STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

---

Appeal No. 2010AP000202-CR
Walworth County Case No. 05-CF-216

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BETH E. REEVES,

Defendant-Appellant.

---

**Appeal From The Judgment and Order Entered**
**In The Circuit Court For Walworth County,**
**The Honorable James L. Carlson, Circuit Judge, Presiding**

---

**BRIEF OF DEFENDANT-APPELLANT**

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES . . . . . iv

STATEMENT OF ISSUES
PRESENTED FOR REVIEW . . . . . vii

STATEMENT ON ORAL
ARGUMENT AND PUBLICATION . . . . . viii

STATEMENT OF THE CASE . . . . . 2

STATEMENT OF FACTS . . . . . 6

ARGUMENT . . . . . 14

I. A NEW TRIAL SHOULD BE ORDERED BASED ON THE UNDISCLOSED PRIVATE PAYMENT OF THE STATE'S EXPERT WITNESS, AND THE PROSECUTOR MISLEADING THE JURY ABOUT THOSE PAYMENTS AT TRIAL . . . . . 14

A. Introduction . . . . . 14

1. Summary of Argument . . . . . 14

2. Trial Court's Ruling . . . . . 15

B. Public Policy . . . . . 15

C. Failure to Disclose . . . . . 20

D. Misleading the Jury . . . . . 23

II. A NEW TRIAL SHOULD BE ORDERED BECAUSE THE JURY WAS EXPOSED TO EXTRANEOUS INFORMATION DURING DELIBERATIONS . . . . . 29

A. Background . . . . . 29

B. Analytical Framework . . . . . . . . . . . . . . . . . . . . . . . . . . . . 32

C. Argument . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 35

1. Ms. Reeves' Deposition . . . . . . . . . . . . . . . . . . . . . 35

2. Foreperson's erroneous statement of law . . . . . . . . 36

III. A NEW TRIAL SHOULD BE ORDERED BECAUSE THE STATE OBTAINED MS. REEVES' FINANCIAL RECORDS FROM HER ACCOUNTANT WITH A SUBPOENA THAT WAS NOT SUPPORTED BY PROBABLE CAUSE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 39

IV. THE PECUNIARY LOSS AND EXPERT WITNESS FEES PORTION OF THE RESTITUTION ORDER SHOULD BE VACATED . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 41

A. Background . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 41

B. Standard of Review . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

C. Pecuniary Loss . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

1. Goes . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

2. Rayner . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 45

3. Eisenhour . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 47

D. Expert Witness Fees . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 48

E. Relief Requested . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 50

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 51

CERTIFICATION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 52

## TABLE OF AUTHORITIES

**State Cases**

*Manke v. Physicians Insurance Company of Wisconsin*,
2006 WI App 50, 289 Wis. 2d 750, 712 N.W.2d 40 . . . . . . . . . 33, 34, 35, 37, 38

*State v. Canady*, 2000 WI App 87, 234 Wis. 2d 261,
610 N.W.2d 147 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

*State v. Desmidt*, 155 Wis. 2d 119, 454 N.W.2d 780 (1990) . . . . . . . . . . . . . . . 41

*State v. Eison*, 194 Wis. 2d 160, 533 N.W.2d 738 (1995) . . . . . . . . 32, 33, 34, 35

*State v. Ferguson*, 202 Wis. 2d 233, 549 N.W.2d 718 (1996) . . . . . . . . . . . . . . 49

*State v. Hall*, 2002 WI App 108, 255 Wis. 2d 662,
648 N.W.2d 41 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 45

*State v. Holmgren*, 229 Wis. 2d 358, 599 N.W.2d 876 (Ct. App. 1999) . . . . . . 49

*State v. Johnson*, 2005 WI App 201, 287 Wis. 2d 381,
704 N.W.2d 625 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

*State v. Missouri*, 2006 WI App 74, 291 Wis. 2d 466,
714 N.W.2d 595 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

*State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1997) . . . . . . . . . . . . . . . . . . 22

*State v. Ott*, 111 Wis. 2d 691, 331 N.W.2d 629 (Ct. App. 1983) . . . . . . . . . 37, 38

*State v. Peterson*, 195 Wis. 2d 351, 218 N.W.2d 367 (1928) . . . . . . . . . 16, 17, 18

*State v. Popenhagen*, 208 WI 55, 309 Wis. 2d 601,
749 N.W.2d 611 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 39, 41

*State v. Rash*, 2003 WI App 32, 260 Wis. 2d 369,
659 N.W.2d 189 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

*State v. Schmalinger*, 198 Wis. 2d 756, 543 N.W.2d 555 (Ct. App. 1995) . . . . 49

*State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989) . . . . . 19

*State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372 . . . . . 27, 28

**Federal Cases**

*Berger v. United States*, 295 U.S. 78 (1935) . . . . . 26

*Brady v. Maryland*, 373 U.S. 83 (1963) . . . . . 20, 22

*Giglio v. United States*, 405 U.S. 150 (1972) . . . . . 20

*Giordenello v. United States*, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958) . . . . . 40

*United States v. Bagley*, 473 U.S. 667 (1985) . . . . . 20, 22, 23

*United States v. Manske*, 186 F.3d 770 (7th Cir. 1999) . . . . . 21

*United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009) . . . . . 26. 27

**Rules and Statutes**

Wis. Crim. J.I. 300 . . . . . 21, 22

Wis. Crim. J.I. 400 . . . . . 37

Wis. Stat. §779.02(5) . . . . . 2

Wis. Stat. §809.30(2)(h) . . . . . 5

Wis. Stat. §906.06(2) . . . . . 32, 33

Wis. Stat. §943.20(1)(b) . . . . . 2

Wis. Stat. §943.20(3)(b) . . . . . 2

Wis. Stat. §943.20(3)(c) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Wis. Stat. §943.38(2) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Wis. Stat. §968.135 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 39

Wis. Stat. §971.23(1)(h) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

Wis. Stat. §973.06 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 49, 50

Wis. Stat. §973.06(1)(c) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 49

Wis. Stat. §973.20 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43, 49

Wis. Stat. §973.20(13)(c)(4) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 50

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a new trial should be ordered based on the private payment of the state's expert witness, the prosecutor's failure to disclose those payments, and the prosecutor misleading the jury about those payments at trial.

The circuit court found that a new trial was not warranted on any of these three grounds.

2. Whether a new trial should be ordered based on the jury's exposure to extraneous information during deliberations.

The circuit court found that the jury's exposure to extraneous information did not merit a new trial.

3. Whether a new trial should be ordered because the state obtained records from Ms. Reeves' accountant with a subpoena that was not supported by probable cause.

The circuit court found that the subpoena was supported by probable cause.

4. Whether the pecuniary loss and expert witness fee portion of the restitution award should be vacated.

The circuit court ordered restitution for pecuniary loss and expert witness fees, over Ms. Reeves' objection.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. §809.22. Ms. Reeves' arguments are substantial and do not fall within a class of frivolous or near frivolous arguments concerning which oral argument may be denied under Wis. Stat. §809.22(2)(a). One issue in particular has broad public policy implications with respect to the role of the prosecutor in the criminal justice system.

Publication also is appropriate under Wis. Stat. §809.23 because the Court's decision is likely to have significant value as precedent.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

---

Appeal No. 2010AP000202-CR
Walworth County Case No. 05-CF-216

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BETH E. REEVES,

Defendant-Appellant.

---

**Appeal From The Judgment and Order Entered**
**In The Circuit Court For Walworth County,**
**The Honorable James L. Carlson, Circuit Judge, Presiding**

---

**BRIEF OF DEFENDANT-APPELLANT**

---

Beth Reeves appeals from the amended judgment of conviction entered on October 1, 2009 (R115; App.18-22)[1] and the final order entered December 23, 2009, denying the her motion for post-conviction relief (R123; App.23), in Walworth County Circuit Court, the Honorable James L. Carlson, presiding.

## STATEMENT OF THE CASE

On April 15, 2005, the state charged Beth Reeves and her husband, Arthur Reeves, in a criminal complaint with two counts of felony theft in violation of Wis. Stat. §943.20(1)(b) and (3)(c) (R2). The alleged victims of the two offenses were Larry and Sally Rayner.

Preliminary hearing sessions on this complaint were conducted before the Honorable Robert Kennedy on July 22, 2005 (R128), August 1, 2005 (R129, 130), and on October 31, 2005 (R131).

