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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022 AP 000111-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. BLABAUM,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
ON MAY 4, 2021 BY THE CIRCUIT COURT FOR IOWA COUNTY,
THE HONORABLE MARGARET M. KOEHLER, PRESIDING

APPENDIX TO THE BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,

STATE OF WISCONSIN,
Plaintiff-Respondent

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STATEMENT OF THE ISSUES

The respondent-plaintiff concurs with the petitioner-defendant's statement of the issues.

STATEMENT ON PUBLICATION

Plaintiff-respondent does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument in this case would be appropriate only if the Court of Appeals determines the submitted briefs fail to fully present the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Pursuant to Wisconsin Statute section 809.81(3)(a)(2) the respondent-plaintiff, unless stated herein, concurs with the recited Statement of the Case and Facts provided by the appellant-defendant.

Appellant-defendant Jeffrey L. Blabaum ("Blabaum") was charged in Iowa County Case No. 20-CM-19 with one count of misdemeanor Disorderly Conduct contrary to Wis. Stat. § 947.01(1).[1] The same jury found Blabaum guilty of misdemeanor Theft in this case and acquitted Blabaum of Disorderly Conduct (Domestic) in the joined case, Iowa County Case No. 20-CM-19.[2]

Respondent-plaintiff ("State") objects to the various assertions by Blabaum that the prosecutor asked questions designed to elicit testimony.[3] The statements by Blabaum are speculative conclusory statements and are not objective factual recitations of the trial court record. Two references, which quote the prosecutor as asking "[w]hy is that?", are not leading as defined in Wis. Stat. § 906.13(2)(b). The questions were not designed to elicit improper testimony from the witness other than to elaborate on a prior, appropriate, response.

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[1] R. 45:183
[2] *Id.*
[3] Blabaum's brief at 13, 18, 20.

The State also objects to the factual assertion by Blabaum that "[i]mmediately after the trial court sustained this objection the prosecutor asked B.B. another question which referenced her testimony about the alleged other acts."[4] The question followed a sustained objection and the statement of fact is, again, conclusory. If the State's question "[w]hy is that", the witness's response, and counsels' argument were stricken, the question "[s]o it is safe to say you felt you needed to leave hastily from Tennessee, correct?" dovetails off the witness's previous response and intentionally *avoids* the improper inquiry.[5] The question and response thereto acknowledges B.B. felt the need to leave quickly and leave B.B's belongings, which is proper and material to the case, while avoiding further comment as to the reason why.

Blabaum's recitation of facts also states "Blabaum told [B.B] to come alone, and she was expecting Blabaum to return a bench, photographs, and blankets."[6] B.B. received a text message with a picture of a from Blabaum stating:

> Want this? I am at Jim's. I'll be here for 10 minutes. It has some of your blankets and photos also. Come alone. It's all good.[7]

[4] Blabaum brief at 14.
[5] R. 45:66
[6] Blabaum brief at 15.
[7] R. 45:76

Blabaum's statement of fact neglected to reference that B.B. arrived at the location to pick up not just anyone's property, but B.B's property, with Blabaum acknowledging as much in his initial text.[8]

B.B. testified that although B.B. did not actually see in the trailer that day, she believed the property to be in the trailer.[9] The picture included in Blabaum's text message included an image of the flooring in the background, which B.B. testified appeared to be the same as that in the referenced trailer.[10]

[8] Blabaum's brief at 15.
[9] R. 45:76, 82-83
[10] *Id.*

ARGUMENT

The State respectfully requests that the Court affirm the Iowa County Circuit Court's Judgment of Conviction entered on May 4, 2021 convicting Blabuam of misdemeanor Theft contrary to Wis. Stat. s. 943.20(1)(a) and reject Blabaum's postconviction requests for relief.

I. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL TO ESTABLISH THE CONVICTION FOR MISDEMEANOR THEFT UNDER WISCONSIN LAW

a. Standard of Review

The State concurs that this issue is a matter of law, to be reviewed *de novo*, with the facts and evidence viewed most favorable to the State.[11]

b. Circumstantial evidence supports the trial court's denial of Blabaum's motion for directed verdict

The facts support the State of Wisconsin having jurisdiction over this case. Wisconsin Statute § 939.03(1)(a) states:

> **939.03 Jurisdiction of state over crime**. (1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:
>
> a) The person commits a crime, any of the constituent elements of which takes place in this state.[12]

[11] ***State v. Booker***, 2006 WI 79, 12, 22, 292 Wis. 2d 43, 717 N.W.2d 676.
[12] Wis. Stat. § 939.09(1)(a)

Blabaum's appellate brief omits the expansive quantity of evidence that, when construed most favorably to the State, sufficiently demonstrates the property was in Wisconsin at the time of the offense; the trial court acknowledged as much.[13] Blaubaum sent a text, proof of which was not challenged at trial, from Blabaum to the victim stating "Want this? (picture of a bench) I'm at Jim's. I'll be here for ten more minutes. It has some of **your** blankets and photos also. Come alone, it's all good."[14] (emphasis added).

