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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

APPEAL NO. 2020AP1750-CR

MILWAUKEE COUNTY CIR. COURT CASE NO. 2103CF5083

STATE OF WISCONSIN,

Plaintiff-Respondent

Vs.

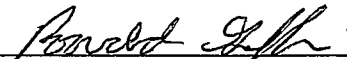
RONALD H. GRIFFIN,

Defendant-Appellant

APPEAL FROM THE CONVICTION ENTERED AND SENTENCE ORDERED
BY THE HON. STEPHANIE ROTHSTEIN, MILWAUKEE COUNTY CIRCUIT
COURT BRANCH 25; AND FROM THE RULINGS, DECISIONS AND
ORDERS DENYING MOTION FOR POST CONVICTION RELIEF ENTERED
BY BRANCH 25, THE HON. STEPHANIE ROTHSTEIN PRESIDING

BRIEF AND ATTACHED APPENDIX
OF DEFENDANT-APPELLANT

RESPECTFULLY SUBMITTED BY,



RONALD H. GRIFFIN # 420720

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ISSUES PRESENTED

1. WHETHER THE STATES FAILURE TO DISCLOSE FAVORABLE EVIDENCE UNDER BRADY AND ITS PROGENY WARRANTS THE GRANT OF A NEW TRIAL.
2. WHETHER GRIFFIN'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE
THE TRIAL COURT ANSWERED: NO
3. WHETHER THE POST CONVICTION COURT ERRONEOUSLY DENIED GRIFFIN A HEARING ON THE CLAIM OF INEFFECTIVENESS.
4. WHETHER THE TRIAL COURT MISUSED ITS DISCRETION BY FAILING TO EXCLUDE LETTER EVIDENCE DUE TO AN INSUFFICIENT SHOWING OF AUTHENTICATION.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Griffin intends to present the relevant facts and to flesh out the legal issues, positions, and arguments of this appeal exhaustively in this brief.

Griffin requests oral argument if such were to help address this courts outstanding questions or aid this courts decision making.

STATEMENT ON PUBLICATION

Griffin takes no position on publication.

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STATEMENT OF THE CASE

Ronald H. Griffin("Griffin") was charged with: one count of first degree sexual assault(forcibly aiding and abetting), contrary to Wis.Stat.940.225(1)(c),one count of attempted second degree sexual assault,contrary to Wis.Stat.940.225(2)(c) and 939.32,and one count of second degree sexual assault contrary to Wis.Stat.940.225(2)(a)

Griffin's jury trial lasted three days.

Griffin was found guilty of counts 3,4,and5,which all stemmed from the incident on October 30th 2013.(Ind.55)(App.1-3 (App.1-2). The trial court renumbered the counts on the verdict forms.See Tr.12/10/14 p.82.

Griffin did not testify based on his knowing,free,and intelligent waiver of the right to testify. See Tr.12/10/14 pp75-79.

Griffin was sentenced to a total of 21 years initial confinement in prison.(Ind.55)(App1-2).

post conviction Griffin sought a new trial on the following grounds:(1)'The State breaching its duty to pursue,obtain and disclose material identification evidence pursuant to Brady and its progeny.(2) Trial counsel's ineffectiveness and (3) The trial court misusing its discretion by failing to exclude certain evidence.

Without holding a hearing,the post conviction court denied

relief after one round of briefing.(Ind.114)(App3-9).Griffin now continues to seek a new, fair trial, asking this court to review and reverse of the post conviction courts denial of relief.

STATEMENT OF FACTS

The convictions challenged here all stem from an alleged sexual assault on October 30th 2013. The criminal complaint describes that the defendant and his co-defendant sexually assaulted T.F. at the co-defendants house on October 30th 2013. The victim named in all three counts is T.F.

The defendant and T.F. did not know eachother, but T.F. and the co-defendant were acquaintances. It alleges that T.F. told police that the defendant was introduced to her as "Ron" After the offense,T.F. found the defendants name and picture on the website using the name "Ron" and the zip code for South Milwaukee.

Griffin attached Exhibits B and C to his post conviction motion that shows that T.F. would not have been able to view and obtain a photograph of Griffin from the website. Despite this fact police officer David Kozlowski indicated in his search warrant affidavit attached to Griffins post conviction motion as Exhibit-A that T.F brought a photograph of a person who she thought to be Ronald Griffin into the police station.

During trial, to persuade the jury that Griffin sexually assaulted T.F. the State presented the testimony of T.F. and

the co-defendant, along with several police officers, a SANE nurse, and a DNA analyst.

(A) T.F. testified about the incident itself. Griffin's trial attorney Andrew Meetz asked T.F. whether there was a traumatic event in her past that maybe prevented her going directly to the police to report the incident. T.F. testified that there was nothing in her past that prevented her from reporting the incident. (Tr.44:16-25)-day 2 of trial. Meetz then asked T.F. whether she remembered telling officer Ko Kozlowski that the reason for her delayed reporting was because she was afraid and that because she was abused as a child. T.F. testified that she did remember telling officer Kozlowski such. (Tr.45:6-13)-day 2 of trial.

T.F. identified Griffin in court with the out of court photo array procedures employed by law enforcement. Griffin was deprived of his due process rights under Brady and its progeny to challenge the admissibility of the out of court photo array procedures due to the State failing to pursue, obtain and disclose material identification evidence. This will be argued infra.

(B) Griffin's co-defendant Ricky Taylor testified for the State after accepting a plea deal.