On February 2, 2006, the state filed an amended criminal complaint (R9). The amended criminal complaint added two new alleged victims, Charles and Linda Goes, and Burt and Judi Eisenhour, along with the Rayners. The amended criminal complaint charged Art and Beth Reeves with three counts of theft by contractor, in violation of Wis. Stat. §779.02(5) and §943.20(3)(b), and three counts of felony theft in violation of Wis. Stat. §943.20(1)(b), (3)(b), and (3)(c). Additionally, Art Reeves

---

[1] Throughout this brief, references to the record will take the following form: (R_:_), with the R_ reference denoting record document number and the following :_ reference denoting the page number of the document, if applicable. Where the referenced material is contained in the appendix, it will be further identified by appendix page number as App._.

was charged with one count of uttering a forged writing, in violation of Wis. Stat. §943.38(2).

Additional preliminary hearing sessions were conducted before Judge Kennedy on February 6, 2006 (CCAP entry #28), February 7, 2006 (CCAP entry #30), May 15, 2006 (R132), and May 16, 2006 (R133). On October 24, 2006, Judge Kennedy issued a written decision and bound the case over for trial (R12).

The state filed an information on November 22, 2006 (R18) and an amended information on June 8, 2007 (R35). The amended information contained the following charges:

| **Count** | **Date** | **Offense** | **Alleged Victim** |
|---|---|---|---|
| 1 | 2/16/99-5/31/02 | Theft by contractor | Goes |
| 2 | 2/16/99-6/30/00 | Felony theft (embezzlement) | Goes |
| 3 | 2/16/99-5/31/02 | Theft by fraud | Goes |
| 4 | 7/16/99-6/30/00 | Theft by contractor | Rayner |
| 5 | 7/16/99-6/30/00 | Theft by fraud | Rayner |
| 6 | 7/16/99-6/30/00 | Felony theft (embezzlement) | Rayner |
| 7 | 9/1/01-12/31/02 | Theft by contractor | Eisenhour |
| 8 | 9/1/01-12/31/02 | Theft by fraud | Eisenhour |

| 9 | 9/1/01-12/31/02 | Felony theft (embezzlement) | Eisenhour |
|---|---|---|---|
| 10 | 3/4/02-3/5/02 | Uttering (Art Reeves only) | – |

The case proceeded to a jury trial on January 4, 2008, before the Honorable James Carlson. On the second day of trial, Art Reeves plead guilty to counts 2, 6 and 9 of the amended information (R180:3-20).

Beth Reeves' trial proceeded to verdict. On January 18, 2008, the jury returned a verdict of guilty on all nine counts of the amended information (R166: 26-30; R63-71).

Judge Carlson sentenced Beth Reeves on May 30, 2008. The court withheld sentence and placed her on probation for five years. The court imposed a jail term of one year as a condition of probation, and stayed all but ninety days of the jail term. The court did not impose a fine, and deferred the issue of costs and restitution to a separate hearing (R171:71-74).

The court conducted a restitution hearing on June 18, 2008, with respect to both defendants (R167). The trial court did not make a final determination of restitution, but ordered the defendants to pay the cost of the state's forensic accounting expert from the Virchow, Krause accounting firm (R167:73-82; App.160-165). The total amount of these costs is listed as restitution in the amount of

$54,644.84 in the initial judgment of conviction issued by the trial court on June 24, 2008 (R86:4; App.4).

Another restitution hearing was held on January 29, 2009 (R168). The trial court did not make a final decision on restitution and scheduled another hearing. On February 24, 2009, an amended judgment of conviction was issued to stay the defendant's reporting date for her jail sentence (R100:3; App.11).

A third restitution hearing was held on April 23, 2009 (R169). The trial court made a final determination of restitution in the amount of $90,637 to the Rayners, $57,644 to the Eisenhours, and $133,076.67 to the Goes, as reflected on the amended judgment of conviction filed on May 22, 2009 (R106:3; App.15) and the accompanying restitution order (R105; App.248-249).

The final amended judgment of conviction in this case was entered on October 1, 2009, to reflect an order by the trial court that Ms. Reeves commence service of her jail sentence (R115:3; App.20).

On June 8, 2009, Ms. Reeves, pursuant to Wis. Stat. §809.30(2)(h), filed her motion for post-conviction relief (R112). On December 17, 2009, Judge Carlson conducted an evidentiary hearing on the motion (R172). Judge Carlson denied the motion from the bench (R172:37-46; App.97-106), and entered a written order to that effect on December 23, 2009 (R123; App.23).

Ms. Reeves filed her notice of appeal on January 13, 2010 (R125). On January 20, 2010, this Court entered an order enlarging by one day, from January 12, 2010, to January 13, 2010, the time for filing the defendant's notice of appeal.

**STATEMENT OF FACTS**

Arthur Reeves and his wife, Beth, were co-owners of Reeves Custom Builders. Art was the president and ran the business on a day-to-day basis (R9:5-6; R163:71-75). Beth was the secretary-treasurer and did the bookkeeping (R9:5-6).

Between 1999 and 2002, Reeves Custom Builders (hereinafter "RCB") remodeled three homes in the Lake Geneva area belonging to Larry and Sally Rayner, Charles and Linda Goes, and Burt and Judi Eisenhour (R9).

RCB had a single business account at the Walworth State Bank. All funds from all RCB jobs, including the three jobs in question, were commingled in that account (R9:5; R163:80-83, 85).

The state alleged that the Reeves misused the funds that had been given to them by the Goes, Rayners and Eisenhours for completion of the projects. These allegations ultimately were the basis for the ten count amended information (R35), jointly charging the Reeves with theft by fraud, embezzlement, and theft by contractor.

On July 27, 2001, the Rayners sued RCB and the Reeves in Walworth County Circuit Court for claims related to the remodeling of their home (*see* CCAP entry for

*Larry and Sally Rayner v. RCB, et al.*, Walworth County case number 01-CV-619). On August 27, 2002, the Eisenhours filed a similar lawsuit (*see* CCAP entry for *Burt and Judi Eisenhour v. RCB, et al.*, Walworth County case number 02-CV-754).

On June 18, 2003, Mr. Rayner met with Captain Wisniewski of the Town of Linn Police Department regarding his allegations that the Reeves had misused funds paid to them on the Rayner project (R9:3). Chief Wisniewski met with Linda Goes that same day regarding her allegations that the Reeves had misused funds on the Goes project (R9:4).

Over the next two years, Chief Wisniewski and Chief Rasmussen from the Lake Geneva Police Department investigated the case. The investigation included interviewing the Eisenhours – who had made the same claims about their project – obtaining RCB bank records, obtaining documents from the discovery in the civil lawsuits, and interviewing various subcontractors who worked on the three jobs (R9:3-7).

When the case was referred to the Walworth County District Attorney's Office, it was reviewed by two assistant district attorneys (R122:Madson Deposition, p.4; App.26). Both of those prosecutors declined to issue charges because of the "lack of resources," and each felt that the case was "more civil than criminal in nature" (R122:Madson Deposition, p.5; App.26).

The case was then reviewed by a third prosecutor, Steven Madson. Mr. Madson, with the approval of District Attorney Phillip Koss, decided to file criminal charges (R122:Madson Deposition, p.5-6; App.26). The complaint was filed on April 15, 2005 (R2).

When Mr. Madson filed the charges he believed that he would require the assistance of a forensic accounting expert in order to prove the case at trial (R122:Madson Deposition, p.9-10; App.27). He also knew that Walworth County did not have the resources to pay for such an expert (R122:Madson Deposition, p.9-10; App.27).

Mr. Madson believed that an accounting expert was necessary for a number of reasons:

- The case was complex and involved thousands of documents;
- The homeowners were not reliable witnesses in the sense that the transactions had occurred many years prior;
- The investigating officers had no accounting background;
- An expert could testify as to the role of Beth Reeves as the bookkeeper for the businesses and "establish her involvement";
- An expert could summarize the complexities of the case for the jury, including accounting methods, the RCB cash flow, and show how

funds were taken out of the business over the period of time in question;

- An expert could rely on hearsay evidence in providing testimony.

(R122:Madson Deposition, p.7-8, 21-23; App.27; 30-31).

The case proceeded to preliminary hearing. There were seven preliminary hearing sessions before bindover was obtained (R128; R129, R130; CCAP entry #28; CCAP entry #30; R132; R133).