B.B. then testified the individual named "Jim" referenced in the text message lives on West Walnut Street in the City of Dodgeville, Iowa County, Wisconsin.[15]

B.B. also testified that she purchased the bench referenced in the text message photo and that Blabaum had it "in his trailer."[16] B.B. then confirmed that not only did Blabaum show up with the trailer, but that the floor in the text message picture showing the bench appeared to match the floor of the trailer.[17] When asked whether B.B. believed the bench was in the trailer in Dodgeville at the pre-arranged exchange time, B.B. answered in the affirmative.[18]

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[13] Blabaum's brief at 9-22.
[14] R 45:76
[15] R 45:77
[16] R. 45:76, 82-83
[17] *Id.*
[18] *Id.*

The State proved with sufficient evidence that the referenced property was in Wisconsin at the time of the incident at issue.

Blabaum argues that the State must prove, by direct or corroborating evidence only, that all elements must have occurred in the State of Wisconsin and, therefore, because neither Officer Weier or the victim laid eyes on the inside of the trailer, that the State failed to establish jurisdiction at trial.[19]

The Wisconsin Court of Appeals previously rejected defense arguments that the location of an offense must be established by direct evidence.[20] Although *Lippold* refers to the question of venue, not jurisdiction, both issues pertain to the "locality of the prosecution", and if the Iowa County Circuit Court has venue, then the State of Wisconsin has jurisdiction.[21]

c. The State need only satisfy one element of Theft to grant Wisconsin jurisdiction.

Blabaum argues that if the Court of Appeals were to believe no reasonable jury could infer the stolen property was in Wisconsin, whereby causing the first element to fail,

[19] Blabaum's brief at 26-28.
[20] ***State v. Lippold***, 2008 WI App 130, ¶ 10, 313 Wis. 2d 699, 757 N.W.2d 825 (internal citation omitted)
[21] *Id*. at ¶ 9 (internal citations omitted)

then Wisconsin has no jurisdiction in this matter.[22] Blabaum's assertion a misstatement of the plain language of the statue.

There are four elements to the misdemeanor charge of Theft under Wis. Stat. § 943.20(1)(a):

1. The defendant intentionally retains possession of moveable property of another.
2. The owner of the property did not consent to retaining the property.
3. The defendant knew that the owner did not consent.
4. The defendant intended to deprive the owner permanently of the possession of the property.[23]

Wisconsin Statute § 939.03(1)(a) states the occurrence of only one element within the State of Wisconsin is needed to confer jurisdiction upon a defendant.[24] Wisconsin Statute § 939.03(1)(a) states, in part, "**any** of the constituent elements of which takes place in this state."[25] (emphasis added).

If this Court rejects the State's position that the circumstantial evidence at trial, viewed most favorably to the State, is insufficient to satisfy the first element occurred in Wisconsin, this Court should find the second, third, and fourth elements occurred on May 13, 2020 in the City of Dodgeville, Iowa County, State of Wisconsin. The

[22] Blabaum's brief at 26-28.
[23] WIS JI-Criminal 1441 Theft – § 943.20(1)(a) (Wisconsin Jury Instructions - Criminal (2020))
[24] Wis. Stat. § 943.20(1)(a)
[25] *Id*.

State met this burden when B.B. expressed to Blabaum at the exchange time that she wanted her property, that Blabaum knew that B.B. wanted her property, and that Blabaum then intended to take, destroy, and deprive B.B. of that property.[26]

Blabaum cites *State v. Kitowski*, 44 Wis. 2d 259, 261, 170 N.W.2d 03 (1969), when Blabaum argues "[w]ithout 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."[27]

The Wisconsin Supreme Court in *Kotowksi* reviewed the trial court record to determine whether a "the evidence relied upon by the jury was sufficient to prove the necessary elements of the crime of arson."[28] The Marathon County Circuit Court entered judgment after a jury's finding of guilt, which the defendant appealed for lack of evidence.[29]

The *Kotowski* Court applied the same standard of review: "whether a trier of the facts could, acting reasonably, be convinced to the required degree of certitude by evidence which it had a right to believe and accept as true."[30]

