STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 2016 CF 909

TODD A. KENDHAMMER,

Defendant.

MOTION FOR POST-CONVICTION RELIEF PURSUANT TO WIS. STAT. 809.30(2)(h).

TO: DA Tim Gruneke
La Crosse County District Attorney's Office
333 Vine Street
La Crosse, Wisconsin 54601

The above-named defendant, Todd A. Kendhammer, by undersigned counsel, BUTING, WILLIAMS & STILLING, S.C., by Attorneys Jerome F. Buting and Kathleen B. Stilling, respectfully moves this Court pursuant to Wis. Stat. Sec. 809.30, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7 and 8 of the Wisconsin Constitution, for the entry of an Order vacating the judgment of conviction and sentence in this matter and granting him such further relief as the Court may deem appropriate, on the grounds that he was denied his constitutional rights to due process, the presumption of innocence, a

public trial and the effective assistance of counsel.

Mr. Kendhammer requests an evidentiary hearing on this motion, and that he be produced for that hearing.

AS GROUNDS THEREFORE, Defendant submits the accompanying Memorandum in Support of Motion for Post-Conviction Relief, and separately e-filed Affidavits and Exhibits.

Date Signed: February 15, 2021

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INTRODUCTION

The State's entire case against Todd Kendhammer consisted of a pyramid of speculation founded on a biased investigation that failed to establish a motive, mechanism, place or time of the alleged assault the prosecution claimed resulted in Barbara Kendhammer's death. The State's case was built on three critical pillars: (1) the injuries were inconsistent with a single incident of a pipe accidentally penetrating the vehicle; (2) parts of the defendant's story appeared untrue; and (3) the laws of physics made it impossible for the pipe to penetrate the windshield after having fallen off a passing truck and flown through the air without striking the ground. Hence Todd Kendhammer must have killed his wife.

But the State's case was built on a series of faulty, unproven and unprovable assertions. The State claimed anything which did not fit its view of the facts meant that Kendhammer was lying and must have killed his wife.

The State did not prove any reason why after twenty-five years of compatible and affectionate marriage, Todd Kendhammer would suddenly attack and kill his wife. Despite an extensive investigation into the couple's affairs, the State failed to prove that there was any domestic violence in the marriage or that the couple was under any strain, financial or otherwise. In closing argument, the prosecution referred to the family and friends who testified for the defense as people "who don't

want to hear the truth."[1] The fact is the State never found a single witness who could say there were any problems between the couple that would have resulted in the death of Barbara Kendhammer.

While the defense did challenge some of the State's faulty assumptions and logical fallacies, they failed to present expert and fact witnesses who could support the accidental cause of Barbara Kendhammer's death and provide the jury an alternate reasonable hypothesis consistent with Todd Kendhammer's innocence. The court's actions also deprived the defendant of his right to due process, the presumption of innocence and the right to a public trial.

SUMMARY OF ARGUMENT

Todd Kendhammer submits he is entitled to a new trial for several reasons.

1. The trial court violated the defendant's right to due process and the presumption of innocence when it ordered that jurors not be identified other than by their juror number or first name, without any legal justification and without giving the jury any precautionary instruction to remove prejudice to the defendant.

2. The defendant's due process rights and right to a public trial were violated when the judge ordered defense-supporting spectators to sit equally behind both the prosecution and defendant sides of the courtroom or else they would not be permitted in the courtroom. Virtually all spectators – including the decedent's own mother – supported the defendant's innocence, did not agree with the State's prosecution of Todd Kendhammer and did not wish to show

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[1]At sentencing the La Crosse County District Attorney went even further, crudely saying that Todd Kendhammer's family and friends "need to get their head out of their asses." (Doc. 108, p. 24).

public support for it by sitting behind the prosecution in the courtroom. The court had no legal justification for the order which denigrated the presumption of innocence and which gave the jury the misperception that many spectators and family members of the victim supported the prosecution and believed Todd Kendhammer was guilty, when they did not. The court's unjustified restriction on spectators, who had in no way misbehaved in court, precluded any spectators who refused to follow the court's order from sitting in the courtroom, in violation of the defendant's right to have a fully public trial for all citizens to observe directly, in person.