In the preliminary hearings, the homeowners testified to funds paid to RCB, and how the defendants used those funds for other purposes without authorization. The defendants maintained that, over the course of the three projects, there was a sufficient "flow of money" in the RCB account to cover all expenditures from the account and thus negate criminal intent (R12) (summarizing the evidence).

At this point Mr. Madson felt that he had "limped through" the preliminary hearing and that it was time to hire the accounting expert (R122:Madson Deposition, p.23; App.31).

As noted, Mr. Madson knew that Walworth County could not afford such an expert. He had also been told by the Attorney General's Office that they could not provide one (R122:Madson Deposition, p.10-11; App.27-28).

In late January or early February, 2007, Mr. Madson met with the Goes, Rayners and Eisenhours (R122:Madson Deposition, p.21-23; App.30-31). He told

them that, in order to successfully prosecute the case, he needed to retain an accounting expert. He told them that Walworth County did not have the funds to pay for the expert (R122:Madson Deposition, p.21-23; App.30). According to Mr. Madson "[t]he three victims in this case were advised that if they were willing to pay the costs of the expert witness, reimburse the county for the costs and pay them directly, we would proceed with the case; and that is what, in fact, took place" (R83:10; R122:Madson Deposition, p.23; App.31). *See also* Complaint in *Walworth County v. Charles and Linda Goes*, Walworth County case number 09-CV-420 ("[i]n order to successfully prosecute Arthur J. Reeves and Beth E. Reeves, the County of Walworth was required to obtain the assistance of expert witnesses, namely, accountants with Virchow Krause and Company, LLP") (R122:Complaint, ¶9; App.44).

After meeting with the Goes, Rayners and Eisenhours, Mr. Madson sent them a letter memorializing the agreement. The letter, dated April 18, 2007, states that the three couples would split the cost of the expert, without whom Mr. Madson seriously doubted it would be possible to proceed (R122:Complaint, ¶13; App.44) (R122:Madson Deposition, p.21; App.30).

When the alleged victims agreed to pay for the cost of the expert, Mr. Madson did not have an estimate from Virchow Krause as to what the total cost would be (R122:Madson Deposition, p.24-25; App.31). He had not asked Virchow Krause

what the total cost would be, and there was no cap on the fees (R122:Madson Deposition, p.24-25; App.31).

By February 20, 2007, Craig Siiro and other members of the Virchow Krause accounting firm began to work on the case (R85:3; App.52). Virchow Krause periodically sent bills to Mr. Madson, who sent them to the Goes, Rayners and Eisenhours for payment (R122:Madson Deposition, p.48-49; App.37) (R122:Motion for Assessment of Costs, p.2; App.51).

The jury trial began on January 4, 2008 (R138:1).

About one week before trial a dispute arose between the District Attorney's office and Mrs. Goes over the Goes share of the Virchow Krause fees (R122:Madson Deposition, p.30-31; App.32-33). A meeting was held. It was attended by District Attorney Koss, Mr. Madson, Mrs. Goes, the Rayners and the Eisenhours (R122:Madson Deposition, p.44-45; App.36). There was a payment due to Virchow Krause at that point (R122:Madson Deposition, p.30-31, 46; App.32-33, 36).

Mr. Koss and Mr. Madson told the Goes, Rayners and Eisenhours that the state would not proceed to trial against the Reeves unless the expert was paid (R122:Madson Deposition, p.31, 43-45; App.33, 36). Mrs. Goes said that she would not pay "a penny more" and "stormed out" of the meeting (R122:Madson Deposition, p.45; App. 36).

The problem was resolved when the Rayners and Eisenhours agreed to guarantee the payments, and Mr. Koss agreed that Walworth County would contribute $5,000 (R122:Madson Deposition, p.31-32, 51-52; App.33, 38).

The case proceeded to trial as scheduled. The theory of defense was that RCB was a small company run primarily by Art Reeves, that Beth Reeves only had minimal involvement, and that she did not knowingly and intentionally participate in any criminal offense (R165:103-117).

Larry Rayner testified for the state on behalf of the Rayners (R160:110-163)(R161:5-70, 77-146), Linda Goes on behalf of the Goes (R162:152-193)(R162:3-116), and Burt Eisenhour on behalf of the Eisenhours (R162:163-203)(R163:145-193)(R164:5-56).

Mr. Siiro from the Virchow Krause firm testified as the state's accounting expert (R163:3-130). His expert report, Exhibit 205, was admitted into evidence (R163:77), along with voluminous materials that he reviewed, Exhibit 206 (R163:77).

Mr. Siiro provided extensive testimony for the state. Among other things, he testified that, in his opinion, Ms. Reeves was "intimately involved with and an integral part of the business" (R163:74, 122).

As noted, Ms. Reeves was convicted on all charges.

None of the circumstances surrounding the Virchow Krause payment arrangement between the District Attorney and the Goes, Rayners and Eisenhours were disclosed to the defense prior to trial. At trial, Mr. Siiro testified at the beginning of direct examination that he was "hired by the State of Wisconsin" (R163:4).

The payment arrangements were not disclosed by the state until the first restitution hearing on June 18, 2008. At that hearing the state filed a "motion for assessment of costs," with an attached itemized statement from Virchow Krause and a summary showing payments made by the Goes, Rayners and Eisenhours, as well as Walworth County's $5,000 payment (R85; App.50-60) (R167:4-11).

The state's motion disclosed to the defense, for the first time, that the expert witness fees had been paid by the individual victims as a result of their arrangement with the District Attorney (R85:1; App.50-60).

On March 23, 2009, Walworth County filed a lawsuit in Walworth County Circuit Court against Charles and Linda Goes (R122; App.42-49). The lawsuit alleged that the Goes had violated their agreement to pay their share of the Virchow Krause fees (R122; App.42-49). The suit brought claims for breach of oral agreement and equitable estoppel, and sought damages of $11,129.07 (R122; App.42-49).

On September 15, 2009, the Goes' lawyer deposed Mr. Madson and Mr. Madson provided detailed testimony about the agreement (R122; App.24-41). Ms. Reeves obtained a copy of the deposition by issuing a subpoena to the Goes' lawyer (R172:34), and the deposition was admitted into evidence as an exhibit at the December 17, 2009 evidentiary hearing on Ms. Reeves' post-conviction motion (R172:34-35).

Additional facts are provided within the arguments below.

## ARGUMENT

## I. A NEW TRIAL SHOULD BE ORDERED BASED ON THE UNDISCLOSED PRIVATE PAYMENT OF THE STATE'S EXPERT WITNESS, AND THE PROSECUTOR MISLEADING THE JURY ABOUT THOSE PAYMENTS AT TRIAL.

### A. Introduction.

#### 1. Summary of Argument.

The private payment of the state's expert witness fees raises three issues, any one of which requires a new trial.

First, the payment arrangement violated public policy. Second, the concealment of the payment arrangement violated the prosecutor's constitutional and statutory duty to disclose exculpatory and impeaching evidence, and the defendant's due process right to disclosure of such evidence. Third, the prosecutor violated the defendant's due process right to a fair trial by misleading the jury about the true role of the expert witness in the case.

### 2. **Trial Court's Ruling**.

The defendant presented these three issues in her motion for post-conviction relief (R112).

The trial court found that the payment arrangement did not violate public policy because the District Attorney was not influenced in his decision making by the "monetary reimbursement agreement with the victims" (R172:43; App.103).

The trial court acknowledged that the state should have disclosed the payment arrangements, but that the defendant was not prejudiced because she had an opportunity to cross-examine the expert about his bias and present her own expert testimony (R172:43-44; App.103-104).

The trial court ruled that the prosecutor did not mislead the jury about the payment arrangements to the expert because the expert was in fact retained by the state and the victims were simply sureties (R172:46; App.106).

### B. **Public Policy**.

According to the state's motion for assessment of costs, the Virchow Krause bill was $54,644.84 (R85; App.50). Walworth County agreed to pay $5,000 and Virchow Krause wrote off $3,000 (R85; App.51). Thus, some combination of the three aggrieved homeowners paid approximately $46,000 out of their own pockets to prosecute Art and Beth Reeves.

The agreement to pay the Virchow Krause firm was open-ended on price from the beginning. When the agreement was entered into, there was no cap on the expert witness fees and the prosecutor did not even have an estimate as to what the total cost would be (R122:Madson Deposition, p.24-25; App.31).