(C) South Milwaukee police officer David Kozlowski testified to his investigation of T.F.'s disclosures, which included taking her statement, developing a suspect, and conducting

a photo array of Griffin. See Tr.120-123-day 2 of trial proceedings.

(D) Nurse examiner Allison Lopez testified that she treated T.F. on November 3rd 2013 and at that time T.F. stated to her, during the course of her diagnostic examination that she was sexually assaulted by two men, one whose name was "Ron".

(E) A Wisconsin State crime lab analyst testified to the DNA results from the investigation. The analyst excluded Griffin from any source of DNA.

(F) The State had a witness, Patty Wagner, that had been subpoenaed for trial who was unwilling to obey her subpoena. the trial court considered a request from the State to remedy the disobedient witness but to no avail. See Tr.12/8/14 Tr. 95:2-11.

No direct evidence tying Griffin to the assault was presented, although readily available impeachment evidence existed. The State, defense and the court all acknowledged that credibility would be a major factor in the case.

In closing, the State argued that its evidence--especially the letters that were admitted over a prior objection as a part of Taylor's testimony represented all of Griffin's guilt. (Tr.114:12-13)-closing argument.

The prosecutor read portions of the letters to the jury during closing arguments and argued that the letters displayed all of Griffin's guilt.

Trial attorney Meetz presented the theory that T.F. was lying to get Griffin in trouble. He argued that the State failed to meet its burden of proof on the charges against Griffin. Meetz argued that credibility was a major issue in the case:"but did not use readily available impeachment evidence in the form of weather data to undermine T.F.'s credibility. This will be argued infra.

The jury found Griffin guilty of the counts related to the assault.

Griffin was sentenced to a total initial confinement term of 21 years and 15 years of extended supervision.(App 1-2).

Griffin always insisted that he was not involved in the assault on October 30th 2013. Griffin asked Meetz to obtain the readily available weather data. But Meetz did not obtain the weather data although he informed Griffin that he would as is demonstrated by Griffin's affidavit attached to his post conviction motion. This will be argued infra.

Post conviction, Griffin investigated and discovered the exhibits B and C attached to his post conviction motion, and

sought a new trial based on such exhibits. Griffin also discovered exhibits L and M attached to his post conviction motion and sought a new trial on such exhibits.

In his motion for post-conviction relief ("Motion") (Ind.97) Griffin sought a new trial on the following grounds: (1) Based on the State failing to pursue, obtain and disclose material identification evidence under Brady; (2) Ineffective assistance of trial counsel; and (3) The trial court misusing its discretion by failing to exclude letter evidence.

Based on briefing, but without holding a hearing, the court denied the motion. (Ind.114).

Griffin sought reconsideration (Ind.115)(App.10) but without holding a hearing the circuit court denied relief again.

The post conviction court stated the following grounds for denying relief:

1. The Brady violation claim was denied because the court agreed with the States analysis that the photograph was not material to the outcome, and that the issue has not been properly preserved for review because trial counsel did not raise a Brady violation argument before the trial court, and the defendant has not argued that his trial counsel deprived him of the effective assistance of counsel by this omission. (App.3-9)

Well established United States Supreme Court case law as well as the exhibits attached to Griffin's post conviction

motion undergrid these findings: The trial court overlooked and failed to recognize controlling precedent that Griffin cited in support of his arguments. This will be argued Infra. Griffin intends to flesh out the legal issues and positions in greater detail below.

- (2) The ineffective assistance of counsel argument for counsel failing to impeach the victim regarding whether there was snow on the ground is simply not an error of "such magnitude" that, without it, there is a reasonable probability that the results of the proceeding would be different.(courts emphasis)

The exhibits attached to Griffin's post conviction motion (exhibits L and M) undergrid these findings: The State describes it as "a minor point of T.F.'s testimony and the court agreed with that characterization."(courts emphasis). However the State also acknowledged that a jury could reasonably use this evidence to assess the credibility of the witness.

In this case credibility was a major factor in the case. T.F. testified that she was wearing blue jeans at the time of the assault (Tr.187:5-9)-first day of trial. T.F. further testified that she was only going to stop by Taylor's house for a short time.(Tr.171:1-4)-first day of trial.

T.F. testified that the reason she had taken her boots off was because it had been snowing out and she did not want to track the snow through the house.(Tr.175:15-17)-1st day trial.

However the weather data attached to Griffin's post conviction motion as exhibits L and M show that there was no snow on the ground for T.F. to track through the house. Had Meetz obtained the weather data which shows that there was no snow on the ground for T.F. to track through the house Meetz would have been able to impeach T.F.'s testimony. This could have affected the jury's assessment of her credibility. The jury could have easily concluded that T.F. never did take her boots off. The jury could very well have been persuaded that Griffin never did take T.F.'s pants off. Especially since T.F.'s boots would have to have been off for her jeans to be taken completely off. Such reason was not given to them. Therefore the weather data could have been critical in persuading the jury that the allegations against Griffin were not sufficiently reliable. This will be argued infra.

- (3) The trial court stands by its admission of the letters, as well as its implicit ruling on the sufficient authentication of the letters (courts emphasis)

The decision further proclaims:

Even if the admission of the letters were erroneous, it was clearly harmless, as "there is no reasonable probability that it contributed to the conviction. (courts emphasis).

Nowhere in the trial courts ruling on the admission of the letters does the court make any reference to the statutory requirements of authentication. This will be argued infra.