In addition, the defendant was denied his constitutional right to the effective

of assistance of counsel for several reasons.

3. Defense counsel failed to present a defense forensic pathologist to explain why Barbara Kendhammer's injuries were entirely consistent with the series of forces at work during the accident and its aftermath and to contradict the opinion of the State pathologist that the injuries received by the decedent were inconsistent with the defendant's reported version of an accident. The defense instead relied on other experts who were not qualified to rebut the State pathologist's opinions. An affidavit is attached to this post-conviction motion by a forensic pathologist who reviewed this case and who has done more than 6,000 autopsies. The pathologist concludes that the injuries Barbara Kendhammer sustained are consistent with the defendant's statements that a pipe flew through the windshield and struck his wife, and the subsequent sequence of events that occurred after the incident. There is a reasonable probability of a different result if such a defense pathologist was presented at trial to rebut the State pathologist's opinions.

4. Defense counsel also failed to consult with or retain a psychological expert on human perception and memory to explain to the jury the process through which memories are encoded, stored and retrieved and the impact of stress and trauma or lack of attention on these processes. Expert testimony on these issues could have countered the State's claim that the defendant's inaccurate memories were lies, and that a bystander's memory of an unremarkable event was reliable, and precluded the State from arguing misconceptions about memory in closing argument.

5. One of the pillars of the State's case rested on an interview of the traumatized defendant by a investigator transporting him to the hospital to be with his critically injured wife. The investigator suggested in his questioning that the pipe came off a truck and "never hit the ground." That version of the accident was adopted by the traumatized defendant and was a key point relied upon by the prosecution, because the effect of gravity would have made it nearly impossible for the defendant to have seen and reacted – with less than one second – to the pipe as it flew through the air before hitting the car. This made it appear the defendant's story was a lie. However, defense counsel failed to present evidence at trial of the defendant's earliest memories of the incident that would have provided a more plausible explanation for what happened and which would have rebutted the State's testimony at trial that his story defied the laws of physics. Kendhammer's earliest memory was that he "heard a loud bang" and that the pipe "bounced off the roadway" before impaling the windshield. These memories were relayed to other law enforcement officers before the suggestive squad car interview, but they were never presented at trial for the jury.

6. Defense counsel received, as part of discovery, videos of experiments conducted by the State at the scene of the accident in which a similar size pipe was rolled off a southbound truck from three different heights. The pipe bounced off the roadway in several instances, once twisting and bouncing end over end at a height close to that which could have impaled the defendant's vehicle as he described. However, defense counsel failed to introduce the videos which corroborated the defendant's earliest description of the event. Neither did counsel present a crime scene expert who could have explained to the jury the mechanics of how a pipe that first bounced on the road could have struck the Kendhammer vehicle as described.

7. Defense counsel also failed to mover for redaction of numerous irrelevant, unfounded and improper assertions by the detectives from the video of the police station interview of the defendant, which was played to the jury. The detectives' statements asserted the scientific accuracy and truthfulness of facts about which they were not qualified to testify, including forensic pathology and the mathematical probabilities of such an accidental event occurring. For example, the detective asserted that the odds of the sequence of events the defendant described was "one in a trillion." There was no basis for this

assertion yet the jury was permitted to hear it and use it to reach their verdict without objection.

8. Trial counsel also failed to present at trial several witnesses who knew that trucks carrying various types of scrap metal to recycle and landfill facilities in the area frequently traveled the road where the defendant said the accident occurred. This evidence would have made the defendant's explanation more plausible and would have countered the State's theory that the pipe accident was staged by the defendant to cover up an intentional killing of his wife.

9. Trial counsel failed to move for a change of venue from La Crosse County after receiving jury questionnaires before trial which showed that pretrial publicity had infected the jury pool with undue prejudice. A motion was prepared but never filed. The jury selection did nothing to dispel these defense concerns about the jury pool, yet still defense counsel failed to seek the remedy of a change of venue.

