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01-17-2025  
CLERK OF WISCONSIN  
COURT OF APPEALS

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 THE PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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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. 2020CM000026

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Respectfully submitted,  
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## II. STATEMENT OF ISSUES

1. WHETHER THE STATE VIOLATED SECTION 971.23, WIS.

STATS., AND THE DEFENDANT'S CONSTITUTIONAL RIGHT TO  
DUE PROCESS.

Trial Court did not find a violation, but assumed a  
violation.

2. WHETHER THE DEFENDANT WAIVED HIS RIGHT TO OBJECT TO  
THE ALLEGED DISCOVERY VIOLATION.

Trial Court did not explicitly address.

3. WHETHER THE DEFENDANT IS ENTITLED TO A NEW TRIAL EVEN

IF THERE WAS NOT A DISCOVERY VIOLATION, AND EVEN IF  
THE DEFENDANT DID NOT ADEQUATELY PRESERVE THE ISSUE.

Trial Court did not address.

## III. STATEMENT OF THE ARGUMENT

1. THE DEFENSE DID NOT PROVE THAT THE STATE COMMITTED A DISCOVERY VIOLATION.
  
2. IF THERE WAS A DISCOVERY VIOLATION, THE STATE HAD GOOD CAUSE AND THE TRIAL COURT GRANTED A RECESS PRIOR TO JURY SELECTION AND THE JURY TRIAL TO ALLOW THE DEFENSE TO REVIEW THE FIVE MINUTES OF VIDEO.
  
3. THE TRIAL COURT COMPLIED WITH SECTION 971.23 (7M) (A), AND GRANTED DEFENSE COUNSEL A RECESS TO REVIEW APPROXIMATLY FIVE MINUTES OF VIDEO.
  
4. INTRODUCTION OF THE VIDEO EVIDENCE WAS HARMLESS BECAUSE DEFENSE COUNSEL FOR THE TRIAL USED THE VIDEO EVIDENCE THAT WAS PRESENTED AND THE LACK OF VIDEO EVIDENCE TO THE DEFENDANT'S ADVANTAGE.
  
5. THE DEFENSE DID NOT PRESERVE THE DISCOVERY ISSUE FOR APPEAL BY STATING HE WAS READY TO PROCEED WITH THE TRIAL AFTER THE RECESS.

6. BECAUSE THE SAME EVIDENCE WOULD BE PRESENTED AT ANOTHER TRIAL, A NEW TRIAL IS NOT NECESSARY.

#### IV. STATEMENT ON ORAL ARGUMENT

Because the parties can adequately address the arguments with briefs, the Plaintiff-Respondent (State of Wisconsin) does not request oral argument.

#### V. STATEMENT ON PUBLICATION

Unless this Court believes that this case can be utilized to establish which party has the burden to prove the existence or non-existence of a discovery violation, publication would not be appropriate.

## VI. STATEMENT OF THE CASE

On January 23, 2020, the State of Wisconsin charged the Defendant-Appellant, Ms. Kamm, with one count of Misdemeanor Retail Theft involving a Milwaukee jacket from Farm and Fleet in the City of Platteville, County of Grant, State of Wisconsin. (R.2) On April 6, 2023, the Trial Court conducted a pretrial conference, jury selection and a jury trial. (R.71) The jury returned a verdict of guilty. (R.41) The defendant appeals.

## VII. STATEMENT OF THE FACTS

- On January 23, 2020, the Plaintiff-Respondent (State of Wisconsin) charged the Defendant-Appellant (Ms. Kamm) with one count of Misdemeanor Retail Theft for shoplifting a Milwaukee jacket from Farm and Fleet in Platteville, Grant County, Wisconsin. The criminal complaint references video evidence. (R.2; App.1-3)
- On February 17, 2020, Ms. Kamm signed a signature bond. (R.8)
- On February 18, 2020, the State Public Defender's Office appointed Attorney Andrew J. Burdick to represent Ms. Kamm. (R.9)
- On February 18, 2020, Attorney Andrew J. Burdick filed a discovery demand. (R.10)
- On February 19, 2020, the very next day, the State provided discovery to Attorney Burdick with a cover letter stating that the discovery materials included 23 Pages and 1 Disk. (R.95; App.4)
- On July 8, 2020, the Trial Court issued a bench warrant for the Ms. Kamm's arrest. (R.19)
- On September 24, 2021, Defense Attorney Burdick filed a Notice of Completion of his involvement in the case. (R.21) The case then languished for three years

through no fault of the State and through no fault of the Trial Court, and on February 14, 2023, and on February 14, 2023, the Trial Court imposed a cash bond. (R.22)