THIS APPEAL FOLLOWS

ARGUMENT 1

1. WHETHER THE STATES FAILURE TO DISCLOSE FAVORABLE
EVIDENCE UNDER BRADY AND ITS PROGENY WARRANTS THE
GRANT OF A NEW TRIAL

A. STANDARD OF REVIEW

Whether the State violated a defendant's right to due process under Brady is a question of constitutional fact that this court reviews independently. See *State v. Delreal*, 225 Wis.2d 565, 571, 593 N.W. 461, 464 (Ct.App.1999).

The prosecutor has a duty to disclose such evidence absent a formal request by the accused and encompasses impeachment evidence and evidence "known only to police investigators and not the prosecutor." *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (citation omitted) thus, to comply with Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the governments behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). To establish a Brady violation Griffin must show that: (1) the evidence at issue must be favorable, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently, and (3) the evidence must be material.

It is the States duty to pursue, obtain and preserve all relevant evidence. The Wisconsin Supreme court in the case of *Wold v. State*, 57 Wis.2d 344 (1973), at page 349 stated:

"...Under the American Bar Association project on standards for criminal justice, standards relating to the prosecution function (approved draft), p.100 sec.3.11(c) the prosecution may not avoid pursuit of any evidence. The commentary at page 102 makes clear it is the prosecutor's duty to acquire all relevant evidence in the possession of investigative agencies of the state..."

**1. THE SINGLE PHOTOGRAPH EVIDENCE IS FAVORABLE TO
GRIFFIN BECAUSE IT IS EXCULPATORY IMPEACHMENT
EVIDENCE AFFECTING THE CREDIBILITY OF THE ACCUSER**

Although the photograph was not in the possession of the district attorneys office, it had a duty to determine whether they had exculpatory material relevant to this case. See Kyles 514 U.S. at 437 (the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police).

The prosecutor in this instant case did not attempt to get the photograph from the police department. The prosecutor also did not attempt to get any information regarding the process that was used to obtain the photograph. Therefore, this court should find that the prosecution violated its duty recognized by Kyles, supra.

When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence

affecting the credibility falls within the Brady rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoted sources omitted).

Griffin's theory of defense was that the victim T.F. was lying to get him in trouble. Credibility was an essential element of the case. If the photograph could never have been obtained from the website as is shown by exhibits B and C attached to Griffin's post conviction motion and exhibits B and C attached to this brief (App16-17), that material would be exculpatory impeachment evidence affecting the credibility of T.F.

Attacking T.F.'s credibility in this manner would have allowed Griffin's trial attorney to impeach T.F.'s statement given to law enforcement. This is because if it is determined that T.F. could not have obtained Griffin's identity from the website, the T.F.'s credibility could have been impeached with her statement given to police. Why? because T.F. stated to police that the website was the only way that she was able to view and obtain Griffin's identity. Without the actual photograph from the website a fair and just inference can be drawn that T.F. lied about this and was only able to identify Griffin after law enforcement suggestion. This will be argued in greater detail below.

Griffin further submits that this court is not in the

position to determine the exculpatory value of the impeachment evidence in the form of the single photograph. Especially since Wis. Stat. 910.02 mandates that the original photograph is required to prove the photographs contents. A hearing is needed to further develop the record on this issue.

2. THE STATE VIOLATED GRIFFIN'S DUE PROCESS RIGHT TO CHALLENGE PRIOR TO TRIAL, THE ADMISSIBILITY OF THE PHOTO ARRAY PROCEDURES

It is important to note that the State presented the out-of-court photo array (exhibit-2 used during trial) to establish Griffin's in-court identification. Therefore the States suppression of the photograph undermines confidence in the outcome of the trial because the State, without giving Griffin the opportunity to challenge the admissibility of the out-of-court photo array procedures, was able to elicit eyewitness identification testimony from T.F. through the introduction of the out-of-court photo array procedures.

Griffin submits that the photograph may have been used to emphasize unduly the out-of-court photo array procedures. Especially since police officer David Stratton was asked during Griffin's preliminary hearing whether the photo from the sex offender registry was the same used in the array. Officer Stratton testified that he could not say for certain. See preliminary transcripts. (emphasis added)

It is for these reasons that a question exists as to whether T.F.'s ability to make an accurate identification are "outweighed by the corrupting effect" of law enforcement suggestion. The United States Supreme Court in the case of Perry, 565 U.S. at 238-39 concluded that due process requires courts to assess, on a case by case basis, whether improper police conduct created a substantial likelihood of misidentification. id. A hearing is needed on this issue so as to allow Griffin to further develop the record on this issue.

Griffin submits that at a hearing he would be able to question police officer David Kozlowski as to whether he had T.F. circle, sign and date the photograph that T.F. allegedly brought into the police station. (emphasis added)

If it is determined at a hearing that officer Kozlowski did not have T.F. circle, sign and date the photograph from the website so as to confirm T.F.'s identification of Griffin from the website, then a valid question would arise as to whether officer Kozlowski suggested Griffin's identification to T.F. Especially if it is also determined at a hearing that the photograph could never have been obtained as is shown by the exhibits B and C attached to this brief. (App. 16-17).

