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STATE OF WISCONSIN  
COURT OF APPEALS, DISTRICT IV  
APPEAL NO. 2024AP001944CR

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STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

REBECCA LEA KAMM,

Defendant-Appellant

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BRIEF OF DEFENDANT-APPELLANT REBECCA LEA KAMM

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APPEAL FROM JUDGMENT OF CONVICTION  
FILED JUNE 9, 2023  
IN CIRCUIT COURT FOR GRANT COUNTY  
THE HONORABLE ROBERT P. VANDEHEY, PRESIDING  
AND  
APPEAL FROM ORDER DENYING POSTCONVICTION RELIEF  
FILED SEPTEMBER 17, 2024,  
IN CIRCUIT COURT FOR GRANT COUNTY  
THE HONORABLE CRAIG R. DAY, PRESIDING

TRIAL COURT CASE NO. 20-CM-26

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### STATEMENT OF THE ISSUES

- 1. Did the trial court err in allowing the State to use video evidence and testimony based on that evidence, when the video evidence was not disclosed to the defense within a reasonable time before trial?**

The trial court answered: No

- 2. Did Ms. Kamm's trial attorney preserve the objection to the admission of the video clips and testimony about the clips for appellate review.**

This issue was not addressed in the trial court.

- 3. Regardless of whether defense counsel sufficiently preserved the issue for appeal, a new trial should be granted, because the trial court's admission of the video clips as well as testimony about their contents was plain error.**

This issue was not addressed in the trial court.

### STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Anticipating that counsels' briefs will adequately set forth the arguments regarding the issues on appeal, oral argument is not requested. Counsel does not request publication.

### STATEMENT OF THE CASE

1. Description of the nature of the case.

This is a retail theft case in which the State failed to disclose crucial video surveillance evidence to the defense until the day the trial was to begin. The defense brought this to the attention of the court and objected. Rather than determining whether good cause existed for the State's failure

to timely disclose this evidence, the trial court allowed the defense a short time to review the video and allowed it to be entered into evidence at the trial. The defense was forced to try to incorporate this evidence into its case, without any time to prepare. The postconviction court erroneously ruled that the State had good cause for the untimely disclosure.

2. Statement of Facts

a. Criminal Complaint

On January 23, 2020, the State filed a Criminal Complaint charging Ms. Kamm with one count of misdemeanor retail theft (intentional taking no more than \$500). (2: 1) According to the probable cause section, a loss prevention manager at a Blain's Farm & Fleet retail store in Platteville, Wisconsin (hereinafter "Farm & Fleet") reported to police that after reviewing the store's security footage from November 24, 2019, he suspected that a customer had stolen a jacket valued at \$269.00. (2: 1-3) According to the footage, the female customer is seen with the jacket in her shopping cart as she entered the fitting room. (2: 1-3) Upon exiting the fitting room, the jacket no longer appeared to be in her shopping cart. (2: 1-3) The female customer later checked out, purchasing an unrelated item. (2: 1-3) According to the loss prevention manager, upon leaving the store, the female customer's "purse appear[ed] to be extremely full as she removed it from the shopping cart." (2: 1-3)

Police later identified the female customer as Ms. Kamm. A male customer, later identified as Kyle Woods, accompanied Ms. Kamm to the store. (2: 1-3)

b. Defendant's Discovery Demand

On February 18, 2020, Ms. Kamm filed and served a standard demand for discovery and inspection on the State pursuant to both Wis. Stat. § 971.23 and provisions of the state and federal constitution. (10: 1-4)

Among other items, it demanded that the State provide the following for inspection:

10. Any and all physical evidence that the state intends to offer in evidence at the trial, sec. 971.23(1)(g) Stats., as well as all other physical evidence within the possession, custody, or control of the state or its investigative agencies or agents.

11. Any exculpatory evidence, sec. 971.23(1)(h) Stats., including but not limited to the following:

a. All evidence and/or other information which would tend to negate the guilt of the defendant, including laboratory reports, hospital records or reports, police reports, or any other information within the state's possession, knowledge, or control. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *State v. Ruiz*, 118 Wis. 2d 177, 347 N.W.2d 352 (1984); *Nelson v. State*, 59 Wis. 2d 474, 208 N.W.2d 410 (1973).

b. All evidence and/or other information which would tend to affect the weight or credibility of the evidence against the defendant, *Giglio v. United States*, 405 U.S. 150 (1972); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977); including but not limited to the following: . . .

iv. Laboratory reports, hospital records or reports, police reports, or any other information within the state's possession, knowledge, or control, that would tend to affect the weight and credibility of evidence used against the defendant

c. Any evidence and/or other information which would tend to mitigate, extenuate, or affect the degree of the offense charged, or the disposition (including sentencing) of the charge against the defendant; *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737; *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

d. Any evidence and/or other information which would form the basis for further investigation by the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80,

680 N.W.2d 737; Ruiz v. State, 75 Wis. 2d 230, 249 N.W.2d 277 (1977).

19. An inventory and copies of all books, papers, documents, photographs, and tangible objects related to this case that the state has within its possession, knowledge, or control or that were obtained from or belong to the defendant, together with the date, time, place, and manner in which these items were obtained, sec. 968.17, Stats.