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[26] 45:82-83, 121-22
[27] Blabaum's brief at 27
[28] ***State v. Kitowski***, 44 Wis. 2d 259, 261, 170 N.W.2d 03 (1969)
[29] *Id.*
[30] *Id*. (internal citations omitted)

Kotowski acknowledged that the test is the same whether the proof is by direct or circumstantial evidence.[31]

Kotowski affirms elements of a conviction can be satisfied by purely circumstantial evidence. "We are satisfied that upon the basis of this evidence, which was believed by the jury, a trier of the fact could be convinced beyond a reasonable doubt that the fire was of incendiary origin and that the fire had been set by the defendant. Curtis, Law of Arson, supra, sec. 486, pp. 528, 529, points out, 'The corpus delicti may be proved with other elements of the offense, by circumstantial evidence.'"[32]

The admitted circumstantial evidence, supported by Blabaum's words and conditions of the exchange, the presence of the trailer, the picture of the items, and B.B.'s testimony that the bench appeared to be in the trailer, is in no way "so insufficient in probative value and force that it can be said as a matter of law that no trier of the facts acting reasonably could be convinced to that degree of certitude which the law defines as 'beyond a reasonable doubt."[33]

The State accordingly and respectfully requests that the Court of Appeals reject Blabaum's argument as to the sufficiency of the evidence to affirm jurisdiction.

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[31] *Id.*
[32] *Id.* at 264–65
[33] *Id.* at 266 (internal citation omitted)

d. In the alternative, out-of-state concealment was an act done with intent to cause a consequence in the State of Wisconsin.

In the alternative, the Iowa County Circuit Court has jurisdiction even if this Court were to find, despite evidence weighed most favorable to the State, that no reasonable jury could find the property was in Wisconsin at the time of the offense and that it must comport to all elements.

The Wisconsin Court of Appeals addressed this issue in *State v. Inglin*, 224 Wis. 2d 764, 592 N.W.2d 666 (Wis. Ct. App. 1999). In *Inglin*, the defendant was convicted of two counts of Interference with Child Custody contrary to Wis. Stat. § 948.31.[34] The charges stem from the defendant, after entry of a judgment of divorce granting the defendant's former wife primary physical custody, taking the parties' child, Erich, to Canada permanently.[35] The defendant was arrested and the child returned to his mother.[36]

Count two of the Information in *Inglin* alleged that the defendant "[b]etween June 24, 1995, and August 16, 1995, in the Village of Shorewood, Milwaukee County, Wisconsin did intentionally conceal a child… from the other parent, contrary to Wisconsin Statutes Section 948.31(3)(a)."[37] At

[34] ***State v. Inglin***, 224 Wis. 2d 764, 769, 592 N.W.2d 666 (Wis. Ct. App. 1999)
[35] *Id*. at 768.
[36] *Id.* at 769.
[37] *Id*. at 777-78.

the time, both Inglin and his former spouse lived outside the State of Wisconsin.[38] Inglin argued the concealment occurred outside the State and, therefore, Wisconsin did not have jurisdiction.[39]

The Wisconsin Court of Appeals rejected Inglin's argument. It determined that "if Inglin, while in Canada, intended that his concealment of Erich would, in Wisconsin, cause *a consequence* prohibited by § 948.31(3)(a), stats., then Wisconsin had jurisdiction."[40] The Inglin Court further stated:

> Unquestionably, every day Inglin kept Erich in Canada, he *prevented* Erich's lawful return to Gennari, and he made more difficult the discovery of Erich by Gennari. Therefore, for purposes of jurisdictional analysis, Inglin's concealment of Erich in Canada was inseparable from the *consequences* of that concealment in Wisconsin.[41]

The Inglin Court found that "every day Inglin kept Erich in Canada, he *prevented* Erich's lawful return to Gennari, and he *made* more difficult the discovery of Erich by Gennari. Therefore, for purposes of jurisdictional analysis, Inglin's concealment of Erich in Canada was inseparable from the consequences of that concealment in Wisconsin."[42]

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[38] *Id.* at 777
[39] *Id.*
[40] *Id.* at 778-79.
[41] *Id.*
[42] *Id.*

Blabaum is subject to the jurisdiction of the Iowa County Circuit Court under Wis. Stat. § 948.31(3)(a) as the evidence proves elements 2, 3, and 4 occurred in the City of Dodgeville, Iowa County, Wisconsin. If the Court were to reject the circumstantial evidence that Blabaum had B.B.'s property in his trailer at the date, location, and time of the charged incident, Wis. Stat. § 948.31(3)(c) grants jurisdiction once he returned to Tennessee. This is due to the purported out-of-state concealment as Blabaum continued to reside in Tennessee after the incident and deny B.B. her property, which caused, in Wisconsin, a consequence set forth in the Theft statute.[43]

