STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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Appeal No. 2022AP111–CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEFFREY L. BLABAUM,

Defendant–Appellant.

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# BRIEF OF DEFENDANT–APPELLANT

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ON APPEAL FROM CONVICTIONS ENTERED ON MAY 4, 2021, IN THE CIRCUIT COURT
FOR IOWA COUNTY, BRANCH 1,
THE HON. MARGARET M. KOEHLER, PRESIDING

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Respectfully submitted,

JEFFREY L. BLABAUM,
Defendant-Appellant

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## STATEMENT OF THE ISSUES

I. Did the State present sufficient evidence at trial such that any reasonable jury could have found Blabaum guilty of theft beyond a reasonable doubt?

The trial court held that it did.

II. Did the admission of prejudicial other acts evidence warrant granting Blabaum's motion for a mistrial?

The trial court held that it did not.

III. Did the exclusion of exculpatory evidence by the court, the admission of prejudicial other acts evidence, and the prosecutor's remarks in closing arguments constitute plain error?

The trial court did not rule on these issues.

IV. Did Blabaum's motion for postconviction relief warrant granting an evidentiary hearing on his ineffective assistance of counsel claims?

The trial court held that it did not.

## STATEMENT ON PUBLICATION

Mr. Blabaum does not seek publication, as the issues presented may be resolved on the briefs by applying established law to the facts of the case.

## STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

## STATEMENT OF THE CASE AND FACTS

Blabaum was charged with one count of disorderly conduct in Iowa County Case 2020CM19, which arose from an incident on November 1, 2019.[1] On August 5, 2020, the State charged Blabaum with one count of Misdemeanor Theft in Iowa County Case Number 2020CM195, which arose from an incident on May 13, 2020.[2] According to the criminal complaint in 2020CM195, law enforcement was called by B.B. to assist with a property exchange between herself and Blabaum.[3] The complaint further alleged that Blabaum arrived for the property exchange, became angered by the presence of City of Dodgeville Officer Jared Weir, and left without exchanging any property with B.B.[4]

A scheduling conference was held, on February 26, 2021, where the court joined 2020CM19 and 2020CM195 for trial.[5] Trial counsel did not object to joinder.[6] On April 23, 2021, defense counsel filed a witness list naming Robert Harazin as the sole potential trial witness.[7] A pre-trial conference was held on that same date, where the court permitted the defense to call Harazin as a rebuttal witness over

[1] R. 46:4.
[2] R. 2.
[3] R. 2:1–3.
[4] R. 2:1–3.
[5] R. 53:1–4.
[6] R. 53:2.
[7] R. 24.

the State's objection.[8] Defense counsel made an offer of proof that Harazin would testify that he believed B.B.'s property to be abandoned in a storage unit he owned in Tennessee.[9] Defense counsel stated that Blabaum's trial defense to the theft charge was that B.B. no longer owned the disputed property because it was abandoned.[10] Defense counsel stated that he was not requesting a continuance of the trial, when the State requested exclusion of Harazin as a witness or a continuance of the jury trial in the alternative.[11]

On April 27, 2021, the State filed a motion in limine to exclude any testimony, by Blabaum or Harazin, regarding statements made by members of Tennessee law enforcement that B.B.'s property was legally abandoned on the grounds that any such testimony would be hearsay.[12] Attached to that motion was a police report regarding a phone interview between Dodgeville Police Department (DPD) Officer Weir and Harazin, on April 26, 2021.[13] That report states the following: Harazin stated that Blabaum and B.B. rented a trailer from him on property he owned in Tennessee. B.B. moved out of the

[8] R. 46:6–12.
[9] R. 46:7 ("He would testify that . . . he observed the property of the alleged victim and felt it was abandoned and stored in, I think, his storage unit.").
[10] R. 46:8–9 ("That's the defense is that the property was abandoned and therefore, there was no theft.").
[11] R. 46:10–11; R. 45:48.
[12] R. 25:1–4.
[13] R. 25:4.

residence in July of 2019, while Blabaum continued to reside in the trailer. B.B. returned to the property sometime in 2020 to retrieve the items she had left behind. Blabaum told Harazin not to let her on the property without him present, fearing she would commit theft. Harazin contacted Tennessee law enforcement and was told by officers that he did not have to allow B.B. on the property if Blabaum did not want her there. Officers told Harazin that, given the length of time B.B.'s property had been left behind, B.B. no longer had legal rights to the property because it was abandoned. Officers advised that Harazin and Blabaum were now the legal owners of the property B.B. left behind.[14]

On May 4, 2021, both cases proceeded to jury trial, and the court addressed the State's motion in limine. Defense counsel stated that Harazin was not available and would not be testifying, whereafter the court granted the State's motion to exclude Harazin's testimony.[15] The State then renewed its motion to exclude any testimony by Blabaum that he had been told by any individual that B.B.'s property was legally abandoned under Tennessee law.[16] Defense counsel conceded that any testimony to that effect would be inadmissible

[14] R. 25:4.
[15] R. 45:5–6.
[16] R. 45:6–7.

hearsay, whereafter the court granted the State's request to exclude Blabaum's testimony on those issues.[17] The court ordered that witnesses would not be sequestered after defense counsel agreed not to request sequestration.[18] Prior to opening statements, the court asked the prosecutor if the State would be presenting any other acts evidence and the prosecutor stated that they would not be.[19]

A twelve-person jury was empaneled at the joint trial, with one of the jurors being Jeffrey McGuire.[20] The court conducted voir dire on the jury panel before they were sworn, and asked the jury panel if anyone was acquainted with Blabaum. None of the jurors, including McGuire, responded to this question.[21] Defense counsel did not ask the jury panel if anyone had met Blabaum before. At Blabaum's sentencing, defense counsel made a record that Blabaum knew a member of the jury and that there had been a controversy between them in the past.[22]

The State called four witnesses to testify at trial: B.B., David Biba, Shane Groom, and Jared Weir. B.B. testified as follows: She had been in a romantic relationship with Blabaum for six years,

[17] R. 45:6–7.
[18] R. 45:8.
[19] R. 45:9 ("THE COURT: We don't have any prior or other acts evidence, am I correct? [Trial Counsel]: That is correct.").
[20] R. 45:17.
[21] R. 45:19–20.
[22] R. 44:12–14.

beginning in 2013 and ending in 2019.[23] She was eighteen years old when she began dating Blabaum, and they lived together in Wisconsin before moving to Tennessee for the last one and a half years of their relationship.[24] She decided to end the relationship and moved to Dodgeville, Wisconsin in September of 2019, quickly taking some of her property, while leaving other property in Tennessee where Blabaum continued to reside.[25] She left Tennessee hastily because Blabaum had been physically violent with her in the past.[26] The prosecutor asked questions designed to elicit testimony on alleged acts of domestic violence by Blabaum, despite the prior assertions to the court that no other acts evidence would be presented.[27]