22. Disclose the existence of any electronic evidence that is in the possession of the State, law enforcement agents or witnesses; or that reasonably could be preserved, retained and obtained by the State or its agents. This request includes but is not limited to squad camera recordings, 9-1-1 dispatch recordings, booking/interrogation room videos and recordings or any other electronic evidence related to the case. This demand includes a request to reasonably preserve all such electronic evidence in order that it may be inspected and copied by the defendant through the defendant's legal counsel. (10: 1-4)

c. Jury Trial

i. *Counsel's objection to non-disclosure of security footage*

The jury trial was convened on April 6, 2023. (71: 1-104) Before commencing jury selection, the Court asked the parties if it needed to take up any issues. (71: 4) Ms. Kamm's counsel, Mr. Paulson, stated that the defense had not received the security footage as part of discovery, leading to the following exchange, which included the State, by Mr. Pozorski, and the court:

MR. PAULSON: I do have maybe one just preliminary issue. I've been going through the discovery - you know, and Mr. Pozorski can certainly attest to this - but one of the potential witnesses on the State's witness list, I'm assuming that he - his testimony is based on some footage. I'm not sure if the State intends to admit that footage into the record, but if they do, the defense never received that footage, and so I just wanted to make the Court aware of that situation.

MR. POZORSKI: We turned over discovery.

MR. PAULSON: That's correct. We got discovery pages 1 through 18 and then various photographs but never the actual footage.

THE COURT: Yeah, and the footage is described in the complaint anyway and the other information, right, as far as what it shows?

MR. POZORSKI: Right.

THE COURT: But –

MR. PAULSON: Right, but just anticipation of that witness, if there is no video, I don't know if that video could be admitted without being shown to the witness.

THE COURT: Right. You would have the right to look at it. How long is it? If you want to look at it, we can probably arrange that before we bring the jury up.

MR. POZORSKI: Yeah. There is like seven or eight clips, and each one is probably on the average 30 seconds, I'd say, on the average. The longest one -- there is two longer ones. They are each about two minutes. The others would be measured in seconds.

THE COURT: So is -- I don't know if you got it or not. It sounds like the State intended to send it or sent it and it's somewhere, but you do have a right to see it. So if you want to review it, we can do that and delay bringing the jury up.

MR. PAULSON: I just don't know if this video, after seeing the footage, if it will affect the case and the way it will move forward.

THE COURT: All right. We'll –

MR. POZORSKI: The only thing I would say - and it's only for future reference - I mean when attorneys know that there is video footage because it's referenced in the report, they should give me a call and say, "Hey, where is the video footage?" And then I would say to Megan or Michele or Zach, "Hey, get that over to the defense attorney right away so we can be all ready to go on the same page."

THE COURT: And if he watches it from start to finish, how long will that take?

MR. POZORSKI: Shouldn't take more than five minutes.

THE COURT: Okay. All right. When you are finished, come back in. (71: 4-6)

Following this exchange, the State allowed trial counsel to access and view approximately ten short video clips—most being a few seconds long, and none longer than a couple of minutes—that were edited for use with the State's witness. (71: 7)

*ii. Relevant trial evidence*

At trial, the State called three witnesses: Tim Kelley (Farm & Fleet retail associate); Marc Johnson (Farm & Fleet loss prevention manager);

and Sgt. Paul Rehlinger (City of Platteville PD). (71: 41-69.)

Mr. Kelly, a Farm & Fleet retail associate, testified that he was working at around 5:20 p.m. on November 24, 2019, cleaning the fitting rooms, when he came across an empty box for a Milwaukee jacket that the store sells among scattered clothes. (71 : 41-43, 45.) Believing that the box looked out of place, he mentioned it to a co-worker, and a report was later prepared regarding the incident. (71: 42-43.)

Mr. Johnson, the Farm & Fleet loss prevention manager, testified that when a store within his district, including the Platteville store, reports a theft to him, he goes back and reviews the security video footage to determine what occurred. (71: 47.) He travelled to Platteville to review security footage when a member of Farm & Fleet's management notified him of a theft that allegedly occurred in the fitting room of the store on November 24, 2019. (71: 47-48.) He testified that:

. . . I reviewed a video camera that sits over our fitting room, and I observed a female subject enter our fitting room with a box that contained a Milwaukee jacket. A short time later the female exited the fitting room. The jacket was no longer in the shopping cart. An associate later came and checked the fitting room and came out of the fitting room with the empty Milwaukee jacket box.

I was able to go back further on video, I was able to find a male and female subject enter our store, go over to our power tool department, actually select the jacket, put it in a shopping cart, then following through the stores when I found the female enter and exit the fitting room.

I then observed the female go up to the register where she made a purchase, but she did not purchase the Milwaukee jacket. The female then exited the store without paying for the jacket, exited the store and got into a vehicle that the male was driving, and they left the store (71: 48-49)

Mr. Johnson stated that based on his review of the footage, the female shopper, later identified as Ms. Kamm, entered the fitting room at 11:52 a.m. and exited at 12:10 p.m. (71: 49.) The prosecutor then played a series of video clips of the security footage, marked as trial exhibit 1, about which Mr. Johnson gave the following testimony:

\*Clip #1 (“Male Enters”): The male enters the store one minute before the female enters. (71: 50.)

\*Clip #2 (“Female Enters”): Ms. Kamm enters the store approximately one minute after the male. (71: 51.)

\*Clip #3 (“Jacket Selection”): At 11:03 a.m., the male enters the power tool department, followed by Ms. Kamm at 11:04 a.m. The male, eventually joined by Ms. Kamm, looks over the Milwaukee heated jackets, and Ms. Kamm picks out one of them and places it in her cart. They then exit the department. (71: 51-52.) Mr. Johnson testified that the jacket retailed for \$269.00. (71: 52.)