**3. GRIFFIN'S POST CONVICTION MOTION (AND THE SUPPORTING
EXHIBITS B AND C DEMONSTRATE HOW THE REGISTRY OPERATES**

Griffin submits that the process by which T.F. obtained the photograph was not possible, as she described it. Attacking T.F.'s credibility in this manner would have allowed Griffin's attorney to impeach T.F. about her statements given to law enforcement. Especially since officer Kozlowski indicated in his search warrant affidavit that T.F. came into the police station with a photograph of Griffin. See exhibit-A-paragraph 13 attached to this brief (App.11-15).

The supporting exhibits attached to Griffins post-conviction as exhibits B and C and the exhibits B and C attached to this brief (App.16-17) show that it does not allow a person such as T.F. to search for a person by their first name and zip code. (emphasis added)

Exhibit B is a document that shows a name search. The document is blank with no name typed in. Exhibit C is the same document except the name "Ron" is typed in. Directly underneath the name search it reads "last name required". It is worth noting that a zip code is not required as T.F. stated to law enforcement that she used a zip code. Exhibit D attached to this brief (App.18) is an affidavit from Cassandra Lydon which shows the process she used to obtain the two exhibits B and C.

The State in response to this argument argued that the registry does in fact permit this, and did so in 2013 as well. The State in its response brief attached an affidavit of Grace

Knutson (exhibit-E) (App.19) to show that a person can search for sex offenders by zip code and search within the list of names of persons on the registry who reside in that zip code by using the "geographical search" function on that web site. First it is prudent to point out that it is not clear from the record as to whether T.F. used the "geographical search" to obtain Griffins identity.(emphasis added)

Griffin submits that nowhere in Knutsons affidavit does she provide clarification as to whether a person in 2013 could have used a "name search" using a zip code. This clarification is important because if it is determined that in 2013 using a "name search" required a zip code then T.F.'s credibility could have been impeached with her statement given to law enforcement. T.F. indicated to police that she used the name "Ron" and the zip code of 53172 and recognized Griffin's photograph. So if the "name search" in 2013 required a zip code along with the last name then T.F.'s credibility could have been impeached with this.(emphasis added)

The affidavit of Grace Knutson does not provide this clarification. Griffin requested a hearing in the post conviction court to elicit testimony from Grace Knutson but to no avail. A hearing on this issue is needed to allow Griffin the opportunity to question Knutson on this issue which will then give this court an opportunity to meaningfully assess Griffins claims.

**4. THE PHOTOGRAPH IS REQUIRED TO DETERMINE WHETHER THE
OUT OF COURT PHOTO ARRAY PROCEDURES WERE UNDULY
SUGGESTIVE**

The State argues in response to Griffin's post conviction motion that "Griffin's argument about the photographs' favorability is conclusory, and undercut by the fact that attacking T.E's credibility, [regarding the process by which she obtained the photograph] in this manner did not, contrary to the defense brief require the photograph itself." (id.p.7). (emphasis added)

Griffin submits that the state is mistaken that the photograph was not required. The photograph is required to determine whether the photograph allegedly obtained from the website was the same photo that was used in the photo array procedures. Griffin argued in his post conviction motion (p.9) that the photograph may have been used to unduly emphasize the out of court photo array procedures that law enforcement employed. Griffin also argued that Wis. Stat. 910.02 mandates that the original photograph is required to prove the photographs contents. id.

The State did not deny or rebut Griffin's argument that the photograph was required to determine whether the photograph was used to unduly emphasize the out-of-court photo array procedures. Nor did the State deny nor rebut Griffin's argument that Wis. Stat. 910.02 mandates that the original photograph is required to prove its contents. Charolais

Breeding Ranches, Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979); State v. Normington, 2008 WI App 8, p. 44, 306 Wis. 2d 727, 744 N.W. 2d 687 (failure to refute a proposition constitutes a concession). The post conviction court denied relief agreeing with the States analysis. However, the States failure to deny or rebut Griffin's arguments in this regard constitutes a concession. Therefore this court should find that the photograph was required to determine whether the photograph allegedly obtained from the website was used to unduly emphasize the out-of-court photo array procedures.

**5. THE STATES OTHER MEANS BY WHICH IT COULD STILL PUT
GRIFFIN'S IDENTITY INTO EVIDENCE MISSES THE MARK**

The State argues that even if T.F. could not identify Griffin in court, the State had numerous other means by which it could "still put Griffin's identity into evidence." id.

It is important to note that the only time in the trial that T.F. identified Griffin was through the introduction of the photo array procedures. See exhibit 2 introduced into the record during trial proceedings. The State never asked T.F. to identify Griffin by the other means it alludes to. This cannot be so easily ignored. Especially since the record reflects that the only time T.F. identified Griffin in court was with the out-of-court photo array procedures that Griffin was deprived of the opportunity to challenge pre trial.

6. THE STATE INADVERTENTLY SUPPRESSED THE PHOTOGRAPH EVIDENCE

Griffin submits that due to oversight the State suppressed the photograph evidence. It can easily be concluded that the State was not attentive to the fact that the search warrant affidavit reflects that T.F. brought a photograph of a person who she thought to be Ronald Griffin into the police station. Therefore this court should conclude that the state inadvertently suppressed the photograph evidence in violation of the second component of Brady.

7. THE PHOTOGRAPH EVIDENCE IS MATERIAL TO THE OUTCOME OF THE CASE

Griffin submits that the photograph evidence is material to the outcome of the case. Credibility was an essential element of the case. The process by which T.F. obtained the photograph, as she described it, could have allowed defense attorney Meetz to impeach T.F.'s statement given to law enforcement. Again, a hearing is needed on this issue so as to allow Griffin the opportunity to show that the photograph and the process by which T.F. obtained it was not possible. If at the hearing it is determined that the process by which T.F. obtained the photograph was not possible then the impact of T.F.'s credibility could have undermined a critical element of the prosecutions case. i.e.-Wis.JI-300.(emphasis added).