Defense counsel objected to B.B.'s testimony alleging that Blabaum had been physically violent towards her on prior occasions.[28] In response, the prosecutor did not deny that this testimony was other acts evidence, but argued that it should be admitted because it provided context to the end of their relationship

[23] R. 45:63–64
[24] R. 45:64.
[25] R. 45:65–68, 86–87.
[26] R. 45:65–68 ("A: Because he has laid hands on me before and I was-- . . . [Trial Counsel] I'll object.").
[27] R. 45:9, 65–66 ("Q: It sounds like you made a hasty departure, is that safe to say? A: Yes. Q: And why is that? A: Because he has laid hands on me before and I was . . ."), R.45:77–78 ("Q: So, you were fearful of going to his place alone? A: Correct. Q: Why is that? A: Just because of the past physical contact that we have had.").
[28] R. 45:65–68.

and why B.B. left property behind in Tennessee.[29] The court sustained the objection, finding that it was other acts evidence.[30] Immediately after the trial court sustained this objection the prosecutor asked B.B. another question which referenced her testimony about the alleged other acts.[31]

B.B.'s testimony continued as follows: In November of 2019, her and Blabaum arranged for a property exchange to occur at her family residence in Dodgeville.[32] Blabaum arrived at that residence to see B.B.'s dog and to return some of her property, bringing a cat with him that the two had owned in Tennessee.[33] Blabaum became upset when she asked for her property back.[34] Blabaum and members of her family began to argue and swear at each other, Blabaum left the residence after being told to leave.[35] Blabaum threw a sign belonging to her on the ground, and she put the cat in Blabaum's truck, before Blabaum drove away.[36] She unsuccessfully attempted to obtain a restraining order against Blabaum, because he had been following her

[29] R. 45:66.
[30] R. 45:66.
[31] R. 45:66 ("Q: So, it is safe to say you felt you needed to leave hastily from Tennessee, correct?").
[32] R. 45:65–78.
[33] R. 45:65–78.
[34] R. 45:65–78.
[35] R. 45:65–78.
[36] R. 45:65–78.

and driving around her family residence.[37] About six to eight months after this incident, Blabaum sent her a text message asking if she wanted her bench, blankets, and some photographs back and to meet him at his brother's house in Dodgeville. Blabaum told her to come alone, and she was expecting Blabaum to return a bench, photographs, and blankets.[38] She contacted law enforcement to have an officer present during the property exchange because Blabaum had been physically violent with her on prior occasions.[39]

When B.B. testified that she was afraid of meeting Blabaum alone because of the alleged prior physical violence, defense counsel again objected and moved for a mistrial.[40] The grounds for the objection and motion for mistrial were that the testimony was prejudicial other acts evidence.[41] The court sustained the objection and struck B.B.'s second statement regarding alleged prior physical violence but denied defense counsel's motion for a mistrial, opting to give a curative instruction to disregard any stricken testimony.[42] Defense counsel did not object to B.B.'s testimony about Blabaum

[37] R. 45:67 ("He followed me up here and had been driving around my home since basically the end of September 2019 . . ."), 73–75.
[38] R. 45:73–79, 94–95.
[39] R. 45:73–79.
[40] R. 45:77–79.
[41] R. 45:77–79.
[42] R. 45:65–79.

following her, driving around her residence, or about her attempt to obtain a restraining order against Blabaum.

B.B.'s testimony continued as follows: She contacted the Dodgeville Police Department, and Officer Jared Weir arrived at the scene of the property exchange to assist her.[43] Blabaum arrived on scene in a pickup truck, which was towing a gray trailer, but she was unable to see what was inside the trailer because it was closed, and Blabaum never opened it.[44] Blabaum became angry when he saw Officer Weir present, told her that he was not going to return the property, and that he was going to destroy or burn the property. Blabaum drove away from the scene without returning any property, and she did not personally observe any of the disputed property during the incident because the trailer was closed.[45] She never received any property back from Blabaum after this incident, aside from a high school yearbook.[46]

David Biba testified as follows: B.B. is his daughter, and he was present for the November 1, 2019, incident when Blabaum arrived at B.B.'s family residence. Blabaum made small talk with B.B. and some of her family and became upset when B.B. asked for the

[43] R. 45:77–84.
[44] R. 45:77–84.
[45] R. 45:77–84.
[46] R. 45:84.

return of her property. Blabaum and members of B.B.'s family began to argue, he was asked to leave, and Blabaum eventually drove away. Before leaving, B.B. threw the cat in the passenger cab of Blabaum's truck and Blabaum threw a sign belonging to B.B. and his epi kit on the ground near B.B.[47] He heard his daughter's testimony and was asked to corroborate aspects of B.B.'s testimony without objection from defense counsel.[48]

Officer Shane Groom testified as follows: On November 1, 2019, he spoke with Blabaum about the incident at the residence of Blabaum's brother. Blabaum stated that he had been involved in an argument at B.B.'s residence, where he threw things in the yard and where B.B. had thrown things at him and slammed the door of his truck on his head when he tried to leave. He did not observe any signs of injury to Blabaum. He then went to B.B.'s family residence, where he spoke with B.B. and David.[49] He had observed B.B.'s testimony in court and her testimony was consistent with the statements she made to him on November 1, 2019.[50] He was in court for David Biba's

[47] R. 45:96–105.
[48] R. 45:96–105 ("A: When-- pretty much it was like B.B. said. When she asked about her belongings, it seemed like he was getting frustrated about it and a little angered. Q: Now, you heard your daughter testify that there some swearing between the two of them. Do you remember that? A: Yes.").
[49] R. 44:105–117.
[50] R. 45:109 ("Q: And you were here today when she testified earlier, is that correct? A: That is correct. Q: And can you state for the jury whether or not her

testimony and that testimony was mostly consistent with the statements David made to him on November 1, 2019, with the exception that David had previously told him that Blabaum drove away quickly while squealing his tires.[51] He called Blabaum after speaking with B.B. and David and told Blabaum that he would be referring charges to the District Attorney against him for disorderly conduct with a domestic modifier.[52]

Defense counsel objected to Groom's testimony that he referred domestic disorderly conduct charges against Blabaum as unfairly prejudicial. The trial court sustained the objection and instructed the jury to disregard that the charges were referred with a domestic modifier.[53] The prosecutor asked Groom a question designed to elicit testimony that the disorderly conduct charge had been referred as an act of domestic abuse.[54]

Officer Jared Weir testified as follows: On May 13, 2020, he responded to 310 Walnut Street in Dodgeville to assist with a property

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statements to you about this incident are generally consistent with what she told you happened that night? A: They are.").

[51] R. 44:110 ("Q: And again, were you here when he testified earlier today? A: I was. Q: And did you conduct an interview with him that night as well? A: I did. Q: And did you-- was his testimony today consistent with what he had told you that night? A: For the most part.").