10. The cumulative effect of trial counsels' error prejudiced the defendant in this very close circumstantial case. The State never offered a coherent theory for when, where and how the defendant supposedly killed his wife. Neither did they offer any motive for him to kill his wife. In fact, all law enforcement and defense investigation supported the defendant's characterization of his 25-year marriage as very loving and happy, free of turmoil or financial difficulties. Therefore, there is a reasonable probability that without defense counsel's errors the jury would have had a reasonable doubt respecting guilt.

Finally, the defendant moves for post-conviction discovery:

11. Post-conviction counsel's investigation has revealed that at least three individuals and three businesses were investigated by the La Crosse County Sheriff's Department for knowledge or records that could have revealed a source for the pipe which accidentally struck the Kendhammer's vehicle, yet no reports of that investigation were provided to the defense in pretrial discovery. This includes witnesses, logs or other documents which recorded vehicles that might have been traveling with metal pipes on County M the day of the accident. This investigation was relevant to an issue of consequence and records should have been turned over to the defense before trial to allow the defense investigation to followup when records were still available and

memories relatively fresh. The defense now moves for disclosure of those investigation interviews, reports and seized business records for consideration in its post-conviction review and reserves the right to supplement this motion if the records lead to other grounds or facts in support of the motion for a new trial.

STATEMENT OF FACTS

The Kendhammers were a close family with many common interests and values and who enjoyed being together. Todd and Barbara Kendhammer spent time with their daughter, Jessica Servais, her husband, Michael Servais, and their granddaughter, five out of seven days of the week. Their son, Jordan Kendhammer, was in their home three nights a week almost every week. Barbara's mother, Joyce Adams, lived on the same plot of land as the Kendhammers. They were surrounded by family and friends who witnessed their interactions daily.

The people who saw them every day all said that the couple was close and affectionate. They had a perfect marriage. There was no whisper of infidelity, no hint of alcohol abuse or drug use, and the couple was careful with their finances and stood on firm financial ground. (Doc. 120, p. 225).[2]

Jessica and Michael saw no friction or signs of marital discord. In fact, at the trial, when asked to describe the relationship, Jessica testified that from her perspective it was, "Absolutely perfect. I tried to model my marriage after theirs."

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[2]References to "Doc." are to the circuit court record document numbers.

(Doc. 121, p. 136). Michael Servais testified, "They had the love and the same interests that I -- me and my wife share. They get along very well. They do everything together. They just seemed overall happy all the time." (*Id.* at 18). Jordan Kendhammer, who lived with them three days a week, saw no signs of trouble. Jordan said his parents did not argue or fight even when they did not see eye to eye on something. (Doc. 120, p. 265). At the trial, not a single person testified to any problems in the relationship, much less the anger and rage that would cause a homicide.

September 16, 2016 started out as any other Friday. Jordan woke early in the morning and heard the normal sounds of early morning in their household, including the murmur of his parents talking normally. (Doc. 120, pp. 258-62). The couple got in their Toyota Camry and began to drive. They stopped first at a neighbor's house to check on it as the owner was away. (*Id.* at 127). From there they headed into town and out County M road. (*Id.* at 128). It was close to 8:00 a.m. when the unexpected incident occurred that would change everything.

Todd and Barbara were talking in the car as Todd drove along looking for the location where he might find a buyer for an extra windshield he had in the garage. Suddenly, Todd heard a "loud bang." (*Affidavit of Jerome F. Buting*, Exhibit 4, BWS

13).[3] Todd said he saw what looked like a bird flying at the windshield and realized a fraction of a second later that the bird was really a pipe which was coming directly at them. (Doc. 120, p. 180). He instinctively lunged at the windshield in an unsuccessful effort to deflect it. (*Id.* at 129-31). The pipe came through the windshield and struck Barbara and he saw her begin to move uncontrollably around in her seat. (*Id.* at 133). He rapidly turned right on the next road and pulled over. In his panic he ended up half in a ditch and half on the shoulder. (*Id.* at 133-34).