\*Clip #4 (“Enters Fitting Room”): At 11:52 a.m., Ms. Kamm enters the fitting room with her cart, which contains the Milwaukee jacket box. (71: 52)(1)

\*Clip #5 (“Exits Fitting Room”): Ms. Kamm exits the fitting room at 12:10 p.m.; the Milwaukee jacket box is no longer in her cart. (71: 52-53)(1)

\*Clip #6 (“Female Purchases”): At approximately 12:56 p.m., Ms. Kamm purchases a construction set in cash but did not pay for a Milwaukee heated jacket. (71: 53.) (1)

\*Clip #7 (“Male Exits”): The male shopper exits while wearing a Milwaukee heated jacket underneath the jacket he was already wearing. (Id.) Mr. Johnson contended that the male also stole a Milwaukee jacket as evidenced by a second empty box that employees found in the shoe department. (Id.) He clarified on cross-examination that “[w]e did not have any footage of that particular area where that [second] box was found” or footage otherwise showing the male putting on the second jacket. (71: 53.)(1)

\*Clip #8 (“Female Exits”): Ms. Kamm exits the store at 12:57 p.m. According to Mr. Johnson, “it appears that her purse is much larger now than when she entered the store.” (71: 54)(1)

\*Clip #9 (“Car in Park Lot”): Ms. Kamm is picked up by the male whose car is parked in front of the store. (71: 55)(1)

\*Clip #10 (“Car Shot Two”): Same as above, just from a different angle. (71:55)(1)

It should be noted that when this witness refers to “the fitting room”, he is referring to the area of the store where the fitting rooms are located. (71: 59-60) He is not referring to the actual private fitting rooms, where

cameras are not present. (71: 59-60) The State did not make this important distinction clear on direct examination. (71: 49-50) On cross examination, the defense pointed it out. (71: 59-60)

Sgt. Rehlinger with the Platteville PD then testified. (71: 65.) He stated that on December 23, 2019, he met with Mr. Johnson about the theft. (71: 65-66.) They reviewed video footage and photographs. (71: 66.) Eventually, through his investigation, Sgt. Rehlinger was able to identify the male and female shoppers as Kyle Woods and Rebecca Kamm. (71: 66-68.)

Ms. Kamm testified on her own behalf and denied taking the jacket. (71: 75.) She stated that at around 11:00 a.m. on November 24, 2019, she went to Farm & Fleet with Kyle Woods, a friend, as she was looking for Christmas gift ideas. (71: 75-76.) She testified that according to the footage played earlier to the jury, at one point, Mr. Woods took the Milwaukee jacket box out of her cart and placed it into his. (71: 76.) She eventually went to the fitting room area, but she did not actually enter any of the fitting rooms. (71: 76-77.) Mr. Woods was already in a fitting room at the time, and he remained there until she exited the fitting room area and continued shopping. (71: 77-78.) Eventually, she purchased a two-in-one construction set for her son and left, testifying that it was the only item she had when she left the store. (71: 78.)

She testified that before entering the fitting room area, she considered buying the jacket for her older son but decided not to do so once she was in the fitting area. While in the fitting room area, she removed the box containing the jacket from her cart and left it there. (71: 79- 81.) She explained that her purse looked so full because it is a big purse that becomes larger when it's lifted up and fully extended. (71: 79-80.)

*iii. Verdict, judgment, and sentence*

The jury returned a guilty verdict on count one, misdemeanor theft.

(71: 99-101) (41) A judgment was entered on the verdict, and Ms. Kamm was sentenced to 10 days of jail time. (65: 12)(61) (App. 1-2)

*iv. Postconviction proceedings*

Appellate counsel for Ms. Kamm filed a motion for postconviction relief and a trial court brief. (79) The motion requested a new trial based on violations of the Due Process clause and the discovery statute (Wis. Stats. Sec. 971.23) for the State's failure to disclose video evidence. (79) (80: 1-14) The trial court scheduled a hearing on the motion.

At the motion hearing, the court initially focused on the State's failure to disclose (1) 5 ½ hours of videotape that was never disclosed, and (2) the 10 clips that were entered into evidence at trial. The State admitted that it had failed to disclose the video footage:

"Now, Attorney Paulson -- right? Attorney Paulson says, well, you know, I had the paper material, but I didn't have the rest. Well, that can be easily explained in the sense that our office must have forgot to send them a copy of the disc. We sent them the paper, but we didn't send them a disc. So I'm not going to say he had it. I'm going to say I assumed he had discovery. But when he says he didn't get a copy of a disc, he didn't get a copy of the disc." (107: 10-11)

The trial court ordered further briefing. (107: 28) Trial counsel's supplemental brief focused on the State's late disclosure of the 10 video clips entered at trial and testified to by the loss prevention officer. (89: 1-14) The court wrote a letter shortly after receiving trial counsel's supplemental brief. (90: 1-2) The letter also focused on the State's failure to timely disclose the 10 video clips. (90: 1-2) In the letter, the court strongly suggested that it was poised to overturn the conviction. (90: 1-2) To summarize the letter, the failure to timely disclose the video clips was without good cause and was prejudicial to the defense. (90: 1-2) The State filed a brief in response to the court's letter, after which a hearing was scheduled for the court make an oral ruling. (94: 1-2) (100)

In its oral ruling, the postconviction court reversed its apparent intention to grant a new trial and denied the postconviction motion. (111: 1-10) (102) (App. 5-12) While the court discussed whether the video clips were timely disclosed, it did not ultimately make a determination on that issue. (111: 4-5, 7-8) (App. 6-7, 9-10) Instead, the postconviction court based its denial of the motion on a determination that, if the disclosure was untimely, there was good cause for the untimely disclosure. (111: 7-8) (App. 9-10)

Ms. Kamm appeals from the judgment of conviction and the denial of her postconviction motions for a new trial.

### **ARGUMENT**

1. **The trial court erred in allowing the State to use video evidence and testimony based on that evidence, when the video evidence was not disclosed to the defense within a reasonable time before trial.**

- a. Standard of Review

Whether the State violated its discovery obligations, thus entitling the defense to a new trial is an issue of law that is subject to de novo appellate review. *State vs. Delao*, 2002 WI 49, 252 Wis.2d 289, ¶ 14. Whether the State has shown good cause for the failure to comply with the statute, and whether the defendant was prejudiced by the violation are also questions of law that are reviewed by appellate court de novo. *State vs. Harris*, 2008 WI 15, 307 Wis. 2d 555, ¶ 15.