[52] R. 45:114–115.

[53] R. 45:115.

[54] R. 45:114–115 ("Q: And what was that recommendation?").

exchange at B.B.'s request.[55] Blabaum arrived on scene, driving a pickup truck with an attached trailer, and he recognized Blabaum based on prior professional contacts.[56] Blabaum was upset at his presence and mentioned being unhappy about his handling of a prior case.[57] Blabaum said he was not going to return the property to B.B. because Weir was present, and that he was going to burn the property instead. Blabaum did not make any statements regarding whether any of the disputed property was in his truck trailer. Blabaum drove away, and he contacted Blabaum by telephone informing him that he would refer charges against him if he did not return B.B.'s property. Blabaum made no statements claiming ownership of the disputed property. He called B.B. about six weeks after the incident and the property had not been returned.[58]

Defense counsel did not object to Weir's testimony about recognizing Blabaum from prior professional contacts or about Blabaum voicing his displeasure at Weir's presence based on Weir's handling of a prior case. Weir's police report regarding the May 13, 2020 property exchange alleged that Blabaum stated that he was upset at Weir's presence based on a prior case where Blabaum was

[55] R. 45:118–121.
[56] R. 45:118–121.
[57] R. 45:120–121.
[58] R. 45:118–125.

criminally charged even though he was the victim.[59] After the court had sustained two other acts objections by defense counsel, and denied Blabaum's motion for a mistrial, the prosecutor asked Weir a question designed to elicit the nature of this prior case involving Weir and Blabaum.[60] This occurred despite the State's prior assurances to the court that no other acts evidence would be presented.[61]

At the close of the State's case in chief defense counsel moved to enter a directed not guilty verdict on both charges.[62] Defense counsel moved for a directed verdict on the theft charge on the grounds that the State failed to prove that the disputed property was ever taken back to Wisconsin, and the evidence presented was insufficient for the charge to go to the jury.[63] The trial court denied Blabaum's motions for a directed verdict.[64] Blabaum did not testify in his own defense, and the defense called no witnesses.[65] Defense counsel renewed his motion to dismiss for lack of evidence and his motion for mistrial, both of which were denied by the trial court.[66]

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[59] R. 25:2–3.
[60] R. 45:120–121 ("Q: Did he say why he was upset at your presence? A: Because he was unhappy with the way a previous case was handled. Q: Did he indicate what that previous case was? A: I don't recall if he did.").
[61] R. 45:9.
[62] R. 45:126–130.
[63] R. 45:126–130.
[64] R. 45:130–131.
[65] R. 45:132–136.
[66] R. 45:137.

In closing arguments the prosecutor stated that Blabaum's alleged admissions established that the disputed property belonged to B.B., that the disputed property was inside of Blabaum's trailer during the May 13, 2020 incident, and that no other evidence was offered to rebut these alleged admissions by Blabaum.[67] A jury found Blabaum guilty of theft and not guilty of disorderly conduct, and the trial court denied defense counsel's post-verdict motion for judgment notwithstanding the verdict based on the sufficiency of the evidence.[68] Blabaum was sentenced on the theft conviction to serve sixty days in jail and to pay restitution, court costs, and surcharges.[69]

Blabaum filed a motion for postconviction relief based on ineffective assistance of counsel. The motion, and supporting brief, argued that Blabaum received ineffective assistance of counsel based on trial counsel failing to move for witness sequestration at trial, failing to conduct sufficient voir dire such that a juror with potential prejudice against Blabaum was on the jury, failure to present apparently exculpatory evidence, failure to object to joinder of the cases for trial, failure to object to other acts evidence, and the cumulative effect of those errors.[70] On December 20, 2021, the court

[67] R. 45:178–179.
[68] R. 45:183, 186.
[69] R. 44:12.
[70] R. 54:1–15; R. 70:1–12.

held a hearing wherein it addressed the motion and briefs filed by both parties and issued an oral ruling denying Blabaum's postconviction motion without a hearing.[71] Blabaum now appeals from the judgment of conviction, and the trial court's order denying a postconviction hearing, in this matter.

## ARGUMENT

### I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO ESTABLISH THAT A CRIME OF MISDEMEANOR THEFT HAD BEEN COMMITTED IN THE STATE OF WISCONSIN

#### A. Standard of review and legal authority

Territorial jurisdiction is an essential requirement to any criminal prosecution under Wisconsin law.[72] Territorial jurisdiction is a function of the United States Constitution's Sixth Amendment requirement that a person be tried by an "impartial jury of the State and district wherein the crime shall have been committed."[73] Relevant to the allegations in this matter, territorial jurisdiction may be established when: (1) a person commits a crime, any of the constituent elements of which take place in Wisconsin or (2) while outside of Wisconsin, a person does an act with intent that it cause in this state a

[71] R. 87:20–26; R. 57.
[72] Wis. Stat. § 939.03(1)(a); ***Hotzel v. Simmons***, 258 Wis. 234, 240, 45 N.W.2d 683, 686 (1951).
[73] ***State v. Triebold***, 2021 WI App 13, ¶ 10, 396 Wis. 2d 176, 183, 955 N.W.2d 415, 419.

consequence set forth in a section defining a crime.[74] Whether the State has established territorial jurisdiction, and whether an objection to territorial jurisdiction can be waived by Blabaum, are questions of law which reviewing courts subject to *de novo* review.[75]

The question of whether the evidence is sufficient to support a conviction is a question of law this Court reviews *de novo*.[76] A conviction may be reversed when the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.[77]

One fundamental rule of the criminal law is that an accused cannot be convicted of a crime unless the corpus delicti ("body of the crime"), the fact that a crime has been committed, is established by the State.[78] A related common law corroboration rule holds that a conviction of a crime may not be grounded solely on the admission or confessions of the accused.[79] A confession must be accompanied by

[74] Wis. Stat. § 939.03(1)(a).
[75] ***Midland Funding, LLC v. Mizinski***, 2014 WI App 82, ¶10, 355 Wis. 2d 475, 854 N.W.2d 371; *see also* ***State v. Soto***, 2012 WI 93, ¶ 14, 343 Wis. 2d 43, 52–53, 817 N.W.2d 848, 853.
[76] ***State v. Booker***, 2006 WI 79, 12, 292 Wis. 2d 43, 717 N.W.2d 676.
[77] *Id.* at 22.
[78] ***State v. Kitowski***, 44 Wis.2d 259, 261, 170 N.W.2d 703 (1969).
[79] ***State v. Verhasselt***, 83 Wis. 2d 647, 661, 266 N.W.2d 342, 349 (1978).

sufficient corroboration of a significant fact before it may form the basis of a conviction.[80] A significant fact is one that gives confidence that the crime the defendant confessed to actually occurred.[81] Courts consider whether the State satisfied the common law corroboration rule to be a question of law and will view the facts in evidence in a light most favorable to the verdict.[82]

### B. The State did not sufficiently corroborate Blabaum's alleged admissions to establish that a crime of theft had occurred in the State of Wisconsin, and the trial court erred in denying Blabaum's motions to dismiss

Trial counsel moved for a directed not guilty verdict on the theft charge arguing that the evidence was insufficient and, that there was no evidence that any of the disputed property was ever brought from Tennessee to Wisconsin.[83] This may be logically interpreted to encompass an objection and motion to dismiss based on the lack of territorial jurisdiction of the trial court over the theft charge.