When Mr. Madson told the Goes, Rayners and Eisenhours that he would not prosecute the case without their financial assistance, they essentially agreed to give him a blank check to do so. When cost became an issue for Mrs. Goes, Mr. Madson and District Attorney Koss personally told the three families – one week before trial – that the state would not proceed to trial unless the expert was paid (R122:Madson Deposition, p.31, 44-45; App.33, 36).

Such an arrangement for the private financing of assistance to the prosecutor in a criminal case was barred by the Wisconsin Supreme Court eighty years ago as contrary to public policy.

In 1928, Clarence Peterson was charged with embezzlement in Crawford County. He was the village treasurer of Soldiers Grove, and it was alleged that he embezzled funds belonging to the village in his role as treasurer. *State v. Peterson*, 195 Wis. 351, 218 N.W. 367 (1928).

In the course of the investigation, private parties raised $3,000 "for the purpose of investigating and prosecuting the defendant." *Id.*, 218 N.W. at 370. The

money was used to hire an attorney from Janesville by the name of Mr. Grubb to assist the prosecutor in the case. *Id*. at 369-70.

At trial Mr. Grubb appeared in court and sat with the prosecutor. The defendant immediately objected to Mr. Grubb's presence because "he was in the employ of private persons interested in prosecuting the defendant." *Id*. at 369. The judge agreed and prohibited Mr. Grubb from further assisting the prosecutor in court. *Id*.

Mr. Grubb, however, continued to assist the prosecutor outside the courtroom throughout the two week trial. *Id*. at 370.

The Wisconsin Supreme Court found that this arrangement violated public policy and ordered a new trial. The Court plainly stated that privately funded assistance to the prosecutor, whether for assistance in court or out of court, is prohibited by public policy. *Id*. at 368.

As the Supreme Court stated:

> In the prosecution of criminal actions, the district attorney prosecutes for public wrongs, not private wrongs, and such prosecution should be by a public officer, not a private party. This court has from the earlier days given full effect to our statutory scheme, and has declared it the public policy of the state.

*Id*. at 369.

Our scheme of government contemplates that it is better public policy "to provide for the public prosecution of public wrongs without any interference on the

part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed." *Id*.

As the *Peterson* court specifically noted, this does not mean that victims cannot have meaningful input into the decisions of the prosecutor, or that the prosecutor cannot fully investigate the facts of the case. It simply means that a private party cannot pay for material assistance to the prosecutor in a criminal case, whether the assistance is in the form of testimony or occurs as consultation outside the courtroom. *Id*. at 370.

The fact that Mr. Grubb was an attorney assisting the prosecutor, and that Mr. Siiro is an accountant who assisted the prosecutor, is immaterial. In fact, Mr. Siiro played a more important role in this case than Mr. Grubb did in *Peterson*. Mr. Siiro and his firm spent 164 hours working on the criminal case through July, 2007, alone (R85; App.60). There is no question that he was the prosecution's star witness. The case could not have been prosecuted without him, as the state has acknowledged.

Indeed, as Walworth County has asserted in its lawsuit against the Goes, "Beth E. Reeves would not have been found guilty except for the work done by Virchow Krause & Company, LLP, which the [Goes] agreed to assist in payment of" (R122; App.45).

By entering into this payment arrangement, the District Attorney abdicated his role of independence that is central to the criminal justice system. The criminal law reforms undertaken by the Criminal Rules Committee of the Judicial Council were intended to eliminate "the last vestiges of the pernicious practice of private prosecutions by persons who owe no allegiance to society as a whole." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696, 702 (1989) (Heffernan, J. concurring).

Courts must enforce appropriate standards in our criminal justice system and impose sanctions for improprieties. It is a distortion of the values underlying that system for wealthy individuals to purchase access to the criminal justice system in order to pursue charges against persons against whom they have a grievance.

For the system to function properly, it requires an independent prosecutor who is not beholden to private interests in the exercise of his discretion. The complete abandonment of that obligation is obvious here. As late as one week before trial, the District Attorney was willing to abdicate his independent role as public servant and drop the case unless the secret private financing agreement was maintained.

The District Attorney's deal with Goes, Eisenhours and Rayners is so far outside the norm of appropriate prosecutorial conduct that, as a matter of public policy alone, it requires that Ms. Reeves' conviction be vacated.

### C. **Failure to Disclose**.

To compound the problem, the District Attorney failed to disclose the Siiro payment arrangement to Ms. Reeves. The District Attorney concealed the arrangement until after trial, despite specific requests from the defense for production of *Brady* and *Giglio* evidence and despite the prosecutor's general constitutional and statutory duty to produce such evidence.

In so doing the prosecutor violated his statutory and constitutional duty to disclose exculpatory and impeaching information to the defendant, as required by *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Bagley*, 473 U.S. 667 (1985), and Wis. Stat. §971.23(1)(h). As a consequence, Ms. Reeves was denied important information that could have been used to impeach the credibility of the state's expert witness, as well as the alleged victims who testified at trial.

The defense was entitled to know, and present to the jury, that the Goes, Rayners and Eisenhours had a direct financial interest in the work and opinions of the expert witness. This information could have been used to undermine Mr. Siiro's credibility – that he was biased in favor of the victims, and in fact could not have continued the assignment (for which he ultimately billed over $54,000) had they not agreed to pay him. This is a classic mode of bias impeachment. *See, e.g., State v. Missouri*, 2006 WI App 74, ¶22, 291 Wis. 2d 466, 714 N.W.2d 595, 601 (bias or

prejudice of a witness is not a collateral matter); *United States v. Manske*, 186 F.3d 770, 777 (7th Cir. 1999) (citations omitted) (witness bias is always relevant and is a "quintessentially appropriate topic for cross-examination").

The bias of a witness is one of the factors the jury is instructed to consider in assessing the credibility of a witness. Wis. Crim J.I. 300. The prosecutor's failure to disclose this evidence prevented the jury from fully assessing the credibility of Mr. Siiro, as well as the Goes, Rayners and Eisenhours.

Their credibility was an issue. This evidence could have been used to cross-examine them. They, in fact, where wealthy individuals using the criminal justice system to pursue a civil grievance against the Reeves, and were willing to literally pay for the cost of the prosecution in order to do it. The prosecutor told them that the case could not move forward without an expert, and that an expert could not be retained unless they paid for it. One week before trial the District Attorney told the three families that the case would be dropped unless the payments were made. It is hard to imagine more compelling evidence of bias in a criminal case.

Of course, the homeowners had no hope for reimbursement of their investment unless the Reeves were convicted and then assessed the cost of the expert, as eventually occurred. This now establishes that the Goes, Rayners and Eisenhours had a direct financial interest in the outcome of the trial beyond any restitution that could be recouped at sentencing.

The jury never heard this evidence because the prosecution never disclosed it – to them, to the court, or to the defense. Due process requires the prosecutor to disclosure all exculpatory evidence, including impeachment evidence relating to witnesses for the prosecution. *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1, 8 (1997), *citing Bagley*, *supra* and *Brady*, *supra*. The jury is instructed to consider a witness' interest in the outcome of the trial, Wis. Crim. J.I. 300, and the jury was denied that opportunity here.

The District Attorney violated his constitutional and statutory duty to disclose this evidence. Not only did Mr. Madson fail to disclose the true source of the Siiro payments, he denied on the record that he was aware of the existence of any exculpatory evidence.

Mr. Madson's letter to the Goes, Eisenhours and Rayners memorializing the Siiro agreement is dated April 18, 2007 (R122:Complaint, ¶13; App.44). Less than ninety days later, at a status conference on July 16, 2007, and in response to Arthur Reeves' discovery demand, Mr. Madson stated "I don't know about any exculpatory evidence that there is, quite frankly" (R136:20).

Later in the hearing, in response to a request from Art Reeves' lawyer, Mr. Madson stated: "Sorry, counsel, we are going to object. We are not providing you with a full set of our file. We only have an obligation to provide you with exculpatory materials" (R136:25).

The defendant is entitled to a new trial when suppression of exculpatory evidence undermines confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985). Here, the jury was denied critical information that it was entitled to consider in order to weigh the credibility of the state's most important witnesses – Mr. Siiro and the alleged victims. A witness' bias and interest in the matter is always relevant and always material, and this basic tenant is reflected in the Wisconsin Criminal Jury Instructions. As Walworth County asserted in its lawsuit, Ms. Reeves would not have been found guilty without Mr. Siiro (R113:Complaint, p.3, ¶17; App.45).

As a consequence of the prosecutor's concealment of the true role of Mr. Siiro in this case, and the true financial relationship between Mr. Siiro, the victims, Walworth County and the State of Wisconsin, Beth Reeves is entitled to a new trial.