The failure to disclose the photograph evidence was so serious that there is a reasonable probability that the photograph's suppression could have produced a different result during trial proceedings. *Strickler v. Greene, supra*.

The photograph evidence could have been used as impeachment evidence to undermine T.F.'s credibility. If at a hearing it is determined that the process by which T.F. obtained the photograph was not possible, a jury could be persuaded that the assault allegations against Griffin were not sufficiently reliable. Moreover, a jury could have chosen not to accept co-defendant Taylor's version of events due to him accepting a plea deal. This would have further supported Griffin's theory of defense that T.F. was lying to get Griffin in trouble and that co-defendant Taylor would say anything due to the plea deal that he accepted.

A hearing is needed so as to give Griffin an opportunity to question Grace Knutson. Griffin would be able to elicit testimony from Knutson as to the functionality of the website. Namely whether the "name search" required a zip code in 2013.

A hearing would also give Griffin the opportunity to establish prejudice resulting from the photograph's suppression. A hearing would provide this court with sufficient evidence as to the amount of prejudice suffered as to the photo's suppression

The critical element of the prosecutions case is the credibility of the witness'.(Wis.JI-300). Therefore, if it is determined at a hearing,(which is the only way to provide this court with sufficient material facts on this issue) that the process by which T.F. obtained the photograph evidence was not possible, then T.F.'s credibility could have been impeached. Prejudice would exist.

The photograph is also material to the case because the State should have been prohibited from relying on the out-of-court photo array procedures to establish Griffin's in-court identification. Especially without giving Griffin the chance of challenging the admissibility of the photo array procedures pre-trial.

8. THE BRADY ISSUE HAS BEEN PROPERLY PRESERVED FOR REVIEW

Griffin submits that this court should find that the Brady issue has been properly preserved for review. This is because Griffin did in fact argue in his post conviction motion that a specific request from defense counsel was not necessary. Griffin cited to United States v. Agurs,427 U.S.97(1976) for this reason.

The court in Agurs,supra recognizes that "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.427 U.S. at 110.

In this case the nondisclosure of the single photograph evidence that T.F. brought into the police station is obviously of such substantial value to the defense that elementary fairness required it to be disclosed without a specific request. Especially since the photograph is the only identification evidence that T.F. relied upon to determine Griffins identity. Which is based on the words of T.F. her self. See sentencing transcripts. R.11;17-25;12:1-3). The photograph is also of such substantial value to the defense because it would have been used to determine whether the out-of-court photo array procedures were unduly emphasized.

It is for these reasons that this court should find that this issue has been properly preserved for review.

ARGUMENT 2

2. WHETHER GRIFFINS COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

A. STANDARD OF REVIEW

Criminal defendant's are constitutionally guaranteed the right to counsel under both the United States constitution and the Wisconsin constitution. U.S. const. amends 6 and 14, Wis. const. art.1 and 7. The right to counsel includes the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.ed. 2d 674 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.ed.2d 763 (1970)); State v. Trawitzki, 2001 WI 77, p.39, 244 Wis. 2d 523, 628 N.W. 2d 801. In order to find that counsel rendered ineffective assistance the defendant must show that trial counsel

the defendant must show that trial counsel's representation was deficient. Strickland, 466 U.S. at 687, 104 S. Ct. 2052. The defendant must also show that he or she was prejudiced by the deficient performance. *id.*

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *id.* at 688, 100 S. Ct. 1945. When evaluating counsel's performance, courts are to be "highly deferential." and must avoid the "distorting effects of hindsight." *id.* at 689, 100 S. Ct. 1945.

In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. 2052. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." State v. Pitsch, 124 Wis. 2d 628, 642, 369 N.W. 2d 711 (1985).

B RELEVANT FACTS TO CONSIDER

On the first day of trial proceedings the prosecutor Cynthia Davis called her first witness (T.F.) to the witness stand. During Davis' direct cross examination of T.F. she asked T.f.

what she did when she arrived to the apartment. T.F. answered by stating that "she took her boots off because it had been snowing and she did not want to track the snow through the house. (Tr.175:12-17-first day of trial).

Directly on the heels of T.F. testifying that the reason she took her boots off was because "it had been snowing, Griffin nudged his trial attorney Andrew Meetz and informed him that there was no snow on the ground on October 30th 2013. Meetz informed Griffin that he would address his concerns in more detail once the trial court ordered a recess. See Griffin's affidavit attached to this brief (App.20-21). Griffin attached this affidavit to his post conviction motion as well.