Under the State's theory of the case, the State was required to prove the following elements beyond a reasonable doubt before a jury

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[80] *Id.* at 662 ("If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.'").
[81] ***State v. Bannister***, 2007 WI 86, ¶ 31, 302 Wis. 2d 158, 171–72, 734 N.W.2d 892, 899.
[82] *Id.* at 172.
[83] R. 45:126–127 ("[T]hose objects remained in Tennessee and as far as any of us know now with the evidence in the record that they are still in Tennessee . . . ."), *see also* R. 45:175 ( "What evidence do they have that the stuff was ever even in Wisconsin besides these statements . . .").

could convict Blabaum of theft: (1) intentionally retaining possession of the moveable property of another, (2) without the consent of the owner of the property, (3) knowing that the owner did not consent, and (4) with the specific intent to deprive the owner permanently of the possession of the property.[84] The meaning of the second, third, and fourth elements of theft are all modified by the first element's language in that each element requires proof of retaining possession of moveable property.[85]

In order to establish territorial jurisdiction for the theft charge, the State was, therefore, required to establish either: (1) that Blabaum allegedly retained B.B.'s moveable property while that moveable property was located within the State of Wisconsin or (2) while in Tennessee, or otherwise outside of Wisconsin, Blabaum allegedly committed an act with the specific intent that it causes in Wisconsin a consequence of the crime of misdemeanor theft.[86]

Blabaum's alleged admissions to B.B. and Weir were the only evidence the State presented to establish that any of the disputed

[84] Wis. Stat. § 943.20(1)(a); R. 29:3–4.
[85] Wis. Stat. § 943.20(1)(a); *see also* ***Berry v. State***, 90 Wis. 2d 316, 329, 280 N.W.2d 204, 210 (1979) (asportation is a separate and necessary element of theft); *see also* ***State v. Delaney***, 2003 WI 9, ¶ 14, 259 Wis. 2d 77, 85, 658 N.W.2d 416, 419 (2003) (courts first look to the plain meaning of a statute); *see also* ***State ex rel. Kalal v. Cir. Ct. for Dane Cnty.***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (2004) ("[S]tatutory language is interpreted in the context in which it is used . . .").
[86] Wis. Stat. § 939.03(1); ***Hotzel***, 258 Wis. at 240; ***Triebold***, 396 Wis. 2d at 183.

property was allegedly in Blabaum's possession at the time he drove away from the meeting with B.B. and Weir. B.B. testified that she resided in a house in Tennessee with Blabaum before she moved to Wisconsin leaving the bench and some other property behind in Tennessee.[87] In closing arguments, the prosecutor relied exclusively on Blabaum's alleged admissions to argue that the State had proven that Blabaum had allegedly brought the property to Wisconsin, and that he then retained possession of it on May 13, 2020.[88]

B.B. testified that the disputed property was never returned to her, and the State presented no physical evidence of the disputed property at trial.[89] None of the State's witnesses testified that they observed any of the disputed property in Blabaum's possession, or even within the State of Wisconsin on May 13, 2020.[90] To the contrary, B.B. testified that Blabaum arrived on scene in a truck which was towing a trailer and that she could not observe what, if anything, was contained inside of Blabaum's trailer.[91] Weir testified that Blabaum did not state whether he had any of the disputed property in his truck trailer during the incident.[92] B.B. testified that she assumed

[87] R. 45:65–68, 86–87.
[88] R. 45:168–169.
[89] R. 45:84.
[90] *See* Wis. Stat. § 939.03(1)(a).
[91] R. 45:77–84.
[92] R. 45:118–125.

that the bench was in Blabaum's truck trailer, but did not testify to having any prior familiarity with the truck trailer Blabaum was towing to corroborate this assumption.[93]

The State failed establish that the disputed property was within the State of Wisconsin at the time Blabaum allegedly retained it.[94] No evidence was presented at trial establishing that Blabaum committed any act while outside of the State of Wisconsin which would confer territorial jurisdiction over the theft charge.[95] Accordingly, the State failed to establish territorial jurisdiction for the theft charge at trial and this Court should dismiss this matter on jurisdictional grounds.[96]

With regards to the sufficiency of the evidence, there was no corroboration of Blabaum's alleged admissions to establish that he possessed or otherwise unlawfully retained B.B.'s property on May 13, 2020. Without corroboration of any significant fact, even viewing the evidence admitted in a light most favorable to the State, Blabaum's alleged admissions were not sufficient for the State to prove the corpus delicti of misdemeanor theft beyond a reasonable doubt.[97] Accordingly, no reasonable jury could have found Blabaum guilty beyond a reasonable doubt and the trial court erred in failing to

[93] R. 45:82.
[94] *See* Wis. Stat. § 939.03(1)(a).
[95] *See* Wis. Stat. § 939.03(1)(c).
[96] Wis. Stat. § 939.03(1)(a)–(c); ***Hotzel***, 258 Wis. at 240.
[97] *See* ***Kitowski***, 44 Wis.2d at 261; *see also* ***Verhasselt***, 83 Wis. 2d at 662.

grant Blabaum's motions for a directed not guilty verdict.[98] This court should vacate Blabaum's conviction, reverse the ruling of the trial court denying his motions to dismiss, and remand the matter with instructions to dismiss the theft charge with prejudice.

