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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2024AP1135-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BILLY RAY EDWARD JOHNSON,

Defendant-Respondent.

On Appeal from an Order Entered in the Milwaukee
County Circuit Court, the Honorable Hannah C.
Dugan Presiding.

BRIEF OF
DEFENDANT-RESPONDENT

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ISSUE PRESENTED

1. Did the circuit court abuse its discretion when it denied the State's motion to admit body camera footage from a deceased police officer?

The circuit court denied the motion based on insufficient authentication and based on Confrontation Clause grounds.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Johnson does not request oral argument because the briefs will fully address the issue presented. *See* Wis. Stat. § 809.22(2)(b). Because this is a one-judge appeal under Wis. Stat. § 752.31(2)-(3), a request for publication is prohibited by Wis. Stat. § 809.23(4)(b).

STATEMENT OF THE CASE AND FACTS

On December 29, 2022, the State filed a complaint charging Mr. Johnson with one count of operating a motor vehicle under the influence as a second offense, one count of operating with a prohibited alcohol concentration as a second offense, one count of operating while revoked, and one count of failing to install an ignition interlock device. (2:1-2). According to the complaint, each of these charges

stemmed from a traffic stop initiated by police officer Mark Swieciak on October 6, 2020. (2:1-2).

Officer Swieciak passed away sometime during the pendency of the case, and the State subsequently moved the circuit court to find that portions of the officer's body camera footage would be admissible at trial. (18:1; 15:1). Defense counsel objected on Confrontation Clause grounds and on the grounds that the State could not authenticate the footage. (16:2).¹

The circuit court held a hearing on the State's motion on April 5, 2024. At the hearing, the State asserted that the initial portion of Officer Swieciak's body camera footage was crucial because "it is frankly, the only evidence I have that I can show to the jury that [Mr. Johnson] was in fact driving." (20:7). However, the State did not provide the court with the footage, nor did it present any other evidence in support of its motion. (20:1-17). Instead, the State argued that the entirety of Officer Swieciak's body camera footage was admissible because "we can authenticate the middle and the end through the testimony of another officer [Officer Balistreri] who can say, 'Yes, it [sic] this indeed shows what I saw.'" (20:5). But the State did not call Officer Balistreri as a witness at the motion hearing, and it did not provide

¹ The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI. *See also* Wis. Const. art. 1 § 7.

the court with this officer's body camera footage. (20:5).

Separately, the State asked the court to find that Officer Swieczak's body camera footage was authenticated based on "the technical testimony of the expert In-Field Technology Officer [Vavera], whose affidavit I have filed[.]" (20:7). The State argued that the affidavit proved "that the entire recording is authentic," but the State did not call Officer Vavera as a witness at the motion hearing. (20:7).

At the conclusion of the motion hearing, the circuit court denied the State's request to admit the first portion of Officer Swieczak's body camera footage. (20:14). The court based its decision in part on authentication grounds due to the fact that no other officer was present for the initial portion of the footage. (20:12-14). Additionally, the court stated that admitting this portion of the footage would create "a confrontation clause issue." (20:14).

On June 12, 2024, the court entered a written decision and order formally denying the State's motion for the reasons set forth in the court's earlier oral ruling. (23:2). The decision also provided expanded reasoning in regards to the Confrontation Clause issue:

The State does not address Defense's essential argument: even if the officers could authenticate the video, the Defendant's right to confrontation of accusers is unconstitutionally denied; the deceased officer's stop and other observations

prior to the subsequent arrival of living subpoenaed officers cannot be confronted or cross-examined.

(23:3).

Based on the State's concession that it could not prove its case without the first portion of Officer Swieciak's body camera footage, defense counsel moved to dismiss the case. (20:15). The circuit court granted the motion. (23:4). The State now appeals.

ARGUMENT

I. The circuit court did not abuse its discretion when it denied the State's motion to admit Officer Swieciak's body camera footage.

A. General legal principles and standard of review.

Authentication is a prerequisite to the admissibility of all evidence. *Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis. 2d 96, 106, 522 N.W.2d 542 (Ct. App. 1994). It is established "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Wis. Stat. § 909.01 (emphasis added).

"The circuit court has 'broad discretion to admit or exclude evidence,' and its decision will be overturned only if there has been an erroneous exercise of discretion." *State v. Kandutsch*, 2011 WI 78,

¶23, 336 Wis. 2d 478, 799 N.W.2d 865 (citing *State v. Nelis*, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619). A reviewing court is not permitted to “substitute its discretion for that of the circuit court.” *State v. Rhodes*, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850. Moreover, regardless of the extent of a circuit court’s reasoning, a reviewing court must affirm a discretionary decision when there are facts in the record that support the circuit court’s decision. *State v. Shillcut*, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983).