- b. The State Violated Wis. Stat. § 971.23(1) When It Failed to Timely Disclose the 10 Clips of Security Footage Before Trial

Wis. Stats. Sec. 971.23 requires the following:

(1) Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state . . .

(g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

(h) Any exculpatory evidence

*Wis. Stats. Sec. 971.23(1)(g)(h).*

“If a circuit court concludes that the State violated its statutory discovery obligation, [it] must then determine whether the State has shown good cause for the violation and, if not, whether the defendant was prejudiced by the evidence or testimony.” *State v. Harris*, 2008 WI 15, 307 Wis. 2d 555, ¶ 15. “[A] prosecutor’s violation of discovery statute, if prejudicial to the defendant, entitles the defendant to a new trial.” *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, ¶ 39. Ms. Kamm should be granted a new trial here because: (A) the State violated Wis. Stat. § 971.23(1) when it failed to timely disclose the 10 clips of security footage before trial; (B) the Court should have excluded the clips of security footage and forbade witness testimony thereon because the State lacked good cause for failing to disclose the evidence—and the Court’s decision to remedy the situation with a recess was improper; and (C) and the Court should order a new trial because Ms. Kamm was prejudiced by the State’s violation of Wis. Stat. § 971.23(1).

The State failed to comply with § 971.23(1)(g) when it omitted the security footage clips from its February 2020 disclosures to Ms. Kamm. While the State was required only to make its disclosure within a reasonable time before trial, it was required to comply with the duty under § 971.23(1)(g) to disclose all evidence that it intended to use at trial. It also had a continuing duty, “subsequent to compliance with” § 971.23(1), to thereafter “promptly notify the other party of the existence of [any]

additional material.” *Wis. Stats. Sec. 971.23(4)*. The State’s discovery disclosures should have included the 10 clips of security footage that had been in the prosecution’s possession since January 20, 2020 and in the police’s possession since December 23, 2019. *See DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 21 (The State’s discovery obligations may extend to information in the possession of law enforcement agencies as “the knowledge of law enforcement officers may be imputed to the prosecutor.”). The 10 video clips of security footage at issue here are within the State’s duty under § 971.23(1)(g) to disclose “any physical evidence that the district attorney intends to offer in evidence at the trial.”

As to the “physical evidence” component, even if electronic data did not meet the definition of the word “physical”—which it almost certainly does—the DVD that prosecutors received from Platteville Police, and on which the clips were burned, meets that definition.

Additionally, the video clips contained exculpatory evidence. Specifically, clip #7 showed another male exiting the store with the stolen jacket concealed underneath another jacket. (71: 53)(1) While this person was with Ms. Kamm in the store, the State did not allege that Ms. Kamm was acting in concert with this person; that is, as a party to a crime under *Wis. Stats. Sec. 939.05.(2)*. The State presented no evidence that Ms. Kamm was aware of the theft of the jacket by the other individual, or that she was involved in any way. (71: 1-104)

Additionally, insofar as it must be evidence that the prosecutor “intend[ed] to offer in evidence at the trial,” the fact is that the State did, in fact, offer the 10 video clips into evidence when examining its trial witnesses. (71: 50-55) And even though courts “interpret the phrase ‘plans to use’ to necessarily embody an objective standard, the same conclusion is warranted. *See DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 30. Under the circumstances of a retail theft case, a reasonable prosecutor would be expected to use security footage at trial, when available, because retailers

routinely rely on surveillance systems and gather such footage for the purpose of deterring, detecting, and documenting retail theft.

As to the timing of disclosures under § 971.23(1), this is where the State fell short. “Statutory discovery is designed to assure fairness at a criminal trial,” and it does so through “pretrial discovery,” which is “the right of the defendant to obtain access to evidence necessary to prepare his or her case for trial.” *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, ¶ 23. Wis. Stat. § 971.23(1) “requires the State to disclose certain materials demanded by the defendant ‘within a reasonable time before trial.’” *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, ¶ 35. Wis. Stats. Sec. 971.23(1) “clearly requires pretrial disclosures,” and those disclosures must be served with “sufficient time for [their] effective use” at trial. *Id.* ¶ 37. For example, the *Harris* Court concluded that the State violated the timing requirement of § 971.23(1) when, with two weeks to go before trial on sexual assault charges, prosecutors had not yet disclosed to the defense the complaining witness’s sexual assault allegations against a third-party. *Id.* ¶ 38.

c. The State Lacked Good Cause for Failing to Disclose the Evidence—and the Court’s Decision to Remedy the Situation with a Recess Was Improper.

Violations of Wis. Stat. § 971.23(1) are to be remedied with certain sanctions prescribed by § 971.23(7m), which states:

(7m) SANCTIONS FOR FAILURE TO COMPLY.

- (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance. (b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m). *Wis. Stats. Sec. 971.23(7m)(a)*.

*DeLao* makes clear that, under § 971.23(7m)(a), the circuit court acquires the authority to “grant the opposing party a recess” only if the State meets its burden to establish good cause. See *Delao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 51.

“Absent a showing of good cause, the evidence the State failed to disclose must be excluded.” *Id.* (citing § 971.23(7m)). “However, if the State can show good cause for its failure to disclose, the circuit court may exclude the evidence or may grant other relief such as a recess or continuance.” *Id.* (citing *State v. Wild*, 146 Wis. 2d 18, 27, 429 N.W.2d 105 (Ct. App. 1988)). “The burden of proving good cause rests on the State.” *Id.* (citing *State v. Martinez*, 166 Wis. 2d 250, 257, 479 N.W.2d 224 (Ct. App. 1991)).