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR MISTRIAL

a. Standard of Review

Determining whether to grant a mistrial is reserved for the sound discretion of the circuit court.[44] In determining whether a circuit court erred in denying a defendant's motion for a mistrial, the Court of Appeals will review those determinations independently.[45] "A denial of a motion for mistrial will be reversed only on a clear showing of erroneous use of discretion.[46]

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[43] R. 45:67
[44] ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (1995)
[45] ***State v. Ford***, 2007 WI App 138, ¶ 28, 306 Wis. 2d 1, 742 N.W.2d 61
[46] *Id*. (internal citations omitted)

"A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process."[47]

b. The trial court properly denied Defendant's motion for a mistrial.

The circuit court properly addressed and disposed of the issues presented by Blabaum. In *State v. DeLain*, 2004 WI App 79, ¶¶ 23-26, 272 Wis. 2d 356, 679 N.W.2d 562, the Wisconsin Court of Appeals stated that "[t]he denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court."[48] The Court of Appeals in this case should apply this "erroneous use of discretion" standard.

The State in *DeLain* committed the error of making a "Golden Rule" comment by asking the jury, in the State's closing, to place themselves in the victim's shoes.[49] The defense objected and the prosecutor immediately withdrew the comment and apologized.[50] The Court of Appeals in *DeLain* found as follows:

> Because of the isolated nature of the remark, the State's immediate response, and because juries are presumed to follow the instructions, *State v. Smith*, 170 Wis.2d 701, 719, 490 N.W.2d 40 (Ct.App.1992), we conclude the trial

[47] ***Bunch,*** 191 Wis. 2d at 506-07 (internal citation omitted)
[48] ***State v. DeLain***, 2004 WI App 79, ¶¶ 23-16, 272 Wis. 2d 356, 679 N.W.2d 562 *citing* ***State v. Ross***, 2003 WI App 27, ¶ 47, 260 Wis.2d 291, 659 N.W.2d 122.
[49] *Id*. at ¶ 24.
[50] *Id*.

court did not erroneously exercise its discretion by denying the motion for a mistrial.[51]

DeLain provides a factual bar and stated presumptions, such as the jury following its instructions, by which Blabaum must exceed to grant Blabaum's requested relief.

Blabaum raises the issue of the age difference between Blabaum and B.B. as being objectionable.[52] Blabaum did not object to testimony of the parties' live-in relationship, that they had no children, and that B.B. was eighteen-years old when the relationship started.[53] Despite Blabaum's argument that proof of age disparity is somehow an issue, no a mention was made of Blabaum's age or the parties' age difference before the jury.[54]

On the other acts issues, B.B. provided testimony without leading from the State.[55] The initial line of questioning pertained to the victim's hasty departure with the intent to provide background information as to why the victim might not have taken much of her personal property with her.[56] Blabaum objected and the trial court interjected

[51] *Id.*
[52] Blabaum's brief at 30.
[53] 45:63-64
[54] *Id.*
[55] R. 45:65, 77
[56] R. 45:65, 77-78

before the victim completed her comment.[57] The trial court sustained the objection and the State moved on.[58]

The second other acts objection occurred after the State asked "why is that?" when the victim stated she was fearful of going to meet Blabaum alone.[59] Upon B.B's inappropriate response, the State took immediate efforts to dissuade B.B. from testifying as to Other Acts evidence.[60] The State moved the Court to strike the testimony after it was ruled other acts evidence, requested a curative instruction presented to the Jury, and also an admonishment to B.B. instructing B.B. not to bring up prior incidents in Tennessee.[61]

There was no mention as to the date, time, frequency, or severity of any other acts-type abuse made or not made.[62] The witness only referenced, first, that "he has laid his hands on me" and, in the second instance, to being fearful due to "past physical contact that we have had".[63]

The statements offered here are far less severe, and were under far less control by the State, than the "Golden Rule" error in *DeLain*. The State, after the second objection in this matter, as in its closing in *DeLain*, quickly

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[57] R. 45:65
[58] *Id.*
[59] R. 45:77-78
[60] R. 45:78-80
[61] *Id.*
[62] R. 45:65, 77-78
[63] *Id.*

acknowledged the error and took immediate, unsolicited, and proactive steps to either apologize or move to strike the statement and cure the record.[64]

Given those points, the limited nature and minimal prejudice in the other acts evidence, and in recognition of the strong deference the Court of Appeals provides trial courts in managing this issue, and the presumption that juries can manage these encapsulated errors with instruction, the State respectfully requests that the Court of Appeals affirm the circuit court's management of the issue and find its conduct regarding the mistrial request reasonable.