## II. THE COURT ERRED IN DENYING BLABAUM'S MOTION FOR A MISTRIAL BASED ON PREJUDICIAL OTHER ACTS EVIDENCE.

### A. Standard of review and legal authority

When a party makes a request for a mistrial, a trial court must determine, "in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial."[99] Courts make this determination by asking whether the defendant can receive a fair trial in light of all the facts and circumstances.[100] A reviewing court will reverse a trial court's decision to grant or deny a mistrial only if there is a clear showing that the court erroneously exercised its discretion.[101]

When a defendant's request for a mistrial is based on laxness or overreaching by the prosecution, the reviewing court gives strict scrutiny to the trial court's ruling.[102] When the basis for the request is for some other reason, the reviewing court must give great deference

[98] *See* ***Booker***, 292 Wis. 2d at 22.
[99] ***State v. Bunch***, 191 Wis. 2d 501, 506–07, 529 N.W.2d 923, 925 (Ct. App. 1995).
[100] ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61.
[101] ***Bunch***, 191 Wis. 2d at 506–07.
[102] *Id.* at 507.

to the circuit court's ruling.[103] A mistrial request is based on prosecutorial overreaching where the grounds for the request are related to conduct by the State.[104]

**B. The other acts evidence so infected the trial with unfairness as to deny Blabaum due process, and the trial court erred in denying Blabaum's motion for a mistrial**

Blabaum's motions for a mistrial were based on B.B.'s testimony regarding alleged other acts of domestic violence by Blabaum to her on prior occasions.[105] Her testimony on these subjects was elicited by the prosecutor, who asked questions designed to probe the alleged reasons B.B. left property behind in Tennessee and why she decided to have an officer present during the May 13, 2020 incident. Since her stated reasoning for these actions was based on the alleged other acts of domestic violence by Blabaum following questions from the prosecutor designed to elicit such answers, Blabaum's motion for mistrial was based on conduct by the State, and this Court should give strict scrutiny to the trial court's decision to deny Blabaum's motions for a mistrial.[106]

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[103] *Id.* at 507.
[104] *Id.*
[105] R. 45:78 ("I don't think that bell can be unrung . . . it's overly prejudicial and we wouldn't be able to get a fair and impartial jury . . . I realize the objections have been sustained, but the jury still heard it and especially the second time, that there was physical abuse . . . I don't think a curative instruction would be sufficient.").
[106] ***Bunch***, 191 Wis. 2d at 507.

These statements, in their totality, would allow a jury to infer that Blabaum allegedly had a propensity to manipulate and physically abuse a much younger woman in a domestic relationship.[107] From this, the jury could draw the forbidden inference that Blabaum acted in accordance with this propensity on May 13, 2020, by allegedly using control over the disputed property to lure B.B. into meeting him alone and then retaining possession of the property and threatening to destroy it when he saw that B.B. had brought Weir to the meeting as protection.[108] This is precisely what the State argued at Blabaum's sentencing in support of a lengthy jail sentence.[109]

The prejudicial impact of this other acts evidence cannot be understated, considering the totality of the circumstances where the jury also heard Weir testify that he knew Blabaum from prior professional contacts, and that Blabaum was upset about Weir's handling of a case. The other acts testimony by B.B. and Weir cumulatively would permit the jury to also infer that Blabaum was a

[107] R. 2:1 (Blabaum's birthday is listed as February 12, 1965); R. 45:64–68, 86–87 (B.B. testified that she was eighteen when she entered a romantic relationship with Blabaum, that the relationship lasted six years, and that she broke up with Blabaum in 2019).
[108] *See* Wis. Stat. § 904.04(1).
[109] R. 44:4 ("What really shocks the conscience in this case, Judge, is the fact that this began with Mr. Blabaum requesting that she come to his brother's residence alone and using that property as apparently a bait to get her to come to that residence alone . . . I can gather from his reaction to the presence of law enforcement that it was not just simply there to exchange a few words.").

scofflaw who had the propensity to commit law violations. The court's denial of Blabaum's motion for a mistrial cannot survive strict scrutiny review, or even review, under a standard giving great deference to the court's ruling.[110] Under those circumstances it was not possible for Blabaum to have a fair trial, and this Court should vacate the theft conviction and remand for a new trial because the court erroneously exercised its discretion by denying Blabaum's motions for a mistrial.

## III. PLAIN ERROR RESULTED FROM THE TRIAL COURT'S EXCLUSION OF EXCULPATORY EVIDENCE, THE ADMISSION OF OTHER ACTS EVIDENCE, AND IMPROPER REMARKS BY THE PROSECUTOR IN CLOSING ARGUMENTS

### A. Legal Authority: Plain Error

A criminal defendant has a constitutional due process right to a fair trial.[111] Even where an objection and motion for mistrial was not timely made, this Court has the authority to vacate Blabaum's conviction and order a new trial based on plain error or to accomplish the interests of justice.[112] Some errors, including those which occurred in Blabaum's case, are "so plain or fundamental" that they cannot be waived, and that the Court should grant a new trial despite a defendant's

[110] *See* ***Bunch***, 191 Wis. 2d 501, 506–07, 529 N.W.2d 923, 925 (Ct. App. 1995).
[111] ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770, 777 (1999); ***State v. Mayo***, 2007 WI 78, ¶ 3, 301 Wis. 2d 642, 650–51, 734 N.W.2d 115, 119.
[112] ***State v. Davidson***, 2000 WI 91, ¶ 87, 236 Wis. 2d 537, 579, 613 N.W.2d 606, 626 (2000); Wis. Stat. § 752.35.

failure to preserve the error.[113] Under the plain error doctrine, Blabaum's conviction may be vacated where an unpreserved error is fundamental, obvious, and substantial.[114]

The existence of plain error depends on the facts of the particular case. The "quantum of evidence properly admitted and the seriousness of the error involved are particularly important."[115] "Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt."[116] If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden shifts to the State to show the error was harmless beyond a reasonable doubt.[117]

An error is harmless only when the State can prove "'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"[118] Courts determine whether an error is harmless by assessing the probable impact of the erroneously admitted evidence on the minds of an average jury, by asking "whether there is

[113] ***Davidson***, 236 Wis. 2d at 579; ***State v. Neuser***, 191 Wis. 2d 131, 142, 528 N.W.2d 49, 53–54 (Ct. App. 1995).
[114] Wis. Stat. § 901.03(4); ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77.
[115] ***Jorgensen***, 310 Wis. 2d at 153–56.
[116] *Id.*
[117] *Id*.
[118] *Id.*

'a reasonable possibility that the evidence complained of might have contributed to the conviction.'"[119]

Courts consider several factors to determine whether an error is harmless, including: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. If the State fails to meet its burden of proving that the errors were harmless, then the court may conclude that the errors constitute plain error.[120]

### B. The trial court violated Blabaum's right to present a complete defense at trial and committed plain error when it prohibited any testimony about what Blabaum had been told by Tennessee law enforcement regarding the legal status of the disputed property

Generally, hearsay is not admissible evidence.[121] Hearsay is defined as an out of court statement offered in evidence to prove the truth of the matter asserted.[122] An out of court statement which is offered for the limited purpose to prove that the statement was made

[119] ***State v. Billings***, 110 Wis. 2d 661, 667, 329 N.W.2d 192, 195 (1983).
[120] ***Jorgensen***, 310 Wis. 2d at 153–56.
[121] Wis. Stat. § 908.02.
[122] Wis. Stat. § 908.01(3).

and had an effect on the state of mind of a defendant at the time of an act or omission is not hearsay.[123]