The State did not establish good cause here, and the Court did not find good cause either. (71: 4-7) Defense counsel first mentioned the non-disclosure of the footage in arguing that because the footage is to be barred, the State’s witnesses should not be permitted to rely on it in testifying. (71: 4.) In response, the prosecutor at first denied the non-disclosure but then sought to downplay its importance given that the footage was referenced in the complaint. (71: 4-5.) The Court replied that defense counsel could view the clips before jury selection commenced, advising that they take a recess and “delay bringing the jury up” until defense counsel was finished. (71: 5-6.) The prosecutor attempted to shift blame for its failure to the defense arguing that “when attorneys know that there is video footage because it’s referenced in the report, they should give me a call and say, ‘Hey, where is the video footage?’” (71: 6)

However, not only do the State’s customs and practices in disclosing discovery not relieve it from strictly complying with its disclosure duties under § 971.23(1), but its attempt to explain its failures amounts to an argument for a “good faith” exception to its disclosure obligations.

Under *State vs. Delao*, this argument must fail. In *DeLao*, the Wisconsin Supreme Court distinguished between “good faith” and “good cause.” It explained:

¶ 54. In *Martinez*, the evidence at issue was a surveillance tape recording of the defendant that incriminated her in a drug deal. Although the State attempted to make the tape available to the defendant in accordance with the defendant’s discovery request, the attempt failed and the tape was lost. *Martinez*, 166 Wis. 2d at 253-55. The State conceded that it had “goofed up,” but the circuit court allowed police officers who had conducted the surveillance to testify as to their recollections of what they heard. *Id.* at 254, 256. The court of appeals reversed with this explanation: The trial court concluded that the state’s actions were “simply negligence” and not done in bad faith. We disagree that the facts permitted this conclusion. Instead, the limited facts offered by the state allowed for a host of speculative (not reasonable) inferences as to the state’s conduct--good faith, negligence, recklessness, intentional conduct, or bad faith. This points to the fundamental problem--the failure of the state to meet its burden under the statute. *Id.* at 258 (footnote omitted). The court added that “even if the facts could be read to support the trial court’s ‘negligence/no bad faith’ conclusion, this still begs the question of ‘good cause’ under the statute.” *Id.* The court of appeals refused to hold that “negligence or lack of bad faith constitutes ‘good cause’ as a matter of law.” *Id.*

¶ 55. Thus, as did the court of appeals in *Martinez*, we conclude that even if the State acted in good faith, it failed to show good cause for its failure to disclose. The State emphasizes that there is no indication that it engaged in sandbagging or otherwise acted in bad faith. However, the State’s assertions miss the mark because it has the burden to provide some explanation other than good faith. *DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶¶ 53-55.

Just as in *DeLao* and *Martinez*, the State does not meet its burden to establish good cause in this case. During postconviction proceedings, the State asserted that the 10 video clips were omitted from the State’s discovery disclosures by accident. (107: 10) The State did not satisfy its burden to show good cause. Therefore, the Court’s decision to order a recess so that defense counsel could review the video clips was improper under § 971.23(7m)(a). *See DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 51.

The postconviction court erroneously ruled that the State had good cause for the untimely disclosure of the video clips. (111:7-8) (App. 9-10)

In explaining this ruling, the postconviction court compared the nondisclosure in Ms. Kamm's case to the State's nondisclosure of evidence in *State vs. Rice*, 307 Wis. 2d 335, 743 N.W.2d 517 (Wis. App. 2007). (111: 4, 6-8) (App. 6, 8-10)

But the facts in *Rice* differ significantly from the facts in Ms. Kamm's case. In *Rice*, the trial court allowed nondisclosed testimony from a citizen witness that the State was not aware of until the morning of trial. *Rice*, 307 Wis. 2d 335, 743 N.W.2d 517, ¶¶ 8, 9. The witness was not contacted by law enforcement until the morning of trial. *Id.* at ¶ 17. The appellate court emphasized that the case was extremely complex involving “three separate burglaries, all proven through numerous pieces of circumstantial evidence.” *Id.* at 18. In further noting the complexity of the case, the *Rice* court noted that the State “ultimately called thirteen witnesses in addition to LeFevre, many of whom testified to only a small piece of the overall picture.” *Id.* The court concluded that:

“In view of the complexity of the case, it is understandable that the potential significance of LeFevre's testimony was overlooked during the initial investigation, and only uncovered while the prosecutor was preparing the case for trial. The State therefore met its burden of proving just cause . . .” *Id.*

In contrast to the facts in *Rice*, the facts in the current case were very simple and straightforward. The entire case was based on the untimely disclosed evidence. Only three witnesses testified for the State, and the trial took only one day. (71: 41-69, 1-104) The State's failure to disclose the video clips cannot therefore be attributed to “the complexity of the case”. Thus, the postconviction court's determination that the *Rice* rationale required a finding that the State in Ms. Kamm's case had good cause for its untimely disclosure of the video clips was erroneous.

d. In addition to excluding the video, the court should have excluded all testimony about the contents of the video.

With the video excluded, another question might be whether someone who reviewed the video could testify about what they saw on the video. The answer to this question is clearly “no.” Admissibility about a video recording is governed by *Wis. Stats. Sec. 910.04*, which reads as follows:

**910.04 Admissibility of other evidence of contents.** The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if:

- (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
- (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or
- (4) Collateral matters. The writing, recording or photograph is not closely related to a controlling issue.