- On February 15, 2023, the State Public Defender's Office appointed Attorney Trevor A. Paulson to represent Ms. Kamm. (R.24)
- On that same day, February 15, 2023, Attorney Trevor A. Paulson filed a discovery demand. (R.27)
- Having already provided discovery to the State Public Defender's Office, the State did not respond do the second discovery demand.
- On April 6, 2023, the Trial Court conducted a pretrial conference before proceeding with jury selection and a jury trial. (R.71)
- During that pretrial conference, Attorney Trevor A. Paulson informed the Trial Court and the State, for the first time, that the Defense did not have the video evidence. (R.71, p.4; App.5)
- The Prosecutor informed the Court that it had provided discovery. (R.71, p.4; App.5)

- The Trial Court pointed out to the Defense Attorney that the complaint referenced the video. (R.71, p.5; App.6)
- The Prosecutor then added that the video evidence was also referenced in the report. (R.71, p.6; App.7)
- Attorney Trevor A. Paulson acknowledged that he had received the other materials, 18 pages and photos. (R.71, pp.4-5; App.5-6)
- The Trial Judge then inquired as to the length of the video evidence. (R.71, p.5; App.6)
- The Prosecutor informed the Court that the video evidence measured about five minutes. (R.71, pp.5,6)
- Section 971.23 (7m) (a), Wis. Stats., provides that if there is good cause for a Discovery violation, the Trial Court may grant a recess or a continuance to the Defense. The Trial Judge complied with Section 971.23 (7m) (a), Wis. Stats., and granted Trial Counsel a recess.
- The State had every reason to believe that it had complied with the Discovery Demand.
- The Court recessed to give Attorney Trevor A. Paulson time to view the video evidence. (R.71, pp.5,6; App.6,7)

- During the recess, Attorney Paulson watched the video and after the recess informed the Trial Court that he was ready to proceed. (R.71, p.7; App.8)
- The jury was selected and the case proceeded to trial. (R.71)
- The State presented its case including the video evidence. (R.71; R.51)
- Ms. Kamm testified and denied shoplifting. (R.71, p.78)
- The jury found Ms. Kamm guilty. (R.41)
- At a post-trial motion hearing, the State did not call Attorney Trevor A. Paulson a liar and assumed he had not received the video evidence. (R.107, pp.10-11)
- In a post-trial brief for the Trial Court, the State did not concede that it had committed a discovery violation. (R.94; App.9-10)
- The Trial Court assumed, but did not find, a discovery violation and denied Ms. Kamm relief. (R.111; App.11-20)

## VIII. ARGUMENT

## 1. THE DEFENSE DID NOT PROVE THAT THE STATE COMMITTED A DISCOVERY VIOLATION.

In *State v. Rice*, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 342-343, the Court stated:

We analyze alleged discovery violations in three steps, each of which poses a question of law reviewed without deference. *State v. DeLao*, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 63 N.W.2d 480. First, we decide whether the State failed to disclose information it was required to disclose under Wis. Stat. § 971.23(1). Next, we decide whether the State had good cause for any failure to disclose under § 971.23(1). *Id.*, ¶15. Absent good cause, the undisclosed evidence must be excluded. However, if good cause exists, the circuit court may admit the evidence and grant other relief, such as a continuance. *Id.*, ¶ 51; Wis. Stat. § 971.23(7m). Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless. *DeLao*, 252 Wis. 2d 289, ¶ 59.

Section 971.23(1)(g), Wis. Stats., provides that the District Attorney shall within a reasonable time before trial disclose to the defendant any physical evidence that the District Attorney intends to offer in evidence at the trial.

Section 971.23(7m)(a), Wis. Stats., provides that the Court shall exclude any evidence not presented for inspection or copying unless good cause is shown for the

failure to comply. That statute also provides that the may in appropriate cases grant the opposing party a recess or a continuance.

In *State v. DeLao*, 2002 WI 49, ¶49, 252 Wis. 2d 289, 312, the Court stated:

As a general rule, the discovery to which a criminal defendant is entitled is limited to Constitutional and Statutory requirements. See *State v. O'Conner*, 77 Wis. 2d 261, 280 n.7, 252 N.W.2d 671 (1977). Thus, as the State asserts, this court has stated that the discovery statute "controls as to the rights of a defendant as to discovery and the procedures to be followed in enforcing such rights." *State v. Calhoun*, 67 Wis. 2d 204, 217, 226 N.W.2d 504 (1975).