A strict application of the hearsay rule may deny a criminal defendant the fundamental right to a fair trial.[124] A criminal defendant has the constitutional right to present a complete defense at trial.[125] The right of an accused in a criminal trial to due process is, in essence, "the right to a fair opportunity to defend against the State's witnesses."[126]

The trial court erred when it ruled that Blabaum was prohibited from testifying about anything he was told by members of Tennessee law enforcement, or any other witness, about the legal status of the property B.B. left behind when she moved to Wisconsin. This foreclosed the defense from presenting evidence that Blabaum believed, based on statements by law enforcement or Harazin, that the disputed property was abandoned and, therefore, no longer belonged to B.B. If offered for this limited purpose, the excluded statements would not be hearsay because they would be offered to prove Blabaum's state of mind, rather than that the property was legally

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[123] ***State v. Wilson***, 160 Wis. 2d 774, 779–80, 467 N.W.2d 130, 132–33 (Ct. App. 1991).
[124] ***State v. Brown***, 96 Wis. 2d 238, 242, 291 N.W.2d 528, 531 (1980).
[125] ***Chambers v. Mississippi***, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973); ***State v. Anderson***, 141 Wis. 2d 653, 660, 416 N.W.2d 276, 279 (1987).
[126] ***Chambers***, 410 U.S. at 294.

abandoned.[127] This state of mind evidence would be relevant because it would negate the mens rea elements of theft: knowledge of the owner's non-consent and specific intent to permanently deprive the owner of possession of the property.

Even if the defense wanted to offer the excluded statements for a hearsay purpose, to prove the property was legally abandoned, the court should have permitted Blabaum to do so because ownership of the disputed property was a critical issue at trial which formed the basis for his original defense. Any such testimony by Blabaum would be sufficiently corroborated to be admissible by the supplemental police report filed by the State,[128] wherein Harazin stated to Weir that he was informed by law enforcement that the disputed property was legally abandoned and that himself and Blabaum now jointly owned the property.

The trial court's exclusion of the foregoing testimony constituted plain error because it improperly categorized such testimony as hearsay, where it was relevant and admissible for the non-hearsay purpose of establishing Blabaum's state of mind regarding who owned the disputed property. Further, the ruling

[127] ***Wilson***, 160 Wis. 2d at 779–80.
[128] *See* ***Brown***, 96 Wis. 2d at 243–45 (for hearsay to be admitted on due process grounds the statement must be critical to the accused's defense, which is determined through a four-factor test which measures the reliability of the hearsay statement).

resulted in a violation of Blabaum's constitutional right to present a complete defense by excluding reliable and critical evidence through mechanistic application of the rule against hearsay.

Had Blabaum been permitted to testify about statements from Harazin and law enforcement, regarding the ownership of the disputed property, he would have been able to testify that he was informed that B.B. no longer owned the property. If offered to prove Blabaum's state of mind, such evidence would negate the mens rea elements of theft. If offered for the truth of the matter asserted, such evidence would negate the elements of theft requiring proof that the disputed property belonged to B.B. Given the clear exculpatory value of this evidence, its exclusion by the trial court was plain error because there is a reasonable possibility that the jury would have found Blabaum factually innocent and legally not guilty of theft had they heard the excluded testimony.[129]

### C. The admission of prejudicial other acts evidence constituted plain error

Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion.[130] Such

[129] *See* ***Billings***, 110 Wis. 2d 661, 667, 329 N.W.2d 192, 195 (1983).
[130] Wis. Stat. § 904.04(1).

character evidence may be admissible provided (1) it is offered for a permissible purpose, (2) it is relevant, and (3) the probative value of the other acts evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[131] If other acts evidence was erroneously admitted, a reviewing court next determines whether the error is harmless or prejudicial.[132] The applicable standard for reviewing a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion.[133]

Other acts testimony against Blabaum included testimony from B.B., Shane Groom, and Jared Weir. An analysis of the applicable legal factors shows that the foregoing errors, individually and cumulatively, rose to the level of plain error, and that those errors were not harmless.[134]

With regards to the frequency of the errors, B.B.'s testimony included two statements that Blabaum had been physically violent towards her. Objections to both statements were sustained, but only the second statement was stricken and subject to the court's curative

[131] ***State v. Sullivan***, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30, 32–33 (1998).
[132] *Id.*
[133] *Id.* at 780–81.
[134] ***Jorgensen***, 310 Wis. 2d at 153–56.

instruction. B.B.'s first statement about Blabaum allegedly being physically violent was admitted into evidence. B.B. also testified that she was eighteen years old when she began a romantic relationship with Blabaum, and that she unsuccessfully tried to obtain a restraining order against Blabaum because he was following her. Trial counsel did not object to this testimony by B.B., and it was received into evidence. The criminal complaint lists Blabaum's date of birth as February 12, 1965, meaning that Blabaum would have been over forty years old at the time his relationship with B.B. began.[135]

Groom's stricken testimony included one statement about referring a charge with a domestic modifier. The objection to this testimony was sustained. Weir's testimony included a statement that he recognized Blabaum from prior professional contacts and another statement that Blabaum was upset at his presence because of Weir's handling of a prior case. No objection was made to Weir's testimony, and it was admitted into evidence.

The importance of Weir's testimony was that it suggested that Blabaum was a scofflaw, who had multiple prior contacts with law enforcement for law violations. B.B.'s testimony suggested that Blabaum was a domestic abuser who would attempt to control and

[135] R. 2:1.

intimidate her. The jury would be able to draw the prohibited inference that Blabaum allegedly had a propensity to violate the law, and that he acted in conformity with that propensity on May 13, 2020.[136]

The admitted other acts statements from B.B. and Weir did not duplicate untainted admissible evidence, they injected inadmissible and highly prejudicial other acts evidence into the trial. Blabaum's original defense was that the disputed property was legally abandoned. The trial court foreclosed that defense when the State's motion in limine was granted. At trial Blabaum's defense changed to assert that B.B. consented to Blabaum retaining the disputed property when she left it in Tennessee, and that the State failed to establish that the property was ever brought back to Wisconsin.[137] The State relied on circumstantial evidence to prove that Blabaum allegedly had the disputed property in his truck trailer on May 13, 2020, and that he unlawfully retained possession of it without B.B.'s consent. Finally, the strength of the State's case on the theft charge depended on the jury's assessment of B.B.'s credibility, including her testimony about Blabaum's alleged admissions and acts of violence.

[136] Wis. Stat. § 904.04(1).
[137] R. 45:174–176.

