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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2024AP001135-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

BILLY RAY EDWARD JOHNSON,

Defendant-Respondent.

APPEAL FROM THE ORDER OF DISMISSAL ENTERED
BY BRANCH 31, MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE HANNAH DUGAN,
PRESIDING.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

1. Defendant-Respondent contends that the circuit court’s ruling on the Confrontation Clause issue was not discussed in the State’s Brief, and thus should be affirmed.

The trial court’s ruling on the confrontation clause issue was incorrect as a matter of law. Neither can any party waive a ruling that is incorrect as a matter of law or did not even apply to the situation at hand. Physical evidence such as photographs, films, videos, and the like, do not implicate the confrontation clause.

There was no testimony of a witness to be confronted. Officer Swieciak was not going to testify at the upcoming jury trial because he is dead. The imaged recording of the defendant himself sitting in the driver's seat of the car was the proffered evidence to be shown to the jury.

2. Defendant-Respondent argues that the circuit court did not erroneously exercise its discretion because the State did not call witnesses to testify or show the actual video at the motion hearing.

Offers of proof were made at the hearing and not challenged by the defense. Thus, both parties were in agreement as to the factual circumstances. The State, defense, and circuit court never quibbled about the facts at the hearing. Things were plain and simple concerning the presence of a deceased officer's body camera video and the State's desire to present that video evidence to the jury at the forthcoming trial.

There is no need for the calling of officers as witnesses to personally testify at a preliminary proceeding such as the one in this case, nor is there a need to show the body camera video when the essence of the video is not at issue. It is not normal practice to do so. As mentioned, the underlying facts and circumstances were not in dispute, as perhaps the facts might be for a defendant's motion to suppress evidence on constitutional grounds. Neither was the credibility of the witnesses at issue.

The suggestion that a formal testimonial hearing was required fails. At the hearing and at the time of its ruling, the circuit court accepted the State's version of facts, impliedly making them its "Findings of Fact". The issue on appeal pertains to the circuit court's Conclusions of Law, not to facts that were not in dispute.

During the hearing, neither party objected to the proffered facts as expressed by the State. In lieu of addressing the merits of the circuit court's decision (its Conclusions of Law), defendant-respondent has chosen to peel open and attack an

aspect of the actual hearing process itself—a process that the defendant never expressed concern over nor was in dispute.

So, defendant-respondent's response sidesteps the authentication issue and fails to address the circuit court's ruling on authentication. Instead, defendant-respondent's response busies itself with raising other non-consequential concerns. The State requests that this Court reach the issue of authentication on the merits.

CONCLUSION

The requirement of authentication is one the lowest bars in the law of evidence. The question, as set forth in statute, is whether there is evidence sufficient to support a finding that the item is what it purports to be. In this case, there is no reasonable dispute that the officer's body-worn camera recording is exactly what it purports to be. We know this because it is a single "take," i.e. a single continuous recording of the events, both because another officer saw the vastly greater portion of the recording and can say so, and because of the recordkeeping and handling of the recording by the police department.

The refusal to admit the video was an erroneous exercise of discretion and should be reversed. The State respectfully requests that this Court reverse and remand this case with instructions to admit the recording into evidence at the trial, so that the jury may give it whatever weight it may deserve.

Dated this May 28, 2025,

Respectfully submitted,

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Electronically signed by Arthur K. Thexton
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 644.

May 28, 2025
Date

Electronically signed by Arthur K. Thexton
Assistant District Attorney
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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19 (12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties

May 28, 2025
Date

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