The trial court ordered that the trial break for the evening. (Tr.200:6-8)-first day of trial. Based on the trial court breaking for the evening Griffin's trial attorney was not afforded an opportunity to begin his cross examination of T.F.. Once the jury exited the court room for the evening Griffin and his attorney were able to talk at the defense table. Meetz asked Griffin about his concerns about there being no snow on the ground. Griffin informed Meetz that there was no snow on the ground and that T.F. was lying to get him in trouble. See Griffin's affidavit.(App.20-22)

Griffin asked Meetz if he could obtain the weather data history for October 30th 2013. Meetz informed Griffin that

he would be able to do that because Meetz wanted to use that information to undermine T.F.'s credibility. Meetz also informed Griffin that the weather data would further support his theory of defense that T.F. was lying to get Griffin in trouble. See (App. 20-22)

On the morning of the second day of trial Griffin was sitting at the defense table before the jury entered the court room. Griffin and his attorney were talking at the defense table and Griffin asked Meetz if he was able to obtain the weather data. Meetz informed Griffin that "it had completely slipped his mind." (App. 20-22)

C. DEFENSE COUNSEL "MEETZ" representation was deficient and prejudicial

Griffin submits that Meetz' conduct in failing to obtain the weather data is constitutionally deficient. It was objectively unreasonable for Meetz not to obtain the weather data which would have further supported his theory of defense. Especially since Meetz informed Griffin that he would obtain the weather data to undermine T.F.'s credibility. (emphasis added)

Credibility was a major issue in the case. The weather data could have been critical in persuading the jury that the allegations against Griffin were not sufficiently reliable. However such reason was not given to the jury in this regard.

See State v. Thiel, 2003 WI 111, pp. 46, 50, 264 Wis. 2d 571, 665 N.W. 2d 305 (concluding that it was objectively unreasonable for defendant's counsel not to pursue further evidence to impeach the victim).

Counsel's actions, are usually based on information supplied by the defendant. Strickland, 466 U.S. at 691. Further, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. State v. Pitsch, 124 Wis. 2d 628, 637, 369 N.W. 2d 711 (1985); State v. Leighton, 2000 WI App 156, p. 46.

This court should find that it was constitutionally deficient for Meetz not to have obtained the weather data. Especially since Griffin asked Meetz to obtain the weather data and that Meetz indicated to Griffin that he wanted to use the weather data to undermine T.F.'s credibility and also to use it to further support his theory of defense.

Griffin asserts that his defense was prejudiced by Meetz's failure to obtain and use the weather data to undermine T.F.'s credibility. Especially since the weather data could have impacted T.F.'s credibility in the eyes of the jury. The weather data could have also undermined the critical element of credibility (WI JI 300) which was a critical element of the prosecution's case. Prejudice would exist.

In satisfying the prejudice prong of Strickland, Griffin submits that counsel's deficient performance in failing to obtain and make use of the weather data was "so serious as to deprive Griffin of a fair trial, a trial whose results is reliable, id at 687. (emphasis added)

Griffin submits that he was deprived of a fair trial because the impeachment evidence in the form of the weather data could have undermined the critical element number three of count number one (which is count three on the verdict form), of the prosecutions case. The prosecutor argued in closing that "the third puzzle piece is that the defendant had contact with her by use of violence, that was both by use of force, forcibly taking her pants off." (Tr. 105:18-21). (emphasis added).

Had the jury been able to hear and evaluate the impeachment evidence in the form of the weather data, the jury could have been persuaded that Griffin never forcibly took T.F.'s pants off, thereby undermining element number three of the prosecutions case. Especially since the jury could have been persuaded that T.F. lied about taking her boots off when there was no snow on the ground for T.F. to track through the house. The jury could have been persuaded that T.F.'s boots had to have been taken off for her pants to be forcibly taken off. It is for these reasons that the result of the trial was not reliable and that Griffin was prejudiced by counsel's failure to obtain the weather data and make use of it for impeachment purposes during the trial.

**1. THE WEATHER DATA COULD HAVE UNDERMINED THE CRITICAL ELEMENT
NUMBER THREE OF COUNT THREE REFLECTED ON THE JUDGMENT OF
CONVICTION.**

To obtain a conviction for First-degree sexual assault the State had to prove: (1) the defendant had sexual contact with T.F.; (2) T.F. did not consent to the sexual contact; (3) the sexual contact was accomplished by use of threat or force or violence, and (4) the defendant was aided and abetted by one or more persons. See WIS JI-1205. (emphasis added)

The weather data could have undermined element number three of WIS JI-1205. Had Attorney Meetz used the weather data to impeach T.F.'s credibility as he indicated to Griffin that he wanted to do, the jury could have reasonably concluded that the alleged sexual contact was not accomplished by use of threat or force or violence. Why? because the jury could have reasoned that T.F. lied about their being snow on the ground. This could have led the jury to conclude that Griffin did not use force or violence to take T.F.'s pants and underwear off. Why? because if the jury believed that T.F. lied about their being snow on the ground then the jury could have reasoned that in order for T.F.'s pants and underwear to have been taken off her boots would have had to been taken off. The jury could have easily concluded that T.F. never did take her boots off. This could have caused the jury to question T.F.'s credibility by finding that T.F. never took her boots off because she lied about their being snow on the ground. The jury could have therefore concluded that the prosecution failed to meet its

burden of proof in connection with count three. However such reason was never given to the jury due to attorney Meetz failing to tender the impeaching evidence in the form of the weather data to the jury.(APP.23-24). It should be noted that APP.23-24 is the impeachment evidence in the form of the weather data that Griffin asked Meetz to obtain and use for impeachment purposes during trial.

Prejudice exists and a new trial must be held. This court should find that it was unreasonable for Meetz not to obtain the weather data to use as impeaching evidence. Especially since Meetz indicated to Griffin that he wanted to use the weather data to fit his theory of defense. Meetz' theory of defense was that T.F. was lying to get Griffin in trouble. The weather data would have further supported that theory of defense.

This court should also find that it was constitutionally deficient for Meetz not to have obtained the weather data. Especially since Griffin asked Meetz to obtain the weather data and that Meetz indicated to Griffin that he wanted to use that data to further support his theory of defense.