Todd got out of the car, ran to her, opened the passenger door and tried to get Barbara's seat belt off so he could get her out of the car. He felt his wife was caught on something. (*Id.* at 135). Frustrated and terrified, Todd ran around the door and pulled the pipe out of the windshield and threw it to the ground. (*Id.*). Then he returned to Barbara and continued to struggle to remove his unconscious wife from the car. (*Id.* at 136). Todd managed to yank her out and they fell together to the ground. Todd was familiar with CPR but his wife was facing head down on the slope and he realized he could not do CPR in that position. (*Id.* at 136-38). Frantically, he pulled at her until she was turned with her head facing up and

[3]References to "BWS" followed by a number refer to Bate-stamps entered on pretrial discovery documents by post-conviction counsel, Buting, Williams & Stilling, S.C. Certain copies of these Bate-stamped documents are attached to this motion by affidavit of counsel because they were not entered into the record as trial exhibits.

started the compressions. As he pressed on her chest, he saw blood coming out of her mouth and nose. (*Id.*)

At 8:05 a.m., he stopped and called 911. He was obviously shaken and distraught on the recording, describing his wife's condition as "bad" and pleading for help. ("Hurry up, hurry up...", "God, I love my wife!")(Trial Ex. 285). In a second 911 call, he frantically asked for instructions on what to do and when the first responders would arrive, and he described his concern about his ability to help Barbara. ("I know First Aid but I don't know what to do with this.")(Trial Ex. 286 at 3).

The first person on the scene was a fire department first responder, Brandon Hauser. (Doc. 124, pp. 79-80). He told Todd they had to move Barbara to level ground, so the two men moved her about five feet, which was the third time she had been moved while unconscious. (*Id.* at 81-82, 84-85). The paramedic began life saving measures. (*Id.* at 83). West Salem PO Loeffelholtz arrived just minutes later while Hauser and Kendhammer were attending to Barbara. PO Loeffelholtz's squad car video recorded some of his discussion with Todd and others. Loeffelhoetz responded to one of the two men saying, "Something flew up? What do you mean something flew up?" (Trial Ex. 287, p. 3). Hauser immediately asked the officer to take Kendhammer away so he would not witness him treating his wife. (*Id.* at 4). PO

Loeffelholz attempted to reassure the distraught and panicked husband, instructing him how to breath slowly through his nose so he would not hyperventilate. (Doc. 124, p. 76).

PO Loeffelholz attempted to get more detail from Kendhammer about the accident and those potentially responsible. Kendhammer told him that he and his wife were driving along the bend just before Bergum Coulee road in this stretch when "he heard a loud bang and observed a pipe coming through the windshield. He says he tried to deflect or stop it but he said he hit the windshield and then the pipe hit his wife in the head." (*Affidavit of Jerome F. Buting*, Exhibit 4, BWS 13).

The first member of the La Crosse County Sheriff's Department, Deputy Robert Kachel, arrived at 8:19 a.m. and assisted Hauser with CPR until the Tri State ambulance arrived at 8:22 a.m. and took over. (*Id.* at BWS 34; BWS 133). Deputy Kachel then spoke to Kendhammer and later that day prepared the official Wisconsin Motor Vehicle Accident Report. Dep. Kachel reported Kendhammer's statement about the accident:

> The driver of Unit One stated there was a flatbed truck traveling southbound on County Road M. The southbound truck lost a 53 inch metal pipe from his load. The pipe *bounced off the roadway* and impaled the front windshield passenger side of Unit 1. The end of the pipe struck the passenger of unit 1 in the head and knocked her unconscious.

(*Affidavit of Jerome F. Buting*, Exhibit 3, BWS 34)(emphasis added).