III. THE ISSUES BLABAUM PRESENTS DO NOT CONSTITUTE PLAIN ERROR

a. Standard of Review

The plain error doctrine allows for the reviewing court to provide for a new trial or other relief despite a party failing to object at trial.[65] The relief, however, must be limited to obvious and substantial errors and granted only sparingly.[66] Plain error should be analyzed on a case-by-case basis, as a quantum of evidence in one case might be inconsequential, but prove critical in another.[67]

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[64] R. 45:78-80
[65] ***State v. Cameron***, 2016 WI App 54, ¶ 11, 370 Wis. 2d 661, 669, 885 N.W.2d 611
[66] *Id.*
[67] *Id*.

In short, granting relief for plain error should be rare, for only obvious and substantial errors, and in cases where the relief would make a meaningful difference.

b. Defendant's purported exculpatory evidence was properly denied admission under basic rules of hearsay and for lack of foundation.

The elements of Theft under Wis. Stat. § 943.20(1)(a) are as follows:

1. The defendant intentionally retains possession of moveable property of another.
2. The owner of the property did not consent to retaining the property.
3. The defendant knew that the owner did not consent.
4. The defendant intended to deprive the owner permanently of the possession of the property.[68]

There is no *mens rea* element requiring the State to prove Blabaum *believed* B.B. owned the property. The State's burden was to prove B.B. owned the property, and that B.B. did not consent to Blabaum's withholding of it; what Blabaum believed is immaterial. The State proved B.B. owned the property and that Blabaum knew B.B. did not consent to Blabaum withholding it from B.B.

Accordingly, the only purpose at trial for the double-layered hearsay testimony would be to 1) offer the evidence for the truth of the matter asserted (that B.B. did not, in fact, legally own the property under Tennessee law), or to 2)

[68] WIS JI-Criminal 1441 Theft — § 943.20(1)(a) (Wisconsin Jury Instructions - Criminal (2020))

confuse the jury into considering a *mens rea* "belief of ownership" element that does not exist.

As to the second and third elements, again, that element relates to "the owner", which means the legal, legitimate owner and not who Blabaum believes to be the owner.[69]

Further, any argument Blabaum now makes that the testimony was being offered for a *mens rea* purpose instead of for the truth of the matter asserted, is contrary to Blabaum's stated purpose for that testimony at the pre-trial hearing and recitation of facts in Blabaum's appellate brief.[70] Blabaum did not seek to admit testimony to prove Blabaum's *belief* of ownership, but to prove *actual* ownership.[71]

The issue is then nullified when, after the purported ownership discussion with Harazin in Tennessee, Blabaum acknowledged B.B.'s ownership with Blabaum texted B.B., "Want this? (picture of a bench) I'm at Jim's. I'll be here for ten more minutes. It has some of **your blankets and photos also**. Come alone, it's all good." (emphasis added).[72]

Even if *mens rea* were an element to the offense, the unrefuted text message demonstrates Blabaum believed B.B.

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[69] *Id.*
[70] Blabaum's Brief at 10 ("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.")
[71] *Id.*
[72] R. 45:76

owned the property at the time of the intended transfer. Blabaum, accordingly, fails to demonstrate the inclusion of this hearsay evidence is admissible or otherwise consequential to the outcome of the case.

c. The "other acts evidence" raised by Blabaum were not unduly prejudicial, consequential, or otherwise did not constitute other acts.

Blabaum raises issue with a number of statements offered at trial and that they, either individually or cumulatively, rose to the level of plain error.[73]

The first purported error Blabaum raises involved B.B.'s background testimony as to why B.B. left Tennessee and why B.B. felt she needed law enforcement presence at the property exchange.[74] The State addressed those instances previously in this brief.

These statements, and others complained of by Blabaum, were not prejudicial because, for one, the jury acquitted Blabaum of the only disorderly-related count: Count 1, Disorderly Conduct (Domestic) in *State v. Jeffrey L. Blabaum*, Iowa County Case No. 20-CM-19.[75] Blabaum offers only conclusory statements and fails to refute that the evidence

[73] Blabaum's Brief at 36-40.
[74] *Id*. at 37-38
[75] R. 45:183

otherwise substantiates the jury's finding of guilt on the theft charge.[76]

Blabaum also argues B.B.'s testimony that the couple began a relationship when she was 18-years old is improper.[77] Blabaum offers no legal or factual basis to claim proof of a mutual, co-habitational relationship between consenting adults is improper. Further, although Blabaum points out his age is listed in the Criminal Complaint, there was no testimony offered at trial as to Blabaum's age at the time of the incident.[78] In raising Blabaum's age and the parties' age gap now, Blabaum presents arguments based on facts not admitted into evidence at trial and considered by the jury.