In *State v. Rice*, 2008 WI App 10, ¶14, 307 Wis.2d at 342-343, the Court, when analyzing alleged discovery violations, stated:

First we decide whether the State failed to disclose information it was required to disclose under Wis. Stat. §971.23(1). Next, we decide whether the State had good cause for any failure to disclose under §971.23(1). *Id.*, ¶ 15. Absent good cause, the undisclosed evidence must be excluded. However, if good cause exists, the Circuit Court may admit the evidence and grant other relief, such as a continuance. *Id.*, ¶ 51; Wis. Stat. §971.23(7m). Finally, if evidence should have been excluded under the firsts two steps, we decide whether admission of the evidence was harmless. *DeLao*, 525 Wis. 2d 289, ¶ 59.

First of all, the Defense has not proven that there was a discovery violation. The criminal complaint gave the

defendant notice that there was video evidence. (R.2, p.1; App.1-2)

On February 18, 2020, Attorney Andrew J. Burdick, Assistant State Public Defender, filed a Demand for Discovery and Inspection. (R.10)

On February 19, 2020, the very next day, the State provided discovery to Attorney Burdick with a cover letter indicating that the discovery included 23 Pages and 1 Disk. (R.95; App.4)

On September 24, 2021, Attorney Andrew J. Burdick filed a Notice of Completion advising the Court of the termination of his representation of Ms. Kamm. (R.21)

There is nothing in the record which shows that between February 19, 2020, and September 24, 2021, more than a year and a half, Attorney Burdick had not received the disk. The case languished for approximately three years through no fault of the State and through no fault of the Trial Court.

On February 14, 2023, the Trial Court imposed a cash bond. (R.22)

On February 15, 2023, the State Public Defender's Office appointed Attorney Trevor A. Paulson to represent Ms. Kamm. (R.24)

On February 15, 2023, Attorney Paulson filed a Discovery Demand. (R.27) Having already provided discovery to the State Public Defender's Office, the State did not respond to the second Discovery Demand from the same law office.

On April 6, 2023, the Trial Court conducted a pretrial conference before proceeding with jury selection and a jury trial. (R.71) During the pretrial conference, Attorney Paulson informed the Court and the State, for the first time, that the Defense did not have the video evidence. (R.71, p.4; App.5) The Prosecutor responded that the State had provided Discovery. (R.71, p.4; App.5) The Trial Court on that date also pointed out to the Defense that the complaint referenced the video. (R.71, p.5; App.6) The Prosecutor also added at that time that the video evidence was referenced in the report. (R.71, p.6; App.7)

The Defense Attorneys were told via the Criminal Complaint that video evidence existed. (R.2; App.1-3) The report provided in Discovery also indicated that video evidence existed. The State sent Discovery to Attorney Burdick with a cover letter indicating that it was providing 23 Pages of materials and a Disk. (R.95; App.4)

The Trial Court at the postconviction motion hearing stated that it was the State's burden to prove that the

State complied with the Discovery statute. While *Rice*, 2008 WI App 10, ¶15, 307 Wis. 2d at 343, states that it is the State's burden to prove good cause for a Discovery violation, *Rice* does not state that the State has a burden with respect to the first element of the analysis, that the State did not commit a Discovery violation. *DeLao*, 2002 WI App 49 ¶51, 252 Wis. 2d at 13, also holds that the burden to show good cause for a Discovery violation rests with the State, but does not hold that the State has the burden to prove Discovery compliance.

Counsel argues that the State conceded the discovery violation at the post-conviction motion hearing when the Prosecutor stated the following:

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 disk. We sent them the paper, but we didn't send them a disk. 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 disk, he didn't get a copy of the disk. (R.107, pp.10-11)

When the issue first arose, minutes before jury selection, the Prosecutor stated that the State had provided discovery to the Defense. The Prosecutor was not going to call Attorney Paulson a liar. Attorney Paulson