The State was permitted, through B.B.'s unstricken testimony, to present Blabaum to the jury as someone who allegedly beat and attempted to manipulate a woman much younger than himself. Through Weir's testimony, the State was permitted to present Blabaum as a habitual law breaker. The impact of this other acts evidence was amplified by the testimony of Groom and B.B., which was stricken. These errors so infected the trial with unfairness that Blabaum was denied his due process right to a fair trial under the Fourteenth Amendment.[138] Accordingly, the foregoing errors were not harmless because there is a reasonable possibility that they, individually and cumulatively, might have contributed to Blabaum's convictions.[139]

### D. The prosecutor's remarks in closing arguments constituted plain error by shifting the burden of proof and commenting on Blabaum's decision not to testify

The United States Supreme Court held in *Griffin v. California* that the Fifth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits a prosecutor from commenting on the refusal of a defendant in a

[138] *See* ***Whitty v. State***, 34 Wis. 2d 278, 295, 149 N.W.2d 557, 564 (1967) ("[T]he trial court will be required in order to assure a fair trial to an accused to carefully consider whether the prejudice of other-crimes evidence is so great as compared with its relevancy and the necessity for its admission . . .").
[139] *See* ***Billings***, 110 Wis. 2d at 667.

criminal case to testify.[140] Wisconsin courts have held that the rule from *Griffin* is violated where a prosecutor indirectly implies that a criminal defendant's failure to testify is evidence.[141] Whether Blabaum's right to remain silent has been violated presents a mixed question of fact and law, where the trial court's findings of historical fact will be upheld unless clearly erroneous and where the trial court's determinations of law will be reviewed *de novo*.[142]

A criminal defendant has the due process right under the Fifth and Fourteenth Amendments to a trial where the government is required to prove every element of every criminal charge beyond a reasonable doubt.[143] Improper burden shifting occurs when a prosecutor directly invites an inference based on a criminal defendant's refusal to testify.[144] The remarks of a prosecutor constitute plain error where the prosecutor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[145] A denial of due process and the right to a fair trial

[140] ***Griffin v. California***, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965).
[141] ***State v. Patino***, 177 Wis. 2d 348, 381–82, 502 N.W.2d 601, 614–15 (Ct. App. 1993).
[142] ***State v. Hassel***, 2005 WI App 80, ¶ 7, 280 Wis. 2d 637, 641, 696 N.W.2d 270, 272 (Ct. App. 2005).
[143] ***In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970).
[144] ***Patino***, 177 Wis. 2d at 381–82.
[145] ***Davidson***, 236 Wis. 2d at 579.

may occur where improper argument by a prosecutor implicates specific rights of the accused.[146]

After defense counsel made his closing arguments, the prosecutor stated the following in rebuttal argument:[147]

> The question about this property and we're hearing something strange about the property being in Tennessee. I don't know where that's coming from. It's not in the evidence here. All I know is, Mr. Blabaum sent [B.B.] a text saying here's your property including blankets and pictures. Come and get it. Come alone. Now, you know, he comes showing up in a trailer. ***Well, of course, it's in the back of the trailer. There's nothing here that says otherwise and why in the world would he say otherwise?*** Come alone! And then he comes back and says, well, I'm going to take off and leave because you brought an officer here to the exchange. He knew the property was hers and again, what the Defense would have you believe is just because you have a break up and you leave and there's some property left behind, oh! It's gone forever. No longer yours. That's nonsense. He knew it was hers and he texted her back and said, do you want your property? It was her property. He admitted it was her property. ***I don't care if it was a day, a month, a year or whatever else, it was her property and there was no testimony, no evidence offered otherwise that would contradict the proof that the State has provided.***

The first improper argument was that Blabaum's alleged admissions established that the disputed property was in Blabaum's truck trailer during the May 13, 2020 incident, that no evidence presented suggested that it was not, and that there would be no reason that Blabaum would claim otherwise. The second improper argument was that no evidence or testimony was offered that would contradict the State's witnesses or version of events.

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[146] *See* ***Darden v. Wainwright***, 477 U.S. 168, 169, 106 S. Ct. 2464, 2465, 91 L. Ed. 2d 144 (1986).
[147] R. 45:178–179.

In their totality, these arguments implied to the jury that Blabaum elected not to testify because he was guilty of theft, and that if there was any evidence consistent with Blabaum's innocence, the defense would have presented it. These arguments violated Blabaum's Fifth Amendment privilege against self-incrimination, and his due process right to make the State prove every element of theft beyond a reasonable doubt, because it shifted the burden of proof and invited the jury to infer that Blabaum's decision not to testify was consciousness of guilt evidence.[148] Therefore, the prosecutor's remarks in closing arguments constituted plain error because they so infected the trial with unfairness as to deny Blabaum due process and the Court should order a new trial.[149]

### E. The Court should order a new trial based on plain error, or in the interests of justice

Each of the aforementioned errors rose to the level of plain error because they affected Blabaum's due process right to a fair trial and because, individually and cumulatively, there is a reasonable possibility that the foregoing evidence might have contributed to Blabaum's conviction.[150] Accordingly, the court should order a new trial based on plain error.[151]

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[148] ***Patino***, 177 Wis. 2d at 381–82.
[149] *See* ***Davidson***, 236 Wis. 2d at 579.
[150] *See* ***Billings***, 110 Wis. 2d at 667.
[151] Wis. Stat. § 901.03(4).

Reversal of Blabaum's convictions is appropriate in the interests of justice under Wis. Stat. § 752.35. This Court has the "inherent and statutory power to review waived errors."[152] A new trial in the interests of justice is required where the controversy has not been fully tried or where it is possible that justice has for any reason been miscarried.[153] A defendant is not required to make any showing as to the likelihood of a different result on retrial.[154] The Court has exercised this power when important evidence was kept from the jury,[155] or when evidence presented to the jury should have been excluded.[156]

For the foregoing reasons a new trial in the interests of justice is required because the exclusion of exculpatory testimony regarding Blabaum's beliefs as to who owned the disputed property, the admission of other acts evidence, and improper closing arguments by the State created a substantial likelihood that Mr. Blabaum has suffered a miscarriage of justice. Blabaum's ability to present exculpatory evidence, which would have negated the *mens rea* element of theft, was prohibited when the court granted the State's motion in limine. The propensity evidence created an unjustifiable

[152] Wis. Stat. § 751.06; ***Bannister***, 302 Wis. 2d at 174–75.
[153] Wis. Stat. § 752.35, ***State v. Hicks***, 202 Wis.2d 150, 549 N.W.2d 435 (1996).
[154] ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991).
[155] ***State v. Cuyler,*** 110 Wis.2d 133, 142–43, 327 N.W.2d 662 (1983).
[156] ***State v. Penigar,*** 139 Wis.2d 569, 578, 408 N.W.2d 28 (1987).

and unreasonable risk that the jury would find Blabaum guilty based on alleged prior acts of domestic violence towards B.B. and of alleged prior involvement with the criminal justice system based on Weir's testimony. Improper remarks by the prosecutor invited the jury to credit the testimony of the States' witnesses and convict Blabaum of theft based on Blabaum's decision not to testify or present any evidence of his innocence. This Court should grant a new trial because it is clear that, due to the erroneous exclusion and admission of the foregoing evidence, a new trial is required in the interests of justice as the real controversy has not been fully tried.[157]