**D. Misleading the Jury**.

At trial, Mr. Madson mislead the jury by giving them the impression that Mr. Siiro was being paid by the State of Wisconsin, rather than the Goes, Eisenhours and Rayners.

At the beginning of direct examination, Mr. Siiro explained that he had twenty-two years of experience working as a CPA and was a certified fraud examiner. He further testified that he had a MBA in operations management and management of information systems (R163:4).

Mr. Madson then asked Mr. Siiro the following question and he gave the following answer:

Q Now, were you hired by the state of Wisconsin to view financial information with respect to Reeves Custom Builders?

A I was.

(R163:4).

As Mr. Madson knew, this answer was not entirely accurate. The Goes, Eisenhours and Rayners hired Mr. Siiro by virtue of the contract that they entered into with the Walworth County District Attorneys Office.

Neither Mr. Madson nor Mr. Siiro made any effort to correct or clarify this misleading response.

In his closing argument, defense counsel challenged the strength of the state's case by arguing that the state had to "bring down witnesses from Minnesota" (referring to Mr. Siiro):

> And let me ask you, and keep this in mind in your deliberation, if he they did not think that the case was very tight on Beth Reeves, would they have spent $50,000 to bring down witnesses from Minnesota? You know, there are accountants in Wisconsin they could have got. There are accountants in Northern Illinois.
>
> But in order to find one who would give them - - who would give them the kind of testimony they want, they had to invest $50,000 from somebody as far away as the

> Twin Cities. That tells you a little bit about how much reaching has gone on in this case.

(R163:107).

In rebuttal, Mr. Madson responded as follows:

> The fact that *the state is willing to pay $50,000* to hire an expert, *I guess I got a deal. Our expert* was 260 bucks an hour plus $150 for the assistant that worked on the project. They paid $300 an hour for the testimony of the individual that came here yesterday, $300 an hour. *So the state got a deal as far as what we paid for it.* Of course, *our expert for what we paid for it* also introduced a report in detail of over 300 pages in length with a front end summary of 28 pages which goes through in minute detail the examples you saw him go through and testify to. And all their expert at $300 an hour could say was, well, its possible a CPA did these or another accountant did these, or it is possible a helper did this, or it is possible someone else did this.

(R163:120-21) (emphasis added).

Thus the jury was led to believe by Mr. Madson that the state was paying Mr. Siiro, and that Mr. Madson had obtained a "good deal" for the taxpayers because Mr. Siiro only charged $260 an hour, compared to the $300 an hour charged by the defense expert.

Contrary to what he told the jury, Mr. Madson knew the exact opposite to be true. The state was *not* willing to pay $50,000 to hire an expert. Mr. Madson did not "get a deal" for the state. The state did not pay for a 300 page report.

This argument was designed the enhance the credibility of Mr. Siiro – and the prosecutor – by suggesting that he and Mr. Madson had saved the taxpayers money. It is a perfectly appropriate and acceptable part of trial advocacy for the prosecutor to argue the credibility of the state's expert. It is not acceptable for the prosecutor to do so by telling the jury things he knows to be false, or even misleading.

A defendant is entitled to a new trial on due process grounds when the jury is misled in this fashion. *Berger v. United States*, 295 U.S. 78, 88 (1935) holds that, while the prosecutor may strike hard blows during closing argument, the prosecutor's duty is to refrain from using improper methods.

The appropriate limits of prosecution advocacy can be seen in *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009), in which the Ninth Circuit Court of Appeals reversed fraud convictions because of prosecutorial misconduct in making false statements of material fact to the jury in closing argument. *Id*. at 1073.

In *Reyes*, a stock options backdating case, the prosecutor falsely told the jury that the entire finance department of the defendants' company did not know of the backdating. *Id*. at 1076-77. This was in direct contravention of statements given to the FBI by finance department employees – which the prosecutor knew of – indicating that they did know about the backdating. *Id*. There was "considerable focus" at trial on the issue of whether the finance department knew of the backdating. *Id*. at 1079.

The *Reyes* court indicated that a prosecutor has a "special duty not to impede the truth." *Id*. at 1077 (citation omitted). This is so because "a prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government rather than its own view." *Id*. Deliberate false statements by the prosecutor "harm the trial process and the integrity of our prosecutorial system." *Id*. at 1070. The court found "no reason to tolerate such misconduct," even though the government's case was "relatively strong," and reversed the convictions. *Id*.

In *State v. Weiss*, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372, the defendant was charged with two counts of sexual assault of a child. In closing arguments the prosecutor told the jury that the defendant never denied committing the offense until he took the witness stand when, in fact, the prosecutor had possession of two police reports showing that the defendant did immediately deny it to the police. *Id*. at ¶1, 752 N.W.2d at 373. The police reports, however, were not admitted into evidence and the jury was unaware of their existence. *Id*. at ¶9, 752 N.W.2d at 375.

The *Weiss* court rejected the state's effort to defend the prosecutor's advocacy in closing. Referring to the prosecutor, the Court of Appeals stated, very simply: "She knew better. She had two police reports saying otherwise." *Id*. at ¶15, 752 N.W.2d at 377. The Court of Appeals continued: "The importance of what we are about to say cannot be underscored enough. *Prosecutors may not ask jurors to draw*

*inferences that they know or should know are not true*. That is what occurred here and it is improper." *Id*. (emphasis added).

The Court of Appeals found a due process violation had occurred and ordered a new trial "so that a new jury can assess credibility in a more candid light." *Id*. at ¶17, 752 N.W.2d at 378.

And so this Court should do the same. The case is remarkably similar to *Weiss*, but the facts are even worse for the state. In *Weiss*, at least, the defense had been given copies of the police reports containing the defendant's statements. Here, the true nature of the financial relationship between Mr. Siiro, the alleged victims and the state had been concealed from the defense. The prosecutor's misleading characterization of Mr. Siiro as someone being paid by the state – when the prosecutor personally knew otherwise – was just as egregious as the prosecutor's misconduct in *Weiss*, and requires the same result.

Jurors view the prosecutor as a representative of the people and have confidence that he or she will faithfully observe those obligations. This is an enormous advantage to the District Attorney in the courtroom. An important prosecution expert witness, whom the jury believes to be working for the state in the search for the truth, benefits by association from that credibility.

The financial arrangement between the alleged victims, the state and Mr. Siiro never should have been entered into in the first place. Once it was, it should have

been disclosed to the defense. Portraying the expert witness in a false light to the jury was the final blow to the fairness and ethical integrity demanded of the prosecutor as an integral part of the foundation of the public's moral confidence in the criminal justice system.

Nothing short of reversal of Ms. Reeves' conviction is appropriate.

## II. A NEW TRIAL SHOULD BE ORDERED BECAUSE THE JURY WAS EXPOSED TO EXTRANEOUS INFORMATION DURING DELIBERATIONS.

### A. Background.

After trial a juror, Karen Saubert, wrote a letter to Judge Carlson expressing her concerns about a number of things that had occurred during the trial (R122: Saubert letter; App.108-109).

Among her concerns was the fact that a deposition of Ms. Reeves from a related civil case – only a portion of which had been read into evidence – was in the jury room during deliberations (R122:Saubert letter; App.109). Additionally, during deliberations the foreperson, a small business owner, "adamantly insisted" that "according to the law," the defendant was 50% liable, regardless of whether or not she was aware of the actions of her company (R122:Saubert letter, p.1; App.108).

During deliberations the jury handed out a note with three questions: "Does the fact that Beth Reeves did not personally sign the contract mean that she did not enter into an oral or written agreement for improvement of land or as RCB? Is she

50% liable even without her signature on it? Would it make a difference if we do not have a contract at all?" (R166:16).

The trial court instructed the jury to re-read the instruction for theft by contractor (R166:24-25).

In her post-conviction motion the defendant moved for a new trial based on extraneous, prejudicial information in the jury room (R112:21-28). Juror Saubert testified at the post-conviction evidentiary hearing conducted on December 17, 2009 (R172:3-28; App.63-88).

Ms. Saubert acknowledged sending the letter to Judge Carlson and that everything in the letter was true (R172:3). Ms. Saubert acknowledged that the foreperson told the jury that Ms. Reeves was "50% liable" regardless of whether she was aware of the actions of her company (R172:13). The fact that the foreperson was a small business owner gave this statement credibility (R172:15).

