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

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

REBECCA LEA KAMM,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT REBECCA LEA KAMM

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

Respectfully submitted,
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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.**

In response to this argument, the State argues that there was no discovery violation. *Brief of Plaintiff-Respondent, pages 13 – 19.*

In support of this argument, the State referred to a letter it wrote, which referred to a disk being provided to the defense. *Brief of Plaintiff-Respondent at 15.* The letter does not say that the 10 video clips were on the disk. (95) In fact, no evidence was produced during trial or postconviction proceedings indicating what was on the disk. (71: 1-7) (107: 1-30) This letter does not negate the statement by Ms. Kamm's attorney that he did not receive the 10 clips before the trial. (71: 1-7) The State's brief goes on to concede that "It is possible that the Prosecutor failed to provide the video clips to the Defense, but highly, very highly unlikely." *Brief of Plaintiff-Respondent at 18.*

In addition, the State's argument that it provided the disk to Ms. Kamm prior to trial is in direct contrast to the State's concession during postconviction proceedings that it "must have forgot" to send the disc in question. (107: 10-11) The State attempts to negate the significance of this statement by arguing that it was made because it did not want to "accuse (the defense attorney) of lying". *Brief of Plaintiff-Respondent at 17-18.* But the State ignores the contradiction inherent in its argument. Either the disc with the video clips was provided to the defense a reasonable time prior to trial or it wasn't. The State's comment that "our office must have forgot to send them a copy of the disc" is a concession that it violated the discovery statute by not providing the defense with a copy of the disc. (107: 10-11)

The State next argues that it had good cause for any failure to comply with the discovery statute. The State argues it had good cause for its failure to provide discovery because it didn't know that defense didn't have the video. *Brief of Plaintiff-respondent, pages 19-21.*

The State misconstrues the meaning of good cause, conflating it with "good faith." The distinction between "good cause" and "good faith" was addressed in *State vs. Delao*, 2002 WI 49, 252 Wis. 2d 289, ¶¶53-55. In that case, the court made it clear that the defense did not have to show an intentional violation of the discovery statute to show that the state lacked "good cause" for its failure to comply. *Id.* In making the distinction between "good faith" and "good cause," the *Delao* court relied heavily on *State vs. Martinez,* 166 Wis. 2d 250, 479 N.W.2d 224 (Wis. App. 1991). The *Martinez* court's reasoning directly relates to the State's claim that it did not know the defense had the video clips. In *Martinez*, the State admitted that it had not provided a tape to the defense. *Id.* at 258, 479 N.W.2d 228. It claimed that the tape had been "lost." *Id.* at 257-258, 479 N.W.2d at 228. It did not explain how it had been lost. *Id*. The Court of Appeals refused to accept that the State's explanation that losing the tape amounted to "good cause" for failing to disclose it to the defense. *Id.* In fact, it emphasized that this attempt to excuse the loss of the tape "points to the fundamental problem--the failure of the state to meet its burden under the statute." *Id*.

The State's argument in the current case is similar to its argument in *Martinez*. In Ms. Kamm's case, the State cannot determine why the clips were not disclosed to Ms. Kamm. (107: 10-11) The State acknowledged during postconviction proceedings that Ms. Kamm's attorney never received the video clips. (107: 10-11) It now asks this Court to ignore those statements and instead rely on other inconsistent statements alleging that the video clips *were* turned over. *Brief of Plaintiff-Respondent, pages 15-19*. As in *Martinez*, the "good cause" issue in the current case boils down to whether the State can prove that it disclosed the video clips. *See*

Martinez, at 257-258, 479 N.W.2d 228. Because the State cannot prove that it disclosed the video clips, it has failed to prove that it had good cause for its failure to comply with the discovery statute.

2. Ms. Kamm was prejudiced by the State's violation of Wis. Stats. Sec. 971.23. the violation was not harmless error.

The State, citing *State vs. Rocha Mayo*, 2014 WI 57, 355 Wis. 2d 85, says "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." *Brief of Plaintiff-Respondent, pages 22-24*. *Rocha Mayo* does not support a harmless error finding in the current case. The *Rocha Mayo* court distilled the harmless error analysis to the following question: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"..." *State v. Rocha-Mayo,* 2014 WI 57, 355 Wis.2d 85, 848 N.W.2d 832 (Wis. 2014). The fact that Ms. Kamm's trial attorney tried to make the best of the late disclosure of the video clips is not relevant to this analysis. In order to show harmless error, "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.

In this case, 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. (71: 49-55) In addition, the State did not have 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. (71: 53)(1)

3. 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 argues that the defense did not adequately preserve its objection for appeal, because trial counsel did not reiterate his objection to the failure to provide the video clips before trial after reviewing the clips that morning. *Brief of Plaintiff-Respondent, pages 24 – 27.*

But trial counsel cannot be faulted for continuing to object to the admission of the video clips, when the trial court had already made it clear that it was going to address the violation by slightly delaying the start of the trial to allow trial counsel to review the clips.

The following exchange made it clear that the court was simply going to overrule trial counsel's request that the video clips be excluded:

> 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 Case 2024AP001944 Brief of Appellant Filed 01-03-2025 Page 26 of 34 27 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's objection to the admission of the clips was clear from its context. *See State vs. Agnello,* 226 Wis. 2d 164, 593 N.W.2d 167, ¶ 10. The court's denial of the objection was equally clear. Trial counsel was not required to renew the objection when it had already been ruled on in order to preserve the objection for appeal. *State vs. Matson,* 2003 WI APP 253, 268 Wis.2d 725, ¶ 32.

4. The State's argument that "a new trial is not necessary" is inapplicable to this case.

The State argues that "because the same evidence will be presented at another trial, a new trial is not necessary." In support of this argument, the State cites *Garella vs. State,* 61 Wis. 2d 351, 353-354. *Brief of Plaintiff-Respondent, pages 27-28*. The State's reliance on *Garella* is misplaced. *Garella* is a case in which the defendant's request for a new trial was based on (1) sufficiency of the evidence, and (2) the interests of justice. *Garella,* pages 352-354. The language cited by the State appears in the following context:

> Garella also asks that we reverse the judgment and grant a new trial in the interests of justice pursuant to sec. 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 interests of justice. Lock v. State (1966), 31 Wis.2d 110, 119, 142 N.W.2d 183. *Id.*

As this citation shows, *Garella* is a case that addressed the granting of a new trial in the interests of justice. *Id.* The current Wisconsin Statute addressing new trials in the interest of justice is Wis. Stats. Sec. 752.35. *Wis. Stats. Sec. 752.35.* Ms. Kamm does not cite "the interests of justice"

under this statute as a basis for her request for a new trial. Therefore, the ruling of the *Garella* court does not apply to this case. The fact that the video clips would be played again at a retrial does not negate Ms. Kamm's arguments.

5. The State does not address Ms. Kamm's argument that a new trial should be granted because the admission of the video clips was plain error.

Ms. Kamm argued that the admission of the video clips was plain error. *Brief of defendant appellant, pages 27 to 32*. The State does not respond to this argument. *Brief of Plaintiff-Respondent, pages 1 to 33.* This Court can take the State's lack of response to this argument as an implicit concession that the admission of the video clips was "plain error." *State vs. Dartez,* 2007 WI App 126, 731 N.W.2d 340 ¶ 20, (the court takes the failure to respond to an argument as implicit concession).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Defendant-Appellant in this matter, 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 February, 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 2,023 words.

Dated this 3rd day of February, 2025.

RYAN & SAYNER
Electronically signed by:
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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 February, 2025.

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