Applying this statute to the current case, testimony about the video recording could be admitted only under the limited circumstances set forth in subsections (1) through (4), none of which apply. The original video clips in question were not “lost or destroyed”; they were “obtainable”; they were not in the possession of the defense; and they were closely related to a controlling issue in the case. The plain meaning of the statute requires exclusion of testimony based on the excluded video. *See State ex rel Kalal vs. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, ¶ 45.

e. Ms. Kamm Was Prejudiced by the State’s Violation of Wis. Stat. § 971.23(1).

“When evidence that should have been excluded under § 971.23 is not excluded, the defendant is not automatically entitled to a new trial” as

he or she must also show that “the improper admission of the evidence [was] prejudicial.” *DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 60. Nevertheless, it is clear that “[a] prosecutor’s violation of the criminal discovery statute, as well as the admission of any evidence that should have been excluded under Wis. Stat. § 971.23, may be prejudicial.” *Harris*, 2008 WI 15, 307 Wis. 2d 555, ¶ 41 n.18. If prejudice is shown, then “the defendant is to receive a new trial[.]” *DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 60.

The prejudice analysis is the same as a harmless error analysis. *Harris*, 2008 WI 15, 307 Wis. 2d 555 at ¶¶ 42-44. “[F]or an error to be harmless, the beneficiary of the error (here the State) must prove that it is clear beyond a reasonable doubt that the same result would have occurred absent the error.” *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, ¶ 71. Put another way, “the error is harmless if the beneficiary of the error proves ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Harris*, 2008 WI 15, 307 Wis. 2d 555, ¶ 42, or proves it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’ *Id* at ¶ 43.

Factors that a circuit court may consider in conducting its harmless error analysis “include the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.” *Id.* ¶ 45 (citing *State v. Mayo*, 2007 WI 78, ¶ 48, 301 Wis. 2d 642, 734 N.W.2d 115).

As the trial transcript reflects, defense counsel was prepared to go to trial without knowing about the video clips. (71: 4.) The State cannot prove beyond a reasonable doubt that it would have secured Ms. Kamm’s conviction without the video clips. Frankly, a contrary position would border on frivolous. Without footage of Ms. Kamm entering the fitting

room area with the jacket in her cart, exiting the fitting room area without the jacket in her cart, and leaving the store with a supposedly “overstuffed” purse, the State would not have witnesses who could credibly attest to these occurrences or evidence to otherwise implicate Ms. Kamm in a crime. Additionally, Ms. Kamm’s trial attorney could not have been prepared to argue that clip #7 was exculpatory in that it showed someone other than Ms. Kamm leaving the store with the stolen jacket worn underneath another jacket.

By springing the footage on defense counsel at trial, defense counsel was deprived of an opportunity to prepare for trial with the benefit of the video clips. In other words, before trial, he undoubtedly undertook trial preparations, such as outlining opening statements, witness examinations, and closing arguments, essentially all in the blind—not knowing what precisely was caught on camera, what precisely that footage would show, and how the footage might influence the testimony of the State’s witnesses (who, unlike defense counsel, would likely know what the footage showed). Then, by not barring the footage and instead forcing defense counsel to proceed to trial after viewing 10 or so video clips one time just minutes before jury selection, defense counsel had to adjust his pretrial preparations on the fly and try to defend Ms. Kamm against a veritable trial-by-ambush.

Notably, *DeLao* emphasized the great risk of prejudice to a defendant when discovery is not made as a pretrial disclosure but is, instead, made at the time of or during trial. The Supreme Court explained:

¶ 63. It is particularly significant that the disclosure was in the midst of trial. The primary focus of § 971.23(1)(b) is on disclosure before trial. Indeed, that is the very nature of discovery. “If there is to be pretrial discovery, broad or limited, in criminal cases, defense counsel should be able to rely upon evidence as disclosed by the state; otherwise, the purpose of discovery is frustrated and more injustice is done than if no discovery were allowed.” [*Wold v. State*, 57 Wis. 2d 344, 351, 204 N.W.2d 482 (1973)]. ¶ 64. We note that two purposes of criminal discovery are to ensure fair trials and to encourage defendants to enter pleas after learning the strength of the State’s case. *Irby v. State*, 60 Wis. 2d 311, 320, 210 N.W.2d

755 (1973); *State v. Maday*, 179 Wis. 2d 346, 353, 507 N.W.2d 365 (Ct. App. 1993). Both purposes are thwarted when the State fails to provide the information required of it before trial begins. ¶ 65. Here, the State's discovery violation undermined the essence of discovery. It placed DeLao on the horns of a dilemma and prejudiced her case. She must have the opportunity to choose a strategy and prepare for trial in light of all the evidence that should have been provided her. Therefore, we determine, as did the court of appeals, that she is entitled to a new trial.

*DeLao*, 2002 WI 49, 252 Wis. 2d 289, ¶¶ 63-65.

These comments from *De Lao* support a finding that Ms. Kamm was prejudiced by the State's discovery violations in this case.

**2. Ms. Kamm's trial attorney preserved the objection to the admission of the video clips and testimony about the clips for appellate review.**

The State may argue that Ms. Kamm's trial counsel failed to preserve his objection to the admission of the video clips as well as testimony about the clips sufficiently to allow for appellate review. This court should reject this argument.

a. Standard of Review

Whether an objection adequately preserves an issue for appeal is a question of law that appellate courts review independently of the legal determinations rendered by lower courts. *In re Corey J.G.*, 215 Wis.2d 395, 405, 572 N.W.2d 845 (1998).

b. The basis for trial counsel's objection was sufficiently specific and was obvious from its context.