“Whether the admission of evidence violates an accused’s right to confrontation is a question of constitutional fact.” *State v. Norman*, 2003 WI 72, ¶24, 262 Wis. 2d 506, 664 N.W.2d 97. When determining a question of constitutional fact, a reviewing court will adopt the circuit court’s factual findings unless they are clearly erroneous, and independently apply the appropriate constitutional standard to those facts. *Id.*

B. The circuit court did not abuse its discretion.

On appeal, “[i]t is the appellant’s responsibility to ensure completion of the appellate record and ‘when an appellate record is incomplete in connection with an issue raised by the appellant, [a reviewing court] must assume that the missing material supports the trial court’s ruling.’” *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (quoting *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993)). Here, the State argues

that the circuit court abused its discretion by denying its motion to admit Officer Swieciak's body camera footage, but the State failed to place this footage in the court record. (20:1-17). The State therefore cannot prevail on appeal because it must be assumed that the missing material supports the circuit court's ruling. *McAttee*, 2001 WI App 262, ¶5 n.1.

Moreover, the circuit court could reasonably conclude that the State failed to authenticate Officer Swieciak's body camera footage because it relied on self-serving statements about what two other officers could testify to without calling either officer as a witness at the motion hearing. (20:1-17). First, the State falsely asserts in its brief that "Officer Balistreri ... testified as to the authenticity of Officer Swieciak's bodycam video and audio footage in that the bodycam footage accurately depicted the scene and events leading up to the arrest[.]" (Initial Br. at 4). But in fact, the State never called Officer Balistreri as a witness, so it cannot now rely on factually incorrect statements about what the officer "testified as to." In addition to failing to call Officer Balistreri as a witness, the State failed to place his body camera footage in the court record. (20:1-17). As a result, the State's self-serving claims about what Officer Balistreri's body camera footage shows should be rejected because it must be assumed that this missing material supports the circuit court's ruling.

The State also asserts that Officer Swieciak's body camera footage was authenticated by an "affidavit from Milwaukee Police Officer Vavera ...

who verified that the video and audio footage from Officer Swieciak's bodycam was unaltered and free from tamper." (Initial Br. at 5).² This argument is flawed because, as with Officer Balistreri, the State failed to call Officer Vavera as a witness at the motion hearing. (20:1-17). Instead, the State relied solely on an affidavit that was not provided under oath. (17:1-2). Because the State failed to present any evidence in support of the claims made in the affidavit, the State has no basis to demand that this Court accept the validity of the contents of the affidavit. *See* Wis. Stat. § 909.01 ("The requirements of authentication ... are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

Based on the above, the circuit court could reasonably conclude that the State did not meet its burden to authenticate the body camera footage where it never provided any evidence in support of its motion. This Court therefore must defer to the circuit court's ruling where that evidence is not otherwise in the appellate record. *McAttee*, 2001 WI App 262, ¶5 n.1.

Furthermore, the State failed to address the circuit court's concern that admitting Officer Swieciak's body camera footage would violate Mr. Johnson's right to confrontation. Mr. Johnson's

² The affidavit does not actually state that the footage was unaltered and free from tamper. It merely states that Officer Vavera could not affirmatively identify any signs "that the video was altered[.]" (17:1).

counsel specifically objected to the footage on Confrontation Clause grounds, the State failed to respond to this argument, and the circuit court expressly denied the State's motion in part based on the State's failure to respond to this objection. (16:2; 20:1-17; 23:3).

To make matters worse, the State wholly omits any mention of the circuit court's Confrontation Clause ruling in its appellate brief, and therefore fails to address the court's findings on this issue. (Initial Br. 1-14). As a result, the State has forfeited any argument on Confrontation Clause grounds, and this Court should affirm the circuit court's order based on the forfeiture. *See Wascher v. ABC Insurance Company*, 2022 WI App 10, ¶63, 401 Wis. 2d 94, 972 N.W.2d 162 (failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity); *see also A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (appellate courts do not address arguments raised for the first time in a reply brief).

CONCLUSION

For the reasons stated above, Mr. Johnson asks this Court to affirm the order of the circuit court.

Dated this 28th day of April, 2025.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,667 words.

Dated this 28th day of April, 2025.

Signed:

Electronically signed by

David Malkus

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