Moreover this court should find that a hearing is needed on this issue so that Griffin can properly develop the record for appeal.

**D. THE WEATHER DATA WOULD HAVE BEEN ADMISSIBLE UNDER THE
WISCONSIN RULES OF EVIDENCE**

The State argued that attorney Meetz could not be expected to present the weather data that Griffin requested because that evidence was not authenticatable by any witnesses at trial and for that reason, not admissible under the rules of evidence.

Griffin argued that the State was incorrect in this regard. Specifically, chapter 902 of the Wisconsin rules of evidence, Wis. Stat. 902.01 pertains to the judicial notice of adjudicative facts. The weather data attached to Griffins post conviction motion and this brief is an historical document in which the trial court would have been able to take judicial notice of. See 520 South Michigan ave Associates ltd. v. Shannon, 549 f.3d 1119 (7th Cir. 2008)(concluding that a court may take judicial notice of an historical document).

Griffin submits that his trial attorney would have been able to request that the trial court take judicial notice of the historical weather data pursuant to Wis. Stat.902.01. This would have eliminated the need for counsel to locate and call a witness to authenticate the weather data. (emphasis added)

Wis. Stat. 902.01(6) allows a judge to take judicial notice at any stage of the proceedings. So even though it was mid trial the court would have been able to take judicial notice of the weather data.

ARGUMENT 3**3. WHETHER THE POST CONVICTION COURT ERRONEOUSLY DENIED
GRIFFIN A HEARING ON THE CLAIM OF INEFFECTIVENESS****A. STANDARD OF REVIEW**

A claim of ineffectiveness assistance of counsel requires that a post conviction evidentiary hearing be held "to preserve the testimony of trial counsel." State v. Machner, 92 Wis. 2d 797, 804, 285 N.W. 2d 905 (Ct.APP.1979).

The post conviction court is required to hold an evidentiary hearing if the defendant has alleged "sufficient facts that, if true, would entitle the defendant to relief." State v. Allen, 2004 WI 106, p.9, 274 Wis. 2d 568, 682 N.W. 2d 433. This is a question of law that this court reviews de novo. id.

A post conviction motion that has pled sufficient material facts to entitle a defendant to relief will generally include the five 'w's and one 'h', that is who, what, where, when, why and how." Allen, 274 Wis. 2d 568, p.23.

**B. GRIFFIN'S POST CONVICTION MOTION ALLEGES SUFFICIENT FACTS
TO ENTITLE HIM TO A HEARING**

This court should find that Griffin's post conviction motion, with the weather data attached, along with Griffin's affidavit attached, includes the requisite information of the five 'w's and one 'h': that Griffin would testify to his

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five 'w's and one 'h': that Griffin would testify to his conversations with attorney Meetz as indicated by Griffin's affidavit. Meetz informed Griffin that he would obtain the weather data (who/what). Meetz indicated that he wanted to use the weather data during trial to undermine T.F.'s credibility and to further support Griffin's theory of defense.(where/when/why and how). (emphasis added)

This court should find that the trial court erroneously exercised its discretion and that the post conviction motion with the attached exhibits was sufficient to entitle Griffin to a Machner hearing. It would be premature for this court to analyze trial counsel's actions in failing to obtain the weather data until the facts concerning counsel's decisions to do so are developed at a Machner hearing. Moreover, Griffin submits that the outcome of the Machner hearing may require reassessment by the trial court of Griffin being prejudiced by trial counsel's failure to obtain and make use of the weather data.

ARGUMENT 4

4. WHETHER THE TRIAL COURT MISUSED ITS DISCRETION BY FAILING TO EXCLUDE LETTER EVIDENCE DUE TO AN INSUFFICIENT SHOWING OF AUTHENTICATION.

A. STANDARD OF REVIEW

This court reviews a circuit courts decision to admit or

evidence under an erroneous exercise of discretion. *Martindale v. Ripp*, 2001 Wi 113, p.28,246 Wis.2d 67, 629 N.W.2d 698.

Where the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the Appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *State v. Pharr*, 115 Wis. 2d 334, 340 N.W. 2d 498.

Wis. Stat. 909.01 provides, "the requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what it's proponent claims." *id.*

Wis. Stat. 909.015 provides examples of authentication that, which not exclusive, satisfy the requirements of 909.01. For example, 909.015(1) provides that the matter in question is what its proponent claims when the testimony of a witness with the knowledge that a matter is what it is claimed to be is presented.

**1. THE TRIAL COURT FAILED TO FIND THAT THERE WAS EVIDENCE
SUFFICIENT TO SUPPORT A FINDING OF AUTHENTICITY**

Griffin submits that the trial court did not find that there was evidence sufficient to support a finding of authenticity. The State had no expert or lay witness tying the letters to

Griffin in anyway, including the inmate who allegedly passed one of the letters between Griffin and Taylor. There is no corroborating evidence. The letters were volunteered by Taylor, who would be its only evidentiary proponent. Neither letter were signed or dated. Nor did Taylor recognize Griffin's handwriting to authenticate the two letters. The trial Court did not point to nothing about the circumstances or the contents of the letters permitting a finding that Griffin actually wrote them. (emphasis added)

Since the State could not tie the letters to Griffin in any way (whether by chain of custody-type evidence or otherwise) and could point to nothing to support a finding that Griffin wrote the two letters beyond Taylor's self-serving testimony, this court should find that the trial court should have excluded the two letters from evidence.