indicated that he did not have the disk or the videos and the Prosecutor assumed that he was telling the truth. The Prosecutor assumed that the State did not provide the disk. In the response brief to the Trial Court, the Prosecutor pointed out that the Court was correct that the State cannot state with certainty that the clips were provided prior to trial, but that short of a paper trail, it would almost always be impossible for an attorney's office to remember in detail each piece of discovery provided to the Defense. (R.94; App.9-10) The State made clear in its response brief to the Trial Court that the State was not conceding that the State committed a discovery violation in this case. (R.94; App.9) It is possible that the Prosecutor failed to provide the video clips to the Defense, but highly, very highly unlikely. The discovery letter to Attorney Burdick, sent one day after Attorney Burdick's discovery demand, described the discovery that was being provided and that it included 23 Pages of discovery materials and the Disk. (R.95; App.4) Attorney Burdick's representation of Ms. Kamm continued for more than a year and a half. The criminal complaint put the Defense on notice that here was video evidence and the report included in the discovery materials indicated that there was video evidence. Attorney Burdick never indicated that he did not

receive the video evidence. Because the State will still not call Attorney Paulson a liar, it is very likely that the State Public Defender's Office misplaced or lost the video evidence. Probably as a matter of standard operating procedure, Attorney Paulson filed a separate discovery demand on 2/15/2023. (R.25) Because Attorney Paulson was working in the same Public Defender's Office in Lancaster, Wisconsin, as Attorney Burdick and because the discovery materials had been previously provided to the Public Defender's Office in Lancaster, Wisconsin, the State did not duplicate its discovery response.

**2. IF THERE WAS A DISCOVERY VIOLATION, THE STATE HAD GOOD CAUSE AND THE TRIAL COURT GRANTED A RECESS PRIOR TO JURY SELECTION AND THE JURY TRIAL TO ALLOW THE DEFENSE TO REVIEW THE FIVE MINUTES OF VIDEO.**

If the State committed a Discovery violation, the next step in the analysis is to decide whether the State had good cause for any failure to disclose the discovery in question. In *Rice*, 2008 WI App 10 ¶15, n.4, 307 Wis. 2d at 343, the Court held that it did not need to decide whether the State violated its discovery obligation because good cause was shown for any potential discovery violation. The Trial Court presiding at the post-conviction motion hearing in this case, proceeded the same way. The Trial Court at

the motion hearing assumed there was an omission or a discovery violation, and held that the State had good cause for the violation.

The Trial Court for the motion hearing stated that although the Prosecutor is charged with the knowledge of what is in the law enforcement files and the files of the other State's witnesses, there is no authority for the proposition that the Prosecutor is charged with the knowledge of what's contained in the Defense file. The Trial Court further stated that it is the Defense Attorney's responsibility to know what's in the file. (R.111; App.16) Since it is the Defense Attorney's responsibility to know what is in the file, it is likewise the Defense Attorney's responsibility to know what is not in the file. The Prosecutor had no way of knowing that Attorney Paulson did not have the video clips. The Defense had notice of the video clips in the criminal complaint. One day after Attorney Burdick filed a Discovery Demand, the State provided discovery with a cover letter that indicated that the discovery included 23 Pages and 1 Disk. (R.95) The Defense was provided with the report in the discovery and the report referenced the video clips. The Trial Court at the post-conviction motion hearing concluded that even if there was a discovery violation, the State had

good cause because the State had no way of knowing that Attorney Paulson did not have the video clips. (R.111; App.17)

**3. THE TRIAL COURT COMPLIED WITH SECTION 971.23(7M)(A), AND GRANTED DEFENSE COUNSEL A RECESS TO REVIEW APPROXIMATELY FIVE MINTUES OF VIDEO.**

*Rice* and *DeLao* point out that if good cause exists for the discovery violation, evidence may still be admitted and the Trial Court can grant other relief. The Trial Court on the day of the jury selection and jury trial did just that. Section 971.23(7m)(a), Wis. Stats., provides that the Court may in appropriate circumstances grant the opposing party a recess or a continuance. The video evidence in this case amounted to about five minutes of video clips. (R.71, pp.5,6; App.6,7) The Trial Judge gave Attorney Paulson a recess to watch the five minutes of video evidence. (R.71, p.6; App.7) After watching the video evidence, Attorney Paulson informed the Trial Court that he was ready to proceed. (R.71, p.7; App.8) The Trial Court had every reason to believe that the recess it granted to the Defense prior to the commencement of the jury selection was adequate.

**4. INTRODUCTION OF THE VIDEO EVIDENCE WAS HARMLESS BECAUSE DEFENSE COUNSEL FOR THE TRIAL USED THE VIDEO EVIDENCE**

THAT WAS PRESENTED AND THE LACK OF VIDEO EVIDENCE TO THE  
DEFENDANT'S ADVANTAGE.

*Rice*, 2008 WI App 10, ¶14, 307 Wis. 2d at 343, the Court states, "Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless."