Kendhammer was interviewed repeatedly in the first thirty minutes, including by La Crosse County Sheriff Dep. Adam Wickland. All of the personnel at the scene described Kendhammer as distraught, emotional, concerned, frantic and shaken. (*Affidavit of Jerome F. Buting*, Exhibit 5, Wickland: BWS 8; Exhibit 4, Loeffelholz: BWS 13, Trial Ex. 287 at 9; Exhibit 6, Hauser: BWS 93).

Sgt. Mark Yehle of the La Crosse County Sheriff's Department took Kendhammer to the hospital to meet the ambulance. On the road, Kendhammer was interviewed for the fourth time. (Trial Ex. 58, transcript at Trial Ex 290). He repeatedly expressed his concern about his wife, cried when referencing his inability to be with her and was obviously anxious to get to the hospital. Kendhammer attempted to explain that he was not paying attention and the event happened so quickly that he could not really describe the truck, the pipe or exactly what happened. (Ex. 290 at 1-2,) He said he was aware of a truck and an object but was initially under the impression that a bird was flying into the windshield. (*Id.* at 9, 14)("I looked up to see that vehicle and something like a bird is coming right us."). Yehle interrupted Kendhammer frequently, looking for more detail. (*Id.* at 3,7) ("I don't want to make you re-live it anymore but I am trying, I'm trying to establish..."). Kendhammer again expressed that his priority was Barbara. (*Id.*) ("I just wanna make sure that Barb's okay."). Yehle continued to press for detail and

asked Todd to "close his eyes" and think about what happened and details about the truck. (*Id.*). Repeatedly, Kendhammer tried to be helpful and answer the questions about the color and description of the truck, the object and the brief chain of events even though he was unsure. (*Id.* at 8). ("Was it like a dump bed? I don't think so, I think it was just a...").

Kendhammer wept when he spoke of the fact that he couldn't go with his wife to the hospital. (*Id.* at 13). But Yehle continued to press for details about the event and offer suggestions about the facts. (*Id.*). At one point Yehle suggested "You said it came off the truck, never hit the ground and..." Kendhammer appeared to endorse the suggestion, "No, it just come right straight off the truck...". He explained he didn't even realize it was a pipe until the last minute. (*Id.* at 15).

Kendhammer cooperated with every question, every request and every direction. He allowed the police to keep the car, take items from it, and photograph his body and made no attempt to limit or obstruct their efforts. He cooperated with four interviews on the scene and en route to the hospital. Through it all he kept asking, "Is she going to be alright?". Barbara's brother would later testify that at the hospital, Kendhammer "...was a frazzled mess. He was just shaking uncontrollably. He was having trouble talking. He was in very bad shape." (Doc. 121, p. 49).

Barbara died the next day and the family authorized an extensive harvesting of her organs and tissue for donation, including her eyes, heart, lungs, pancreas, liver, long bones and skin. On September 20, 2016, three days after her death, the body was transported to the Dane County Medical Examiner's Office and Dr. Kathleen McCubbin performed an autopsy. She told an investigator with the La Crosse County Medical Examiner, Sandra Carlson, that some of the injuries were questionable and that "it would be nice to find out how these questionable injuries occurred." (*Affidavit* of *Jerome F. Buting*, Exhibit 7, BWS 408). Dr. McCubbin had only a brief summary of the incident and was aware only that the decedent had been struck by a pipe coming through the windshield and had subsequent medical intervention. (Doc. 125, at 16-17, 51-52). The day after the autopsy, the decedent's body was sent back to Dane County and Dr. McCubbin met with Sgt. Yehle. (Doc. 125, p. 52). The body was re-examined and photographs were taken, including parts of the body that had not been photographed at autopsy.[4] Dr. McCubbin told Yehle that the injuries she found were not consistent with the single mechanism of injury described, from a pipe striking her in the head. (*Id.*).

[4]As discussed further, *infra* at Section III.B.1., photographs of the lacerations in her head were taken the second day after the surrounding hair had been shaved. However, by that time the head had been opened at the autopsy potentially altering their original condition.