To support that the State did not provide the court with any evidence to establish that Griffin wrote the two letters in question, the trial court carried out its own independent investigation during Griffin's sentencing hearing in an attempt to establish that Griffin wrote the two letters in question. See sent Tr.pg.30. (emphasis added)

The trial courts independent investigation (two months after the trial court allowed the admission of the two letters into evidence during trial proceedings), as to whether Griffin

wrote the two letters, should be read in the context of the trial court possessing self-knowledge that the State never offered the court with sufficient evidence to establish that Griffin wrote the two letters. No other inference is possible. The State did not deny or rebut Griffin's argument in this regard. *Charolais Breeding Ranches Ltd v. FPC Secs. Corp.*, 90 Wis.2d 97,108-09,279 N.W. 2d 493(Ct.app.1979; *State v. Normington*,supra,(failure to refute a proposition constitutes a concession).

The State in response to Griffin's argument in this regard cited to *State v. Leichman*,2016 Wi App 75 to show similarities to Griffin's case. Griffin argues that Leichman bears no similarities to his case. This is because the trial court in *Leichman* observed identifiers associated with the letter evidence. The trial court in this instant case did not observe any identifiers associated with the letter evidence. Therefore this court should find that *Leichman* does not apply to the facts of this case.

The trial court only made a finding that Ricky Taylor's testimony, including his reading of portions of the contents of the letters meets the statutory requirements for authentication post-conviction. The trial court should have made this finding before allowing the letters admission into evidence,page 7(App3-9)-footnote-2, not after Griffin advanced an argument on this issue post-conviction.

2. GRIFFIN BEING PREJUDICED BY THE ADMISSION AND TESTIMONY
RELATED TO THE LETTERS CONTENTS.

Griffin submits that this court should find that it was prejudicial and that Griffin's substantial rights were affected for the trial court to admit the two letters and allowing the jury to evaluate the testimony in relation to the two letters. (emphasis added).

This is because the jury was able to give consideration to Taylor's testimony that he had to be telling the truth about Griffin's alleged involvement in the assault. Moreover the State thought the letters were important enough to its case that it highlighted the letters during its closing and rebuttal arguments. The State did not deny or rebut Griffin's argument in this regard. Therefore the failure to refute this proposition constitutes a concession. Charloais Breeding Ranches, LTD V FPC. Secs corp, supra.

This court should find that it was the content of the letters associated with Taylor's testimony that led to Griffin's conviction. This is because absent the admission of the two letters there is a reasonable probability that the jury would harbor reasonable doubt as to Griffin's alleged involvement in the assault. Why? because the two letters were able to be used to bolster Taylor's testimony. It is reasonable to conclude that if the jury had reason to doubt Taylor's version of events

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because of his plea deal to testify against Griffin then the introduction of the two letters as part of Taylor's testimony could reasonably give the jury a reason to believe his testimony as being truthful. This cannot be so easily ignored. Especially since the two letters were allegedly passed inside of the jail. The danger of unfair prejudice should have outweighed the probative value of the two letters in question. The State did not have the inmate to testify that he allegedly witnessed Griffin pass one of the letters. All the State had was Taylor's self-serving testimony that Griffin allegedly passed the letters inside of the jail. For these reasons this court should conclude that Griffin was prejudiced by the letters admission during trial proceedings.

3. THE ADMISSION OF THE LETTER EVIDENCE WAS NOT HARMLESS ERROR.

Griffin submits that the two letters and the testimony in relation to the letters contents was not harmless error. Why? because in order to prove Griffin's alleged involvement in the assault the State did not just primarily rely on the victim's testimony but rather relied on Co-defendant Taylor's testimony as well. Taylor's testimony consisted of his reading of the contents of the letters. This allowed the jury to consider Taylor's testimony as being truthful in that he had to be telling the truth about his alleged observations in the assault.

Griffin submits that it is reasonable to conclude that the admission of the letters and Taylor's testimony in connection with the letters led the jury to conclude that Griffin must have been involved in the assault. Why? because the contents of the letters discussed trial strategy and aspects of the assault itself. A reasonable jury would conclude that Taylor's testimony as being credible and that Griffin must have wrote the two letters in question.

Considering the totality of the letter evidence and circumstances there is a reasonable probability that the jury would have acquitted Griffin absent the admission of the letters. Why? because had Griffin's trial attorney Meetz effectively impeached T.F. with the weather data a reasonable jury could very well have disbelieved Taylor's version of events. The jury could have given great weight to the defense theory that T.F. was lying to get Griffin in trouble. However such reason was not given to the jury. Rather the jury had an opportunity to take into consideration Taylor's reading of the contents of the letters as well as the prosecutions reading of the letters during closing arguments.

Griffin submits that absent the admission of the letters along with trial attorney Meetz effectively using the weather data to impeach T.F. demonstrates a reasonable probability that the jury would have acquitted him. Prejudice exists by showing

that the admission of the letter evidence was not harmless and that the letter evidence played a significant role in the jury's determination of finding Griffin guilty. A new trial should be granted so that Griffin can receive a fair trial in which there is an absence of the letters and the effective use of the weather data for impeachment purposes.

Dated this 15th day of January 2021

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RESPECTFULLY SUBMITTED

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CONCLUSION

This court should find that Griffin is entitled to a Machner/
evidentiary hearing on the claims presented here-in and Grant
Griffin a new trial.

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