In *State vs. Agnello*, the Wisconsin Supreme court addressed the issue of whether an adequate objection was made to preserve an issue for appeal. The court ruled that:

“in order to maintain an objection on appeal, the objector must articulate the specific grounds for the objection unless its basis is obvious from its context. *Id.*; *State v. Caban*, 210 Wis.2d 597, 604, 563 N.W.2d 501 (1997); *State v. Marks*, 194 Wis.2d 79, 88, 533 N.W.2d 730 (1995). This rule exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources. *Corey J.G.*, 215 Wis.2d at 405, 572 N.W.2d 845; *Caban*, 210 Wis.2d at 605, 563 N.W.2d 501.” *State vs. Agnello*, 226 Wis. 2d 164, 593 N.W.2d 167, ¶ 10.

The objection is not required to be “as specific as possible to be effective.” *Id.* at ¶ 12. The objection simply must “object in such a way that the objection's words or context alert the court of its basis.” *Id.* at ¶ 12, *citing Cory J.G.*, 215 Wis.2d at 405, 572 N.W.2d 845.

Trial counsel’s objection to the State’s use of the videotape meets the requirements set forth in *Agnello*. The full colloquy surrounding trial counsel’s objection to the admission of the video clips occurred as follows (Mr. Paulson was Ms. Kamm’s attorney. Mr. Pozorski was the prosecutor):

MR. PAULSON: I do have maybe one just preliminary issue. I’ve been going through the discovery - you know, and Mr. Pozorski can certainly attest to this - but one of the potential witnesses on the State’s witness list, I’m assuming that he – his testimony is based on some footage. I’m not sure if the State intends to admit that footage into the record, but if they do, the defense never received that footage, and so I just wanted to make the Court aware of that situation.

MR. POZORSKI: We turned over discovery.

MR. PAULSON: That’s correct. We got discovery pages 1 through 18 and then various photographs but never the actual footage.

THE COURT: Yeah, and the footage is described in the complaint anyway and the other information, right, as far as what it shows?

MR. POZORSKI: Right.

THE COURT: But –

MR. PAULSON: Right, but just anticipation of that witness, if there is no video, I don’t know if that video could be admitted without being shown to the witness.

THE COURT: Right. You would have the right to look at it. How long is it? If you want to look at it, we can probably arrange that before we bring the jury up.

MR. POZORSKI: Yeah. There is like seven or eight clips, and each one is probably on the average 30 seconds, I’d say, on the average. The

longest one -- there is two longer ones. They are each about two minutes. The others would be measured in seconds.

THE COURT: So is -- I don't know if you got it or not. It sounds like the State intended to send it or sent it and it's somewhere, but you do have a right to see it. So if you want to review it, we can do that and delay bringing the jury up.

MR. PAULSON: I just don't know if this video, after seeing the footage, if it will affect the case and the way it will move forward.

THE COURT: All right. We'll --

MR. POZORSKI: The only thing I would say - and it's only for future reference - I mean when attorneys know that there is video footage because it's referenced in the report, they should give me a call and say, "Hey, where is the video footage?" And then I would say to Megan or Michele or Zach, "Hey, get that over to the defense attorney right away so we can be all ready to go on the same page."

THE COURT: And if he watches it from start to finish, how long will that take?

MR. POZORSKI: Shouldn't take more than five minutes.

THE COURT: Okay. All right. When you are finished, come back in. (71: 4-7)

Trial counsel made it clear that he was objecting to the admission of the videotape based on the fact that it had not been provided to him before the morning of trial. He made his belief that it was inadmissible clear. Having not seen the video, he could not have made an argument as to how admission of the video prejudiced him. The State had adequate knowledge of the basis for the objection, as noted by its detailed argument for admission of the clips. The record demonstrates that the basis of the objection was made clear to all parties by its context.

**3. Regardless of whether defense counsel sufficiently preserved the issue for appeal, a new trial should be granted, because the trial court's admission of the video clips as well as testimony about their contents was plain error.**

If this court finds that trial counsel's objection to the admission of the video clips and testimony about the events they purport to show was somehow deficient, a new trial should be granted regardless, based on the fact that admission of the clips was plain error.

a. Standard of Review

Appellate courts independently review the record to determine if a new trial is warranted due to plain error. *State v. Mayo*, 2007 WI 78, 301 Wis.2d 642 ¶29.

b. Plain error doctrine

Under the plain error doctrine, a conviction may be vacated when an unpreserved error is “fundamental, obvious, and substantial.” If the defense can make this showing, “the burden then shifts to the State to show the error was harmless.” *State v. Jorgensen*, 2008 WI 60, 310 Wis.2d 138, ¶22. To determine whether an error was harmless in this case, appellate courts consider whether the State can prove “beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]” *Mayo*, 2007 WI 78, 301 Wis.2d 642, ¶47. The Wisconsin Supreme Court has identified several factors to assist in making this determination:

(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. *Jorgensen*, 2008 WI 60, 310 Wis.2d 138, ¶ 45.

c. The erroneous admission of the video clips and testimony about the clips, were “fundamental, obvious and substantial” trial court errors.

Based on the discovery violations, the trial court erred in allowing the 10 video clips to be admitted into evidence, and in allowing the loss prevention officer to testify about them. These errors were “fundamental, obvious and substantial.” The trial court did not engage in any analysis of whether a discovery violation occurred, and what the remedy should be.

(71: 4-7) It simply ordered a minimal delay in the start of the trial so that trial counsel could review the 10 video clips. (71: 4-7) Trial counsel had no opportunity to prepare a response to the video or to incorporate it into his theory of defense.

The error was fundamental. The trial court did not conduct any analysis to determine if the State had “good cause” for the nondisclosure of the 10 video clips, as is required under *Delao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 51. During postconviction proceedings, the State made no convincing argument that it had good cause for the nondisclosure, instead relying on an argument that the nondisclosure was the defendant’s fault. (107: 1-30) There could be no conceivable argument that the State had good cause for its failure to disclose the 10 video clips. Therefore, the erroneous admission was obvious.