Ms. Saubert also testified that a deposition of Ms. Reeves entered the jury room, even though only a portion had been admitted into evidence (R172:17-19). During deliberations, Ms. Saubert read a part of the deposition, specifically a segment in which Ms. Reeves was asked whether she was aware that thirty-eight lawsuits had been brought against RCB (R172:23).

At trial, Ms. Reeves' October 25, 2002 deposition had been marked as Exhibit 14 during the testimony of Chief Wisniewski (R180:156-57; App.137-138).

However, Chief Wisniewski was allowed to read only limited portions of Exhibit 14 to the jury. (R180:156-65; App.137-141).

In admitting Exhibit 14 into evidence, the Court stated: “I’m going to receive the exhibits but not the whole exhibits will go to the jury, only the parts that were read or that you read.” (R180:165; App.141).

During deliberations the jurors asked to see a number of exhibits. A number of exhibits were sent to the jury room. (R166:3-16; App.144-150). It is likely that Ms. Reeves’ deposition transcript was delivered to the jury room at that time, consistent with what juror Saubert reported to the court. Trial exhibit 205, Mr. Siiro’s report, was one of the exhibits provided to the jury (R166:9-10; App.147-148), and the attachments to the report contained the October 25, 2002 deposition (R172:19).

Included in the portion of the deposition that was not read to the jury was a question to Ms. Reeves as to whether she was aware that RCB had been sued 38 times (R172:23-24).

During the post-conviction evidentiary hearing, the prosecutor interposed numerous objections to Ms. Saubert’s testimony on the grounds that it improperly delved into the jurors’ deliberative process (R172:4, 6, 9, 20). In response to these objections, the trial court indicated that it would consider Ms. Saubert’s testimony as an offer of proof from the defendant (R172:7, 11-12, 27-28). However, in its ruling

from the bench at the conclusion of the hearing, it was clear that the trial court considered Ms. Saubert's testimony substantively on the merits (R172:39-41; App.99-101).

The trial court found that the erroneous statement of law by the foreperson did not effect the verdict because the jury was referred back to the jury instruction (R172:39; App.99). The trial court also found that Ms. Reeves' deposition was part of the expert's opinion, the attorneys agreed it to could go to the jury room, and it did not improperly influence the jurors (R172:40-41; App.100-101).

Because there was a fair amount of confusion at the evidentiary hearing as to the appropriate procedure to be followed, Ms. Reeves will briefly outline the law applicable to such a motion.

**B. Analytical Framework**.

A party is entitled to a new trial when extraneous, prejudicial information is brought to the attention of the jury. *State v. Eison*, 194 Wis. 2d 160, 533 N.W.2d 738, 743 (1995).

Extraneous information improperly brought before a jury jeopardizes a defendant's constitutional right to trial by an impartial jury, right to counsel and right to confrontation. The risk stems from the possibility that a defendant's conviction rests on information not part of the evidence offered in the courtroom under the rules of evidence and under the supervision of the court. *Id*. Wis. Stat. §906.06(2) seeks

to protect a defendant's interest in a fair trial while at the same time protecting the finality of verdicts and the integrity of a jury. *Id*. (citations omitted). The statute achieves an equilibrium by prohibiting a juror's testimony as to the deliberative process of the jury but allowing a juror's testimony regarding whether extraneous and potentially prejudicial information was improperly brought to the jury's attention. *Id*.

A motion for a new trial based on prejudicial extraneous information requires the circuit court to make a number of evidentiary, legal and factual determinations. *Manke v. Physicians Insurance Company of Wisconsin*, 2006 WI App 50, ¶17, 289 Wis. 2d 750, 712 N.W.2d 40, 50. The Court of Appeals in *Manke* set forth the analytical framework that the trial court must follow.

First, the trial court must determine whether to hold an evidentiary hearing by making the determination as to whether a juror or jurors is competent to testify under Wis. Stat. §906.06(2). A juror may testify about extraneous prejudicial information if: (1) the testimony concerns the extraneous information and not the deliberative process, (2) the extraneous information was improperly brought to the jury's attention, and (3) the extraneous information was potentially prejudicial. *Manke*, 2006 WI App at ¶19, 712 N.W.2d at 50 (citations omitted). Information is improperly brought to the jury's attention even if only one juror possesses the information. *Id*. (citation omitted).

Extraneous information means "information coming from the outside." *Id*. at ¶29, 712 N.W.2d at 52 (citation omitted). Extraneous information is information that is neither of record nor in the general knowledge and accumulated life experience we expect jurors to possess. *Id*. (citations omitted). It is information that a juror obtains "from a non-evidentiary source." *Eison*, 533 N.W.2d at 743 (citation omitted).

In deciding whether to hold an evidentiary hearing, the trial court must determine whether the extraneous information was *potentially* prejudicial. *Manke*, 2006 WI App at ¶32, 712 N.W.2d at 53. The standard for prejudice in order to conduct a hearing is lower than the standard for prejudice when deciding whether a new trial is warranted. *Id*. (citations omitted). The test is whether the information "conceivably relates to a central issue of the trial." *Id*. (citations omitted).

The second step in the process is for the trial court to determine whether the competent juror testimony and any other admissible evidence establishes that the moving party is entitled to a new trial. *Id*. at ¶20, 712 N.W.2d at 51 (citation omitted). This is both a factual and legal determination. *Id*. at ¶21, 712 N.W.2d at 51 (citation omitted).

First, the court must decide whether there is clear, satisfactory and convincing evidence that a juror was exposed to the extraneous information. *Id*. Second, if so, the trial court must determine whether the extraneous information constitutes

prejudicial error requiring reversal of the verdict. *Id*. at ¶22, 712 N.W.2d at 51 (citation omitted).

In this final step of the inquiry, the circuit court must assess, as a matter of law, whether the extraneous information "would have had a prejudicial effect upon a hypothetical, average juror." *Eison*, 533 N.W.2d at 745. The state must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id*. (citation omitted).

To determine the possibility of prejudice, the trial court should consider such factors as the nature of the extraneous information, the circumstances under which it was brought to the jury's attention, the nature and character of the state's case and the defense presented at trial, and the connection between the extraneous information and a material issue in the case. *Id*. at 745 (citations omitted).

### C. Argument.

#### 1. Ms. Reeves' Deposition.

This case involved allegations of theft, fraud and improper business practices by the defendants. The fact that RCB had been sued thirty-eight times in the past was prejudicial because it tended to improperly bolster the state's theory as to the manner in which the company was run by the Reeves.

No such evidence was admitted at trial, nor could it have been. The extraneous information about the thirty-eight lawsuits essentially served as otherwise

inadmissible "other acts" evidence that reasonably could be expected to influence a hypothetical, average juror. Indeed, Ms. Saubert remembered this passage from the deposition – she testified that "it stood out to me" (R172:23) – and was troubled enough by it to include this in her letter to Judge Carlson, while expressing her concern that "some jurors saw information not presented during trial that may have impacted their decision" (R122:Saubert letter, p.2; App.109).

**2. Foreperson's erroneous statement of law.**

The theory of defense at trial was that Ms. Reeves was a busy "soccer mom," occupied by raising a family, and that she had little to do with the running of the business on a day-to-day basis (R165:103-117).

Defense counsel acknowledged in closing argument that he was in no position to assert that Art Reeves was "innocent of anything," and did not doubt that Art had "committed the crimes" (R165:107). But counsel argued that it was Art, not Beth, who was responsible for those crimes, and that Beth did not knowingly assist Art in the commission of any offense (R165:110-116).

Ms. Reeves' knowledge and intent was thus the central issue in the trial. The jury foreperson's statement that Beth Reeves was "fifty percent liable for the actions of her company, regardless of whether or not she was aware of the actions of her company," was inaccurate and inconsistent with the jury instructions. It essentially

imposed a “strict liability” standard by virtue of Ms. Reeves’ position as a shareholder.

The party to a crime instruction read to the jury states that one aids and abets the commission of a crime only if one acts with knowledge or belief that another is committing a crime, and has the purpose to assist in the commission of the crime (R165:31-32; Wis. Crim. J.I. 400).

With respect to the knowledge requirement of all nine counts, the jury was instructed that it had to assess the defendant’s knowledge based on her “acts, words and statements, if any, and all of the facts and circumstances in the case bearing on knowledge and intent” (R165:33-41).

With respect to the theft by fraud counts, the jury was instructed that “the defendant is responsible for a statement made to a third person if the defendant intended or had reason to expect that the statement would be repeated or its substance communicated to the owner and that it would influence the owner’s conduct in the transaction” (R165:39).

