should ignore this argument.

C. The State ignores the standard of review for trial court error in striking Exhibit 4 after Officer Sandler's testimony.

Once again the State ignores the standard of review and the trial court's analysis and states that the trial court did not err because: 1) defense counsel acquiesced to the court's alleged corrective action; 2) defense counsel did not object based on relevance; 3) any error was harmless because the court instructed the jury to ignore the Exhibit; and 4) Officer Sandler's certification was relevant because she was testifying concerning the accuracy of the intoximeter. (Gov. Br. at 16-17). As outlined below, all of these reasons are meritless and should be dismissed.

1. Mr. Lee did not forfeit his objection to the admittance of Exhibit 4.

Exhibit 4 was a 30 page document which had not been provided to defense until the day of trial. (R. 59 at 132, 148). When the government began questioning

Officer Sandler on this Exhibit, defense counsel immediately objected and asked for a side bar. (R. 59; 131-132). However, the side bar did not take place until after Officer Sandler's testimony and the admittance into evidence of the Exhibit 4. (*Id.* at 159). This alone was error that could have been prevented merely by the court hearing the objection and looking at the document, prior to Officer Sandler's testimony.

Instead, in light of these facts, the State now argues because defense counsel did not object based on the fact that Exhibit 4 was out of date, Mr. Lee has forfeited this argument. (Gov. Br. at 9, 16-17). To the contrary, this makes Mr. Lee's point that he did not know what was in the document and therefore could not present a proper defense. Further, because defense counsel acquiesced when the court finally struck Exhibit 4, does not mean the objection is forfeited. Defense counsel attempted to object prior to any testimony on it and was denied this opportunity. It is hard to imagine what the State would have defense counsel do in such a situation.

2. The jury instruction did not cure the error or make it harmless error.

Instructing the jury to ignore Exhibit 4 does not make the error harmless. It did not reverse the clock and allow defense counsel to cross examine Officer Sandler properly. It did not allow defense counsel to ask why she did not have a certificate for the relevant time period and to draw inferences from that evidence for the jury. Instead, the manner in which the court handled it made it

seem as if it was merely a minor administrative error. Again, the State has not met its burden that the inability to properly cross examine Officer Sandler did not contribute to the jury verdict and therefore was not harmless error.

3. The State's conclusory argument that allowing Officer Sandler to testify concerning Exhibit 4 was not error, or alternatively was harmless error, is underdeveloped and without merit and makes Mr. Lee's point that it was key to Exhibits 6 and 7.

Once again the State makes Mr. Lee's point concerning the importance of Exhibits 4, 6-7 and therefore the error of their admission into evidence. It argues:

> 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. (Gov. Br. at 17).

That is exactly why Mr. Lee should have been provided all three Exhibits well in advance of the trial. The three are interwoven and key to the State's case. Officer Sandler's testimony is key to interpreting the result and therefore the intoximeter itself. Allowing Officer Sandler to testify concerning Exhibit 4 was error. Further, the State has not met its burden that her testimony did not contribute to the verdict. It merely makes a conclusory statement unsupported by any case law and therefore its argument is underdeveloped and without merit.

D. This court should hold that destroying potentially exculpable evidence violates due process when the State does not charge the defendant until after the evidence has been destroyed.

The State argues that because there is no evidence of bad faith, the court did not err in refusing to give the spoilation instruction. (Gov. Br. at 12). This court should hold that when the State fails to charge a defendant until after the evidence

is destroyed, due process has been violated because it deprives the defendant of any opportunity to investigate it. In his brief in chief, Mr. Lee argued that potentially exculpatory evidence "offers an avenue of investigation that might have led in any number of directions." (Lee Br. at 9), *citing, Hubanks v. Franks*, 392 F.3d 926, 931 (7th Cir. 2004) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L.Ed.2d 281(1988)).

This opportunity was denied Mr. Lee because the State took seven months to charge him. Under these circumstances, the requirement to prove bad faith is unattainable. The police have a retention policy and if the State merely waits until the appropriate time has passed, before charging a defendant, defendants will never have the opportunity to review the video. The State is in control of the entire process; they create the retention policy and they decide when a defendant will be charged. The State should not be allowed to benefit from its own rigging of the system. Under these circumstances, the court erred in not giving the jury the spoilation instruction.

E. The Cumulative effect of the trial court's errors require a new trial.

The State alleges, without any legal support, that because Mr. Lee's argument that the cumulative effect of the trial court's errors requires a new trial, is one sentence, that it is underdeveloped and unsupported and should be ignored. (Gov. Br. at 9). Based on the State's logic, one could argue the same concerning its position on this issue. Mr. Lee has noted, several of the State's arguments are

unsupported and underdeveloped and even one sentence. By way of further example, *see,* section IV.B. where the State's entire argument concerning Officer's Sandler's testimony as harmless error amounts to one sentence and is unsupported by case law. (Gov. Br. at 17).

The State's reliance on Wis. Stat. §901.03(1) is also misplaced. Mr. Lee assumes the State is referring to section (1)(a)[6] however, in its conclusory argument it does not state so. This however, is not the standard. *See, Harris,* 2008 WI 15 at ¶ 110. In *Harris*, trail counsel did not make a specific objection concerning the cumulative effect of multiple errors and yet the court addressed this issue. *Harris* stated "The cumulative effect of several errors may, in certain instances, undermine a reviewing court's confidence in the outcome of a proceeding. We therefore aggregate the effects of the multiple errors in determining whether their overall impact satisfies the standard for a new trial." Such is the case in the present matter.

The State has not provided any legal support that a one sentence argument is underdeveloped and therefore should be ignored. The cumulative effect of the trial court's errors requires a new trial.

F. Mr. Lee has not forfeited any arguments and his arguments are developed and otherwise appropriate.

[6] **(a)** *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

As noted throughout Mr. Lee's reply, he has not forfeited any arguments. Further, as to Mr. Lee's issue number 3, once again, the State has not provided any support that an argument has to be a certain length before this court will address it. *See*, Gov. Br. at 9. As to Mr. Lee's issue number 4, see section C.1. above.

CONCLUSION

For all the reasons stated in Mr. Lee's brief in chief and this reply brief, this court should grant Mr. Lee a new trial on count two as charged in the complaint.

Dated this 18th day of February, 2021.

Respectfully submitted,

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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 2773 words.

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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.

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