In *State v. Rocha-Mayo*, 2014 WI 57, ¶31, 355 Wis. 2d 85, 98, the Court stated, "Under Wisconsin Statutes and precedent, harmless error analysis is applicable to this case. Wisconsin Stat. § 805.18(2) provides,

No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of...the improper admission of evidence...unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

(Emphasis added.) Although Wis. Stat. § 805.18 specifically applies to civil procedure, this statute is applicable to criminal proceedings through Wis. Stat. § 972.11(1)."

Attorney Paulson indicated to the Court that he was ready to proceed.

As it turns out, the Defense was ready to proceed.

The State presented ten video clips (R.51) and the testimony of the Loss Prevention Manager. (R.71, pp.46-64)

In Appellant's brief (pp.12-13), the Appellant states:

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 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)

A Farm and Fleet employee testified that while cleaning the fitting rooms, he came across an empty box for a Milwaukee jacket. (R.71, pp.41-43, 45) The State charged Ms. Kamm with stealing a Milwaukee jacket. (R.2) As Attorney Paulson, Trial Counsel, pointed out, the video evidence did not show Ms. Kamm in the fitting room. Attorney Paulson elicited testimony from the Loss Prevention Manager that we didn't know whether Ms. Kamm actually went into an individual fitting room. (R.71, p.60) Attorney Paulson then called Ms. Kamm to the stand and elicited testimony from her that she never entered a fitting room. (R.71, p.76)

Therefore, Attorney Paulson was able to utilize the video evidence and the lack of video evidence to the defendant's advantage. The video evidence showed Ms. Kamm

went to the area of the fitting rooms, the video evidence did not show that she entered a fitting room, the box for the stolen Milwaukee jacket was found in a fitting room and Ms. Kamm testified that she never entered a fitting room.

Therefore, the admission of the video evidence was harmless to the Defense because the video evidence and lack of video evidence was utilized by Attorney Paulson to the defendant's advantage.

**5. THE DEFENSE ATTORNEY DID NOT PRESERVE THE ISSUE FOR APPEAL BY STATING HE WAS READY TO PROCEED WITH THE TRIAL.**

In *State v. Peters*, 166 Wis. 2d 168, 174 (Ct. App. 1991), the Court stated:

Whether a party objected to the admissibility of evidence in a manner sufficient to preserve the issue for appeal requires the application of Sec. 901.03910(a), Stats., to an undisputed set of facts. This is a question of law that we review de novo. *State v. Maloney*, 161 Wis. 2d 127, 128, 467 N.W.2d 215, 216 (Ct.App. 1991). In order to preserve his right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based. *Holmes v. State*, 76 Wis. 2d 259, 271, 251 N.W.2d 56, 62 (1997). General objections which do not indicate the grounds for inadmissibility will not suffice to preserve the objectors right to appeal. *Id.* To be sufficiently specific, an objector must reasonably advise the court of the basis for the objection. See *id.*

In *State v. Agnello*, 226 Wis. 2d 164, 172-173 (1999),  
the Court Stated:

The necessity of lodging an adequate objection to preserve an issue for appeal cannot be overstated. We have written on numerous occasions 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 404, 572 N.W.2d 845; *Caban*, 210 Wis. 2d at 605, 563 N.W.2d 501.

The Trial Counsel advised the Court on the morning of jury selection and jury trial that the defense had never received the video evidence. (R.71, p.4; App.5) Although Trial Counsel did not specifically state that he was objecting to the video evidence, for purposes of this argument, the State will assume that Attorney Paulson was raising that issue as an objection. Had the Trial Judge simply indicated, "Too bad," and proceeded with the trial, the Defense could at least argue that an adequate objection was made and overruled. The Trial Court at the jury trial recognized that the Defense was entitled to see the video. (R.71, p.5; App.6) The video evidence was short,

approximately five minutes, and the Trial Court took a recess in the proceedings to allow Trial Counsel to view the video clips. (R.71, p.6; App.7) Trial Counsel watched the videos and indicated that the Defense was ready to proceed with the trial. (R.71, p.7; App.8)

If Trial Counsel did not have enough time to view the evidence and incorporate the video evidence into the defendant's theory of the defense, Defense Counsel should have made that known to the Trial Judge. As *Agnello* points out, the purpose of requiring an adequate objection is not only to preserve the issue for an appeal, but to give the parties and the Court notice of the issue so that there can be a fair opportunity to address the issue in a way that most efficiently uses judicial resources. Had the Trial Court been told that Trial Counsel did not have enough time, the Trial Court could have granted a longer recess. Had a longer recess not been adequate for the Defense, the Trial Court could have granted a continuance. Judicial resources are not overabundant and trying cases more than once is not an efficient use of judicial resources. Just as the Prosecutor took Attorney Paulson at his word when Attorney Paulson said he did not have the video clips, and *assumed* that the clips were not provided, the Trial Court

took Attorney Paulson at his word and *assumed* that the Defense was ready to proceed.