Blabaum also argues Dodgeville PD Officer Weier's statement that he had multiple "prior professional contacts" with Blabaum is also improper and unduly prejudicial.[79] First, the State carries the burden to identify the defendant.[80] Secondly, the testimony on this point was limited to that purpose:

BY MR. JOHNSON

Q: How did you identify Mr. Blabaum in the truck?
A: I recognize him from past professional contacts.

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[76] Blabaum Brief at 37.
[77] *Id*. at 38.
[78] R. 45:64
[79] Blabaum Brief at 38.
[80] WIS JI-Criminal 1441 Theft – § 943.20(1)(a) (Wisconsin Jury Instructions - Criminal (2020))

Q: Okay. And do you see— is— again, is Mr. Blabaum present in the courtroom today?
A: Yes.
Q: And is he seated at Defense counsel?[81]

The line of questioning did not include the basis for those past contacts, the number of contacts, or when they happened; the testimony was limited to identification.[82]

Many citizens have contact with law enforcement that does not include that citizen being a "scofflaw". Some are crime victims, while others are witnesses to incidents, and some might have experienced a motor vehicle accident or health incident; all would have fallen under "prior professional contacts". The line of questioning only affirmed Officer Weier's ability to identify Blabaum, which was proper.

The Wisconsin Court of Appeals previously held in an unpublished case that an officer relying on "prior professional contacts" to identify an defendant is without error.[83]

Blabaum's continues by reintroducing the trial court denial of hearsay evidence between an unnamed Tennessee law enforcement officer and Blabaum's acquaintance regarding legal property ownership in the State of Tennessee.[84] Again,

[81] R. 45:120
[82] *Id.*
[83] ***State v. Klinkenberg***, 2016 WI App 1, ¶¶22, 39, 366 Wis. 2d 331, 873 N.W.2d 100 (UNPUBLISHED DISPOSITION)
[84] Blabaum Brief at 39.

this issue is moot as who Blabaum believed owned the property is not an element of the Theft charge.[85]

Further, if this court deems it relevant, any error by the trial court is not material given Blabaum subsequently admitted to B.B. by text message that the property was, in fact, B.B.'s[86]

d. The State's closing statements did not burden shift or comment on Blabaum's decision not to testify.

Blabaum contends that the prosecutor's closing argument undermined his right to not testify in his own defense.[87] Blabaum's brief raises two finite statements the prosecutor made in closing, and ignores its totality: (1) the prosecutor stated "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", which refers to Blabaum asking B.B. to show up and pick up B.B's property, and; (2) the prosecutor stated "I don't care if it was a day, a month, a year or whatever else, it was [B.B.'s] property and there was no testimony, no evidence offered otherwise that would contradict the proof that the State has provided."[88]

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[85] WIS JI-Criminal 1441 Theft – § 943.20(1)(a) (Wisconsin Jury Instructions - Criminal (2020))
[86] R. 45:76
[87] Blabaum's brief at 40-41
[88] *Id.* at 42

Counsel is allowed considerable latitude in closing, and the trial court has discretion to determine the propriety of counsel's statements and arguments to the jury.[89] The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces the prosecutor and should convince the jurors.[90] "'The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.'"[91]

Closing argument is usually spoken extemporaneously and with some emotion and while the attorney is under stress.[92] The Wisconsin Supreme Court said it would not "throttle the advocate by unreasonable restrictions so long as the comments relate to the evidence."[93] The prosecutor's argument must be judged within the context in which it was made.[94] Whether the prosecutor's conduct affected the fairness of the trial is

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[89] ***State v. Wolff***, 171 Wis. 2d 161, 167-68, 491 N.W.2d 498 (Ct. App. 1992); ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).
[90] ***State v. Nielsen***, 2001 WI App 192, ¶46 247 Wis. 2d 466, 634 N.W.2d 325; **State v. Draize**, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).
[91] ***Nielsen***, 247 Wis. 2d 466, ¶46 *quoting* ***Draize***, 88 Wis. 2d at 454).
[92] ***State v. Johnson***, 153 Wis. 2d 121, 133, 449 N.W.2d 845 (1990); ***Draize***, 88 Wis. 2d at 456.
[93] ***Draize***, 88 Wis. 2d at 456.
[94] ***Wolff***, 171 Wis. 2d at 168.

determined by viewing the statements in the context of the entire trial.[95]

When a prosecutor is charged with misconduct, however, it is not enough that the prosecutor's remarks were "'undesirable or even universally condemned.'"[96] Rather, the test is whether those remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[97]