As noted above, the Supreme Court has explained the seriousness of discovery violations. *See Delao*, 2002 WI 49, 252 Wis. 2d 289, ¶ 63 to 65. Applying this analysis specifically to Ms. Kamm’s case, it is notable that the 10 video clips were crucial to the State’s case. The State described the video clips in its opening statement. (71: 36-37). The video clips were all played to the jury, and they were the most important portion of the Farm and Fleet security officer’s testimony. (71:48, 50-56). The security officer did not witness the alleged theft. (71: 46-63) Without the video clips, he could not have provided any relevant testimony. The State again emphasized the contents of the video clips in its closing argument. (71: 82-85). Moreover, there was another person on tape wearing a jacket that appeared to be the stolen jacket. (71: 62)(1)

Based on the importance of disclosure of items subject to discovery as set forth in *Delao* and based on the importance of the video clips to the State’s case, the court’s incorrect response to the nondisclosure of the clips until the morning of trial was a “fundamental, substantial and obvious” error. It meets the *Jorgensen* test for plain error. *Jorgensen*, 2008 WI 60, 310 Wis.2d 138, ¶ 45.

d. The erroneous admission of the video clips and testimony about the clips was not harmless.

"If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." *Id.*, ¶23. To determine whether an error was harmless in this case, we consider whether the State can prove "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]" *Mayo*, 2007 WI 78, 301 Wis.2d 642, ¶47. Our supreme court has identified several factors to assist in making this determination:

(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. *Jorgensen*, 2008 WI 60, 310 Wis.2d 138, ¶ 45.

An analysis of these factors follows:

*The frequency of the error.*

The erroneously-admitted evidence was referenced repeatedly during the trial. The State discussed it in detail during its opening statement. (71: 34-36). The security officer testified about the footage in the 10 clips. (71: 50-55). The clips themselves were viewed by the jury. (71: 50-55). The State emphasized the events depicted in the video clips in its closing argument. (71: 82-87)

*The importance of the erroneously admitted evidence.*

The video clips and testimony about their contents were central to the State's case. It is clear that without the clips and testimony about them, the State could not have proven its case at a very basic way. The clips were the only way Ms. Kamm was identified as being in the store. (71: 66-68).

There were no eyewitnesses to the theft of the jacket. Without the video clips, there would have been no case against Ms. Kamm. The importance of the erroneously admitted evidence cannot be overstated.

*The presence or absence of evidence corroborating or contradicting the erroneously admitted evidence.*

Clearly, if there is other evidence corroborating the video clips, that would support a harmless error argument. In this case, there was no such evidence. As noted above, without the video clips, and the testimony about them, the State did not have a case against Ms. Kamm. There was no other direct evidence implicating Ms. Kamm. Ms. Kamm testified and denied the theft. (71: 75-80) The absence of evidence corroborating or contradicting the video clips negates a claim of harmless error.

*Whether the erroneously admitted evidence duplicates untainted evidence.*

Again, the video clips and testimony about them were the entire case against Ms. Kamm. There was no “duplicate or untainted evidence” presented. This factor also negates a claim of harmless error.

*The nature of the defense*

This factor also fails to support a claim that the admission of the clips and testimony about them was harmless error. Ms. Kamm testified that she did not steal the jacket. The State’s only evidence against her were the videos and related testimony, both of which should have been excluded. Ms. Kamm’s testimony, without the entry of the clips and testimony about them, was uncontroverted. This factor does not support a harmless error claim. *Id.*

*The nature of the State's case.*

Again, the State's case was based entirely on the video clips and testimony about them. The nature of the State's case can be seen in a brief portion of its closing statement. In it, the State asks, "whether you believe her side of the story or whether you believe all the stuff that you saw." The State's case was that the video clips and testimony from those who reviewed them supported a conviction. Without the evidence, there is no case. *Id.*

*The overall strength of the State's case.*

The difference in the strength of the State's case with and without the entry of the video clips and testimony about them is obvious. With the video clips and testimony about them, the State was able to obtain a guilty verdict. The clips showed Ms. Kamm in the store, looking at the jacket, going into the fitting room, and leaving the store without the jacket. Without these clips, it is impossible to see how the result of the trial would have been the same. The clips were instrumental in identifying Ms. Kamm as being in the store. (71: 65-69). The State used them to show Ms. Kamm in possession of the jacket in the store, and to show that she left the store without paying for the jacket, although the evidence that she left with the jacket was minimal. (71:49 – 55). Without this evidence and testimony, the State's case would have been not only weak but nonexistent.

As a whole, the harmless error analysis turns on "whether the State can prove "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Mayo*, 2007 WI 78, 301 Wis.2d 642, ¶47. In this case, it is impossible to see how a guilty verdict could have been returned absent the erroneous admission of the video clips and testimony about them.

### **CONCLUSION**

For the foregoing reasons, Ms. Kamm respectfully asks the Court to reverse the judgment of conviction, as well as the postconviction court's denial of Ms. Kamm's postconviction motions and order a new trial.

Dated this 3rd day of January, 2025.

RYAN & SAYNER  
*Electronically signed by:*  
Daniel P. Ryan  
Attorney for Defendant-Appellant

### **FORM and LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,138 words.

Dated this 3rd day of January, 2025.

RYAN & SAYNER  
*Electronically signed by:*  
Daniel P. Ryan  
Attorney for Defendant-Appellant

### **CERTIFICATE OF EFILE/SERVICE**

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish the electronic notice and service for all participants who are registered users.

Dated this 3rd day of January, 2025.

RYAN & SAYNER

*Electronically signed by:*

Daniel P. Ryan

Attorney for Defendant-Appellant