None of these instructions came close to telling the jury that it could find knowledge, intent or responsibility simply because Ms. Reeves was a shareholder.

In *Manke*, *supra*, the Court of Appeals reversed and remanded for a new trial because a juror brought an erroneous definition of the term “negligence” into the jury room. *Manke*, WI App 50, ¶57, 712 N.W.2d at 59-60. In *State v. Ott*, 111 Wis. 2d

691, 331 N.W.2d 629 (Ct. App. 1983), the Court of Appeals reversed and remanded for a new trial because a juror brought an erroneous definition of the term "depraved" into the jury room. *Id.*, 331 N.W.2d at 632. In both cases the definition came from a dictionary, so the definition itself was accurate but inconsistent with the legal definition of those terms contained in the jury instructions.

The present case is similar. The foreperson's adamant insistence that, "according to the law," Beth Reeves was fifty percent liable for the actions of Art Reeves simply because she was a officer and shareholder was an incorrect statement. It may be true in some other context, but not under the criminal offenses that Beth Reeves was charged with. Similar to the dictionary definition of negligence in *Manke*, or the dictionary definition of depraved in *Ott*, the foreperson's statement of law flatly contradicted the jury instructions.

According to juror Saubert's letter, the foreperson presented herself as an expert on this topic because she was the part owner of a small business. The jury had no other knowledge, so they took her word for it. As Ms. Saubert states, if the jury had known that being a shareholder and officer was not enough to make the defendant criminally responsible, it could have impacted the jury's verdict (R122:Saubert letter, p.1; App.108).

This extraneous information related to a central issue in the trial, which was Ms. Reeves' knowledge and intent. Coupled with the inadmissible portion of Ms.

Reeves' deposition concerning numerous lawsuits filed against RCB, it is reasonably likely that this extraneous information would have impacted a hypothetical, average juror. The trial court erred, as a matter of law, in concluding otherwise.

## III. A NEW TRIAL SHOULD BE ORDERED BECAUSE THE STATE OBTAINED MS. REEVES' FINANCIAL RECORDS FROM HER ACCOUNTANT WITH A SUBPOENA THAT WAS NOT SUPPORTED BY PROBABLE CAUSE.

On January 16, 2007, the prosecutor obtained a subpoena, pursuant to Wis. Stat. §968.135, from Judge Michael Gibbs for an extensive list of the Reeves' financial records, dating from January 1, 1999 to December 31, 2003 (R47:5-8; App.110-113). The subpoena was directed to the Reeves' accountants at the firm of Suby Von Haden in Brookfield (*Id*.). The subpoena was based on an affidavit submitted by Chief Wisniewski, and the subpoenaed records were returnable to him (*Id*.).

Ms. Reeves moved to suppress all documents seized pursuant to the subpoena (R47). The motion brought an array of challenges to the subpoena. For purposes of this appeal, Ms. Reeves will focus on her challenge to the probable cause showing in support of the subpoena.

A civil subpoena for financial records under Wis. Stat. §968.135 requires a showing of probable cause, the absence of which requires the suppression of the subpoenaed records and all evidence derived from those records. *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611.

Although the subpoena in the present case was supported by an affidavit, the affidavit set forth no facts establishing probable cause that a crime had been committed, what the crime was, that the Reeves had committed it, and that the requested records were evidence of that crime. Instead, the affidavit merely states that the officer was *investigating* the crime of theft by contractor, and that Ms. Reeves testified in a deposition that the Reeves' accountants had kept track of their financial transactions and had their financial records (R47:6; App.111).

In denying the motion to suppress, Judge Carlson found that the subpoena was adequate because the judge who issued it, Judge Gibbs, had knowledge of additional facts from a related civil case involving the Reeves, and that this additional knowledge provided probable cause for the subpoena (R179:6-19; App.115-128). In a subsequent written decision, Judge Carlson indicated that it was a "fair inference for Judge Gibbs to make that the accountants kept records regarding the Goes and Rayners remodeling contracts and that those records contain[ed] evidence of crimes he was investigating and would be used in a criminal case involving the Reeves and their corporation" (R55:1-2; App.133).

The mere conclusion that the defendant committed a criminal offense (much less the mere assertion that the officer is investigating an offense) is insufficient to establish probable cause. *Giordenello v. United States*, 357 U.S. 480, 486-87, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958). Moreover, it is black letter law that in reviewing

whether probable cause existed for issuance of a search warrant or criminal complaint, the reviewing court is limited to the four corners of the document. *State v. Desmidt*, 155 Wis. 2d 119, 454 N.W.2d 780, 785 (1990).

Establishing that an officer is *investigating* an offense does not establish probable cause that an offense occurred. The warrant application on its face was thus inadequate, and the trial court erred in finding that the issuing judge could supplement the inadequate affidavit with extra-judicial knowledge. Consequently, Ms. Reeves' conviction should be vacated and the suppression of all records obtained by the subpoena, and all fruits and leads derived from those records, should be ordered. *Popenhagen*, 2008 WI 55, ¶71, ¶97, 749 N.W.2d 636, 643-44 (ordering suppression of subpoenaed records and evidence derived from the records – defendant's statements).

## IV. THE PECUNIARY LOSS AND EXPERT WITNESS FEES PORTION OF THE RESTITUTION ORDER SHOULD BE VACATED.

### A. Background.

As indicated above, the trial court conducted three hearings before deciding the issue of restitution.

The first restitution hearing was held on June 18, 2008. At this hearing, the state submitted several hundred pages of documents supporting the victims' restitution claims (R175-178; R167:11-12).

Mr. Rayner testified (R167:13-56). The trial court then engaged in an extended colloquy with the prosecutor in an effort to clarify the state's position (R167:56-64). The parties ultimately agreed to submit written briefs in support of their respective positions, with citations to the trial record (R167:65-66).

The trial court at this hearing did order the defendants to pay the cost of the state's accounting expert, in the amount of $54,644.84 (R167:73-82; R86:4; App. 161-165).

The next restitution hearing was held on January 29, 2009 (R168). The defendants had submitted their brief on restitution, with citations to the record (R88, R89). The state submitted nothing, describing the job as a "monumental task" (R168:5-7). The matter was continued (R168:24-26).

The third restitution hearing was held on April 23, 2009 (R169). The hearing consisted of an extended dialogue between the trial court and the prosecutor. On several occasions, the trial court expressed frustration with the state's failure to clearly set forth the restitution claims (R169:12, 15, 35, 38, 42).

Nevertheless, the trial court proceeded to mostly grant the restitution request made by the state and the victims, with some modifications. Specific transcript references will be set forth below.

The trial court awarded restitution in the amount of $90,637 to the Rayners, $57,644 to the Eisenhours, and $132,076 to the Goes, as reflected in the amended

judgment of conviction filed on October 1, 2009 (R106:3) and the trial court's written restitution order (R105).

**B. Standard of Review.**

The statutory scheme for restitution is set forth at Wis. Stat. §973.20. The question of whether a restitution order comports with the statute is a legal determination subject to de novo review. *State v. Rash*, 2003 WI App 32, ¶5, 260 Wis. 2d 369, 659 N.W.2d 189, 191-92.

The determination of the amount of restitution is within the trial court's discretion. *State v. Canady*, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147, 149. The reviewing court is to examine the record to determine whether the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a reasonable conclusion. *State v. Johnson*, 2005 WI App 201, ¶10, 287 Wis. 2d 381, 704 N.W.2d 625, 630 (citation omitted).

**C. Pecuniary Loss**.

**1. Goes.**

The trial court awarded the Goes $82,037 in pecuniary loss (R105:1).

As noted, at the beginning of the final restitution hearing, the trial court engaged in an extended dialogue with the prosecutor in an effort to understand the state's restitution figures (R169:3-12).

At one point, the clearly frustrated judge indicated that “all I want to know is how much they are out of pocket. That is all I am interested in” (R169:12; App.177). Later the judge said, referring to the state’s written submission, that “this is supposed to be the amount they were frauded out of. I don’t know how you are reasoning this. I really do not. I want to know how much they stole” (R169:15; App.180).

Following a brief discussion of a civil lawsuit between the Goes and the Reeves, the trial court made its ruling on the Goes pecuniary loss: “You have cited to overpayment of $82,037. And you cite to exhibits in the trial...I’m going to find the $82,037" (R169:28).