A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.[98] The reviewing court should only reverse a conviction if, without the improper remarks, the trial's outcome would have differed.[99] In other words, this court should affirm the circuit court's ruling unless there has been an erroneous exercise of discretion which is likely to have affected the jury's verdict.[100]

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[95] ***Neuser***, 191 Wis. 2d at 136.
[96] ***Darden v. Wainwright***, 477 U.S. 168, 181 (1986) (internal citation omitted).
[97] ***Wolff***, 171 Wis. 2d at 167 (internal citation omitted); ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) (internal citation omitted) (prosecutorial misconduct violates due process only where it "'poisons the entire atmosphere of the trial'").
[98] *Id*. at 168.
[99] ***Lettice***, 205 Wis. 2d at 352 (internal citation omitted) (reversing on the basis of prosecutorial conduct is a "'drastic step'" that "'should be approached with caution'"). See also ***United States v. Scott***, 267 F.3d 729, 740 (7th Cir. 2001) (defendant must establish not only that the remarks denied him a fair trial, but also that the outcome of the proceedings would have been different absent the remarks).
[100] ***Neuser***, 191 Wis. 2d at 136.

Moreover, if a defendant fails to object or move for mistrial during the allegedly improper closing argument, the defendant waives the error on appeal and this court need not consider the argument.[101]

Even if this court overlooks Blabaum's waiver of the issue, Blabaum is not entitled to a new trial because the State's arguments were proper and did not constitute plain error or otherwise so infect the trial with unfairness.

Under the "plain error" doctrine, Blabaum is not entitled to a new trial unless the error is so obvious, substantial, and fundamental that a new trial must be granted.[102] In other words, the "plain error" doctrine is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right.[103]

Here, no such plain error or due process violation occurred because the prosecutor's comments did not cross the line between permissible and impermissible argument, and Blabaum was not deprived of a fair trial. In order to determine whether the prosecutor's comments affected the fairness of the trial, this court must view the statements in

[101] ***State v. Opalewski***, 2002 WI App 145, ¶¶28-29, 256 Wis. 2d 110, 647 N.W.2d 331.
[102] ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.3d 830 (1996)
[103] ***State v. Kruzycki***, 192 Wis. 2d 509, 527, 531 N.W.2d 429 (Ct. App. 1995).

the context of the entire trial.[104] The State did not imply that Blabaum carried the burden or that he did not testify, only that he offered no proof to rebut the State's evidence. In fact, the State admitted in its opening and closing that it carried the weight of the burden.[105]

The facts in this case are akin to those cited in *State v. Patino,* 177 Wis. 2d 348, 382-83, 502 N.W.2d 601 (Wis. Ct. App. 1993). In *Patino*, the jury reached a split decision on charges brought against the defendant.[106] One issue on appeal involved the State, in its closing and/or rebuttal argument, noting the defendant failed to question a witness as to self-defense at the preliminary hearing.[107]

Patino, unlike Blabaum, objected to that statement at trial, and the trial court sustained the objection.[108] The prosecutor then responded "Well, [defense counsel] has his reasons for not asking those questions."[109] The trial court sustained another immediate objection from the defense in the presence of the jury.[110] Patino contended that the State's closing statements assisted in the deprivation of his

[104] ***Wolff***, 171 Wis. 2d at 167.
[105] R. 45:59, 165
[106] ***State v. Patino***, 177 Wis. 2d 348, 359, 502 N.W.2d 601 (Wis. Ct. App. 1993)
[107] *Id*. at 376.
[108] *Id*.
[109] *Id*.
[110] *Id*.

constitutional rights by implicating his right to remain silent and shift the State's burden onto him.[111]

The *Patino* Court found not only was there no plain error, but it also rejected Patino's argument on the merits.[112] The *Patino* Court held that the State is permitted to point out when the defense fails to provide evidence that otherwise undermines the proof brought forth by the State.[113]

In this case, the State's rebuttal only pointed out the defendant offered no evidence contrary to the State's proof.[114] The points made at closing/rebuttal are reasonable under *Patino*.

The State's second point, which pertained to the issue of whether B.B. owned the property, highlighted the lack of proof contradicting the State's evidence that B.B. was the actual owner of the property.[115] Again, this statement served a legitimate purpose.

Finally, the State outright acknowledged in its closing that it carries the burden of proof.[116] Looking at the

[111] *Id.*
[112] *Id.* at 380.
[113] *Id.* at 382.
[114] R. 45:178-79
[115] *Id.*
[116] R. 45:165 ("As you heard the Court state, it is the State's burden of proof to prove those elements beyond a reasonable doubt. That is my burden to carry… because I have to carry the burden of the State to prove Mr. Blabaum is guilty of these two crimes.")

totality of the case, the State did not burden-shift, it freely acknowledged that burden.