Therefore, the Defense did not adequately preserve the issue for Appellate review.

**6. BECAUSE THE SAME EVIDENCE WILL BE PRESENTED AT ANOTHER TRIAL, A NEW TRIAL IS NOT NECESSARY.**

In *Garrella v. State*, 61 Wis. 2d 351, 353-354 (1973), the Court stated:

Garrella also asks that we reverse the judgment and grant a new trial in the interest of justice pursuant to Section 251.09, Stats. We decline to do so. A new trial will be granted only when it appears that the result will be different upon a retrial. While it is possible that another jury could interpret the testimony more favorably to the defendant, we have held that the hope that a new jury will draw different inferences from the same evidence is not sufficient reason to grant a new trial in the interest of justice. *Lock v. State* (1966), 31 Wis. 2d 110, 119 142 N.W.2d 183.

Despite a lengthy argument about a justification for a new trial, the Defense fails to point out how the trial will proceed differently. The trial was held in this case on April 6, 2023. The Defense has **NOT** pointed out that a more thoughtful review of the video evidence has now resulted in a new evidentiary strategy that would affect the outcome of the trial. The Defense has not pointed out how a more thoughtful review of the video evidence would result in a different cross-examination of the State's

witnesses. Even if the Prosecutor should have known that the Defense Attorney did not receive the video when the cover letter to Attorney Burdick indicated that it was included, and even if the Trial Judge should have assumed that Trial Counsel for the Defense was not ready to proceed when the Defense Attorney indicated that he was ready to proceed, Ms. Kamm should not be entitled to a new trial because the evidence will not change. The Defense Attorney at a new trial would simply point out what the video evidence shows and what it does not show. Just because a defendant is not satisfied with the result of a trial does not entitle the defendant to a new trial. Defendants can never twice be put in jeopardy for the same crime and victims should not have to go through a second trial just because the Defense doesn't like the outcome of the first.

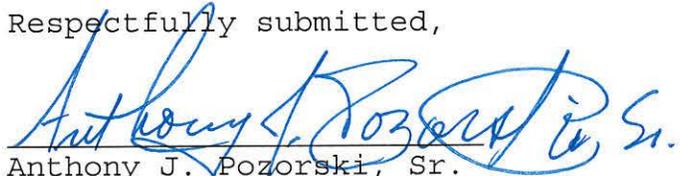
#### CONCLUSION

The Defense has not proven that the Prosecutor committed a Discovery violation. If there was a Discovery violation, the State had good cause for that violation. Because there was good cause for any potential violation the Trial Court granted a recess. Defense Counsel took advantage of the recess, watched the video and was prepared to proceed. Defense Counsel used the video evidence to his advantage. Not only did Defense Counsel fail to preserve

the issue, but his adept handling of the evidence demonstrates that if the Trial Court erred, the error was harmless. Because any re-trial would result in the same evidence being presented, a new trial is unnecessary and inappropriate.

Dated this 17th day of January, 2025.

Respectfully submitted,

A handwritten signature in blue ink that reads "Anthony J. Pozorski, Sr." with a stylized flourish at the end.

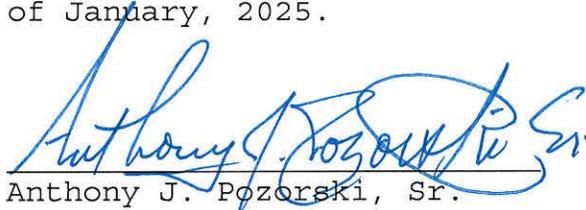
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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 29 pages.

Dated this 17th day of January, 2025.



Anthony J. Pozorski, Sr.  
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## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with the content requirements of Wis. Stat. S (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of January, 2025.

Signed:

A handwritten signature in blue ink that reads "Anthony J. Pozorski, Sr." The signature is written in a cursive style with a large, stylized initial 'A'.

Anthony J. Pozorski, Sr.  
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CERTIFICATE OF COMPLIANCE  
WITH WIS STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 17th day of January, 2025.

  
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