The problem is that the state’s position – it’s brief, it’s methodology, it’s general and conclusory reference to the voluminous trial exhibits, and it’s shifting positions – was incomprehensible. It was incomprehensible to the trial court, and is likely incomprehensible to the Attorney General and to this Court.

Although the trial court’s frustration was understandable, the court failed to analyze the record and arrive at a reasoned conclusion.

For example, Ms. Reeves submitted specific references to the trial record showing that three major subcontractors on the Goes job, relied upon by the state as witnesses at trial, were all paid in full by the Reeves (R88:7-9). This was proven by the state’s own evidence at trial and the admissions made by the prosecutor in closing argument (*Id.*).

If these three subcontractors (Harry Breen Plumbing, Adams Electric, and R&S Cooling) were significant enough to be featured at trial by the state, and they were all paid in full, how could the state and the Goes claim an "overpayment" to the Reeves of $82,037?

The answer to that question cannot be found in the trial record. Not even the prosecutor argued at trial that the Reeves simply "stole" $82,000 from the Goes. It cannot be found in the Goes restitution submission (R177) or the state's restitution submission (R90; R101). And it cannot be found in the trial court's analysis of the issue, in any meaningful way, because the trial court engaged in no analysis. The appropriate exercise of discretion requires a process of reasoning based on a logical rationale. *State v. Hall*, 2002 WI App 108, ¶17, 255 Wis. 2d 662, 648 N.W.2d 41, 48 (citation omitted). It is not simply "decision making." *Id.*

The trial court thus abused its discretion by exercising no discretion at all. The Goes' pecuniary loss award should be reversed.

**2. Rayner.**

The trial court awarded the Rayners a pecuniary loss of $52,144 as the "total overcharge" on their job (R105). This presumably represents payments by the Rayners for the labor of RCB employees, at the hourly rate of $45. Unbeknownst to the Rayners, these were not RCB employees but rather independent subcontractors

who billed RCB at an hourly rate of less than $45 (*See* State's Closing Argument, R165:83-89).

Similar to the Goes pecuniary loss award, the trial court engaged in no analysis of the issue and simply rubber stamped the state's figure (R169:47-51; App.212-216).

In closing argument at trial, the prosecutor had summarized the testimony and exhibits on this issue and told the jury that "the grand total of this billing scheme of misrepresenting subcontractors as employees [was] $43,793" (R165:89).

Nothing in the state's restitution submission to the trial court explains the discrepancy between this figure and the figure of $59,381 originally submitted by the state (R101:6), or the corrected figure of $52,144 (R169:47-51; App.212-216).

As Ms. Reeves pointed out in her restitution brief, the Rayner restitution award is flawed, in part, because it assumes that the Rayners would have hired the subcontractors directly if they had known that they were not actually RCB employees. It further assumes that the subcontractors would have agreed to work for Rayner without the general contractor's involvement and would have billed the Rayners something less than $45/hour (R88:12).

The trial court did not address any of these objections, or make any finding on the record as to why the $52,144 figure was the appropriate amount. Consequently, the trial court abused its discretion and the Rayner's pecuniary loss award should be reversed.

### 3. Eisenhour.

With respect to the Eisenhours, the state's restitution brief (R101:7-9) and its position at the restitution hearing as to the Eisenhour $126,971 "overcharge" were similarly incomprehensible. The trial court made no effort to understand the figures, and simply ruled that "I'm going to allow the $126,971. They claim that to be their net overpayment that flows directly from Barker, etc., Barker Lumber, or Schneider, etc." (R169:73; App.238).

The trial court was referring to two subcontractors on the Eisenhour job, Barker Lumber and Schneider Electric.

In her restitution brief, Ms. Reeves cited to the specific trial testimony from the owner of Schneider Electric in which he indicated that they were paid in full by RCB, albeit late. Consequently, the loss to the Eisenhours was $0 (R88:13).

There was no assertion made at trial by the state, much less proof, that the Reeves "inflated" any Schneider Electric bills for payment by the Eisenhours.

In her restitution brief, Ms. Reeves cited to the trial testimony of the representative of Barker Lumber, the trial testimony of the state's expert, Mr. Siiro, and the prosecutor's own statements in closing argument to show that the Eisenhours owed $104,790 for the materials and labor of Barker Lumber, and were billed $103,593 by RCB. Hence, the loss was $0 (R88:13-14).

Not surprisingly, the state did not and could not dispute any of this trial evidence at the restitution hearing.

In the face of this evidence – the *state's* evidence – defense counsel at the restitution hearing pressed the prosecutor to explain exactly how it was that the Reeves "overbilled" the Eisenhours by $126,971 (R169:69-70). He couldn't do so. Ultimately refusing to "go through the entire testimony" (R169:72), the state's submission was characterized as "just a summary" because, according to the prosecutor, "that is all you can do is summarize it" (R169:72).

Rather than attempt to reconcile the difference between "the summary" and the state's trial evidence, the trial court again simply approved the figure with no explanation. Consequently, the trial court abused its discretion and the Eisenhour pecuniary loss figure should be reversed.

**D. Expert Witness Fees.**

The trial court ordered the Reeves to reimburse the Goes, Rayners, and Eisenhours for the cost of the services of Virchow Krause. The trial court entered this order at the first restitution hearing held on June 18, 2008 (R167:73-82; App.161-165). The total amount is listed on the judgement of conviction as $54,644.84 (R115:4; App.21), with $17,282 to go to the Goes, $16,548 to the Rayners, and $17,548 to the Eisenhours (R115:4; R105; App.248-249).

This award was made as a court cost under Wis. Stat. §973.06 pursuant to the state's Motion For Assessment of Costs (R85). At the final restitution hearing the trial court acknowledged that this amount was awarded as a court cost under Wis. Stat. §973.06, not as restitution under Wis. Stat. §973.20 (R169:31-32; App.196-197). Nevertheless, the judgement of conviction lists this as restitution, as well as "other fees" (R115:4).

The defendant has already set forth her position as to why these payments were in violation of public policy and therefore illegal.

Moreover, although the court has the authority to assess costs for payments made by the prosecution to a private expert witness, *See, e.g., State v. Holmgren*, 229 Wis. 2d 358, 599 N.W.2d 876 (Ct. App. 1999) (auditor); *State v. Schmalinger*, 198 Wis. 2d 756, 543 N.W.2d 555 (Ct. App. 1995) (accident reconstruction expert), nothing in Wis. Stat. §973.06(1)(c) authorizes an award of costs to reimburse a private party for expenditures made in a criminal case.

The assessable costs under Wis. Stat. §973.06(1)(c) are limited to the plain language of the statute. *State v. Ferguson*, 202 Wis. 2d 233, 238-39, 549 N.W.2d 718 (1996). Nothing in Wis. Stat. §973.06(1)(c) indicates that it was intended to cover payments made by private parties in a criminal case. Looking at the statute as a whole, §973.06 encompasses the recoupment of certain costs incurred by the county

or by the state in criminal prosecutions (*e.g.*, witness fees and costs, some law enforcement costs, court appointed counsel costs, certain tests, etc...).

The defendant is unaware of any Wisconsin case permitting the assessment of costs to reimburse a private party for fees and costs paid to prosecute a citizen for a crime.

Apart from her objections to the payment arrangement on public policy grounds, the defendant submits that the reimbursement of the Goes, Rayners, and Eisenhours for the expert witness fees is not a reimbursable cost under Wis. Stat. §973.06.

**E. Relief Requested.**

There is ample basis in the record to vacate Beth Reeves' conviction in its entirety. In the event that such relief is denied, Ms. Reeves requests that the Court vacate the specified portions of the trial court's restitution order.

Ms. Reeves further requests on remand that this Court order that the matter be assigned to a court commissioner or other appropriate referee pursuant to Wis. Stat. §973.20(13)(c)(4). Given the complexity of the case, the docket demands of the busy trial court judge, and the time and resources already expended by the trial court, this would likely be the most efficient way to resolve the matter.

## CONCLUSION

For the reasons stated, Beth Reeves requests that the Court vacate her judgment of conviction and remand for a new trial. As part of that order, the Court should order suppression of all records obtained by virtue of the state's subpoena to Suby Von Haden, and all fruits and leads derived from those records.

In the event the Court denies Ms. Reeves' request for a new trial, she requests that the Court vacate the pecuniary loss and expert witness fee portions of the restitution order and direct that the matter be assigned to a court commissioner or referee for further proceedings.