If the Court finds the statements to be in error, the *Patino* Court takes its dicta further and finds that any comment, if it had been an error, was harmless given the circumstances. *Patino* found that the prosecutor's comments were isolated, there was no request by defense for a curative instruction or request for mistrial, and that the trial court instructed the jury that the State carried the burden of proof.[117]

To find the State erred in its comments in this case would deprive the State from ever pointing out deficiencies in a defendant's evidence, especially when a defendant chooses not to testify. These were plain, basic comments limited to specific fact issues and, in no way, implicated a burden shifting or Blabaum's decision not to testify.

e. Blabaum fails to meet the *McKellips* standard for discretionary reversal.

The defendant seeks another avenue of relief, the extraordinary remedy pursuant to Wisconsin Statutes § 752.35, whereby requesting discretionary reversal. The Wisconsin Supreme Court stated plainly in *State v. McKellips*, 2016 WI

[117] ***State v. Patino***, 177 Wis. 2d 348, 383, 502 N.W.2d 601 (Wis. Ct. App. 1993)

51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258, "[w]e have consistently held that the discretionary reversal statute should be used only in exceptional cases."[118]

Blabaum's argument failed to establish the exceptional nature of these issues to warrant the invocation of Wisconsin Statutes § 752.35. Blabaum requests that the Court of Appeals take exceptional steps to "in the interests of justice", circumvent and shortcut around the sound discretion of the circuit court in managing its jury trial, yet offers no basis for such extraordinary relief.[119]

For the reasons previously articulated herein, the interests of justice and the finality of jury decisions, the Court should reject the defendant's interests of justice and plain error arguments.

IV. THE TRIAL COURT PROPERLY DENIED BLABAUM'S REQUEST FOR A *MACHNER* EVIDENTIARY HEARING

a. Standard of review

"Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, [the Court of Appeals] determine[s] whether the motion on its face alleges sufficient material facts that, if true, would

[118] ***McKellips***, 2016 WI 51 at ¶52(internal citations omitted)
[119] Blabaum's brief at 44.

entitle the defendant to relief."[120] The Court of Appeals requires the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion."[121] The Court of Appeals utilizes the "deferential erroneous exercise of discretion standard" when reviewing a circuit court's discretionary decision.[122]

"[W]here an evidentiary hearing is requested, one is not automatically granted. The court 'does not have to hold an evidentiary hearing on a motion just because a party asks for one.'"[123]

b. Blabaum's postconviction motion is insufficient to warrant an evidentiary hearing

The State restates its legal and factual arguments presented within its brief in opposition to Blabaum's motion for a *Machner* evidentiary hearing. A defendant's motion must include facts that "allow the reviewing court to meaningfully assess [the defendant's] claim."[124] Opinions or conclusory statements by the defendant do not constitute a valid claim,

[120] ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437
121 ***State v. Nelson***, 54 Wis. 2d 489, 498, 195 N.W.2d 629 (1972)
[122] ***Allen***, 2004 WI 106 at ¶ 9 (internal citation omitted)
[123] *Id. at* ¶ 10 (internal citations omitted)
[124] *Id*. at ¶ 21 *citing* ***State v. Bentley***, 201 Wis.2d 303, 314, 548 N.W.2d 50 (1996)

and fails to provide a sufficient factual basis to warrant an evidentiary hearing.[125]

In addition, facts alleged in a motion or petition must be material to the issue presented.[126] A material fact is defined as "[a] fact that is significant or essential to the issue or matter at hand"[127]

As presented in the State's brief filed with the circuit court in opposition to Blabaum's postconviction motion, the allegations fail to exceed beyond the conclusory and speculative or otherwise prove material to the matter at hand.[128] The circuit court properly denied Blabaum's request for an evidentiary hearing and the State requests the Court of Appeals to affirm.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the Iowa County Circuit Court's Judgment of Conviction and deny Blabaum's request for relief.

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] R. 57:5-15

Dated at Dodgeville, Wisconsin, 18th of August, 2022.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with monospaced font. The length of this brief is 6,246 words and thirty-nine (39) pages including this Certification and not including the Appendix.

Dated at Dodgeville, Wisconsin, 18th day of August, 2022.

Signed,

-electronically signed by Curtis E. Johnson-

By: _____

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CERTIFICATION

I hereby 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 at Dodgeville, Wisconsin, 18th day of August, 2022.

Signed,

-electronically signed by Curtis E. Johnson-

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