## IV. THE TRIAL COURT ERRED IN DENYING BLABAUM'S MOTION FOR POSTCONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING

### A. Standard of review and legal authority

A hearing on a postconviction motion is required when the movant states sufficient material facts that, if true, would entitle the defendant to relief."[158] "A trial court may deny a hearing on a postconviction motion if the motion does not raise facts sufficient to entitle the movant to relief, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled

[157] Wisconsin Stat. § 751.06.
[158] ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433.

to relief.[159] Whether a motion alleges sufficient facts that, if true, would entitle the defendant to an evidentiary hearing presents a question of law that is reviewed *de novo*.[160]

The Sixth Amendment guarantees the "fundamental and essential" right of the defendant in a criminal case the effective assistance of counsel.[161] A claim of ineffective assistance of counsel is typically analyzed under the two-part *Strickland* test, which requires showing both (1) that counsel performed deficiently and (2) that his or her performance prejudiced the defense.[162] To demonstrate deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering the totality of the circumstances.[163] A single unreasonable error is sufficient to a finding of ineffectiveness.[164] The right to effective assistance of counsel may be violated "by even an isolated error if that error is sufficiently egregious and prejudicial."[165]

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[159] *Id.* at ¶9.
[160] *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).
[161] ***Gideon v. Wainwright****,* 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963); ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334.
[162] ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).
[163] ***State v. Carter***, 324 Wis. 2d 640, 658–59, 782 N.W.2d 695 (2010) (*quoting* ***Strickland*** at 688 (1984)).
[164] ***Kimmelman v. Morrison***, 477 U.S. 365, 383, 106 S. Ct. 2574, 2587, 91 L. Ed. 2d 305 (1986).
[165] ***Murray v. Carrier***, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986).

The deficiency prong is met when counsel's oversight or inattention caused the error, instead of a reasoned defense strategy.[166] Strategic decisions made after less than a complete investigation of law and facts may still be adjudged reasonable.[167] But "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[168] This Court must assess a given decision's reasonableness in light of "all the circumstances."[169]

The defendant must also demonstrate that trial counsel's deficient performance was prejudicial.[170] The Wisconsin Supreme Court explicitly applies the "cumulative effect" approach to decide whether trial counsel's deficient performance prejudiced the defendant.[171] The second prong requires resulting prejudice. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'"[172] Rather, "[t]he question on review is whether there is a reasonable probability" of a different result but for counsel's deficient

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[166] *See* ***Wiggins v. Smith***, 539 U.S. 510, 534, 123 S. Ct. 2527, 2541–42, 156 L. Ed. 2d 471 (2003); ***Kimmelman,*** 477 U.S. at 385; ***State v. Moffett***, 147 Wis. 2d 343, 433 N.W.2d 572, 576 (1989).
[167] ***Strickland***, 466 U.S. at 690–91.
[168] *Id.* at 691.
[169] *Id.*
[170] *Id.* at 687.
[171] ***State v. Thiel***, 264 Wis. 2d 571, 603–05, 665 N.W.2d 305 (2003).
[172] ***Moffett,*** 433 N.W.2d at 576, *quoting* ***Strickland,*** 466 U.S. at 693.

performance.[173] "Reasonable probability" under this standard is defined as "'probability sufficient to undermine confidence in the outcome.'"[174] In addressing this issue, this Court must consider the totality of the circumstances.[175]

### B. The trial court erred in denying Blabaum's postconviction motion without a hearing

Blabaum specifically incorporates all of the information, law, and argument from his postconviction motion and supporting brief by reference.[176] Blabaum's postconviction motion and supporting brief addressed how and why trial counsel should have requested sequestration of witnesses, conducted a more extensive voir dire of prospective jurors, made efforts to call Harazin as a witness, and objected to joinder of the cases and to other acts evidence.[177] The postconviction motion and brief details why these errors individually and cumulatively constituted deficient performance and prejudiced Blabaum at trial.

As set forth in this brief, the other acts testimony by B.B. and Weir should not have been admitted at trial. Trial counsel's failure to object to B.B.'s testimony about attempting to obtain a restraining

[173] ***Moffett,*** 433 N.W.2d at 577.
[174] *Id.*, *quoting* ***Strickland,*** 466 U.S. at 694.
[175] ***Strickland,*** 466 U.S. at 695.
[176] R. 54:1–15; R. 70:1–12.
[177] R. 54:1–15; R. 70:1–12.

order against Blabaum after he followed her to Wisconsin, or to Weir's testimony about prior police contacts involving Blabaum and Blabaum's displeasure over Weir's handling of a case, constituted deficient performance which prejudiced Blabaum.

Regarding the issue of prejudice, Blabaum's postconviction motion and supporting brief set forth how the aforementioned errors individually and cumulatively prejudiced Blabaum.[178] The lack of sequestration allowed the State to bolster B.B.'s credibility through other witnesses. Inadequate voir dire, and a juror's inaccurate response to the trial court's voir dire, resulted in a potentially biased juror being empaneled. Harazin could have testified about statements he, or members of law enforcement, made to Blabaum regarding the legal status of the disputed property. If Blabaum believed that the disputed property no longer belonged to B.B., that would negative the mens rea element of theft. Joinder of the cases and failure to object to other acts evidence allowed the State to present inadmissible propensity evidence. In a case where ownership of the disputed property, Blabaum's beliefs regarding who owned the property, and B.B.'s credibility were critical issues, the foregoing errors were prejudicial because there is a reasonable probability that Blabaum

[178] R. 54:1–15; R. 70:1–12.

would have been acquitted of the theft charge had the aforementioned errors not occurred.[179]

Blabaum's postconviction motion and supporting brief properly alleged ineffective assistance of counsel by alleging deficient performance and resulting prejudice.[180] Therefore, Blabaum's motion properly plead his ineffective assistance of counsel claims, and the trial court erred in denying the motion without an evidentiary hearing.

## CONCLUSION

For the reasons stated in this Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court enter a directed not guilty verdict based on the sufficiency of the evidence and lack of territorial jurisdiction. Alternatively, Blabaum respectfully requests a new trial based on plain error and in the interests of justice or, if the Court deems this relief inappropriate, that the matter be remanded for an evidentiary hearing on his ineffective assistance of counsel claims.

[179] ***Moffett,*** 433 N.W.2d at 577.
[180] ***Allen***, at ¶14.

Dated at Middleton, Wisconsin, July 12, 2022.

Respectfully submitted,

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## CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,975 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: July 12, 2022.

Signed,

BY: Electronically signed by Brendan P. Delany
BRENDAN P. DELANY
State Bar No. 1113318
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## CERTIFICATION

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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: July 12, 2022.

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