Barbara Kendhammer's funeral was held September 24, 2016. On September 22, 2016, the day before the visitation, Sgt Yehle used a ruse to get Kendhammer to come down to the department, saying that they wanted him to look at some videos of suspected trucks which might be responsible for the accident. But this was a lie; their intentions were quite different. When he arrived at the station he was questioned by Yehle and Investigator Fritz Leinfelder for the next three and one half hours in a small interrogation room . (Doc. 120, p. 162).

Meanwhile, law enforcement obtained a warrant and searched the Kendhammer residence. They seized computers, documents, and took swabs of any location that might have evidentiary value. They found no evidence to suggest that there had been any violence at the home. (Doc. 121, pp. 73-94).

During the September 22nd interrogation, the officers encouraged Kendhammer again to think back to the moment of the incident to tease out his memory. ("...if you can remember what you were thinking at the time, that might give you a flash to what the truck looked like.") (*Id.* at 19). Kendhammer told the officers that he had been wracking his brain and trying to "force stuff out" in an effort to remember the accident more clearly even to the extent of going to the scene twice in the hope it would help him visualize the accident. (*Id.* at 21). But there was much he could not recall. He guessed that he cut and bruised his hands on the

windshield when he struck it, could not remember how the car went into reverse, which end of the pipe entered the car, or even turning on Coulee Road or taking off Barbara's seatbelt. (*Id.* at 32-4, 51). As he attempted to retrieve the painful memories he became deeply upset and had to be told by the officers to breath. (*Id.* at 35).

About an hour into the interrogation, it dawned on Kendhammer that the officers were accusing him of harming his wife. (*Id.* at 67). The officers became more confrontational and challenged him to explain how all her injuries arose from the single event of a pipe coming through the window. (*Id.* at 88). They lectured him about physics and why it was impossible for this event to have happened the way he said. (*Id.* at 89-94).[5] He repeatedly professed his innocence throughout the whole interrogation.

The defendant was charged in a criminal complaint on December 6, 2016. (Doc. 1). His case went to trial over nine days in December of 2017. Kendhammer was represented at trial by Attorneys Stephen Hurley and Jonas Bednarek. During the State's opening statement the prosecutor told the jury that the defendant was vague about how his wife was injured, where the pipe hit her and his description

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[5]The interrogation was video recorded and later played at trial for the jury in its entirety without any redactions. As argued *infra* at Section II.B.4, this allowed the jury to hear the detectives claims and theories as if they were testifying as quasi-expert witnesses on several topics for which they had no education or training, including forensic pathology, physics and statistical probabilities (e.g., "what are the odds [of this happening from a pipe coming off a truck]? ...One in a trillion, if at all." *Id.* at 183-84).

of other things that happened. (Doc. 124, p. 34-35). In the defense opening statement, counsel promised the jury that they would hear from a memory expert (Doc. 124, at 60), but this promise was not fulfilled.

The State called a number of the first officers who arrived at the scene, including West Salem Police Officer Loeffelholz. The state played Loeffelholz's squad car video which contained the audio of parts of his discussion with Kendhammer when the two of them were near the squad car. However, neither party introduced Loeffelholz's report which was prepared the same day. Neither was he questioned on direct or cross about the fact that he reported that Kendhammer said he "heard a loud bang" and after that saw a pipe coming at his windshield. (*Affidavit of Jerome F. Buting*, Exhibit 4, BWS 13).

The prosecution played the 911 call from the defendant during which Kendhammer's distress was evident and he could be heard administering CPR. The prosecution also played the squad car video of Sgt. Yehle's interview with the defendant as he drove him to the hospital, which again revealed the defendant's extreme emotional distress and overarching concern for his wife. The recording included Kendhammer's adoption of Sgt. Yehle's suggestion that the pipe never hit the ground before impaling the windshield.

The State called Dr. Kathleen McCubbin, the forensic pathologist who performed the autopsy on Barbara Kendhammer. She testified that she did not believe the injuries she observed could have been caused by a pipe coming through the windshield and striking the decedent. She prepared several diagrams (Exhibits 6-9) which documented more than 50 marks, abrasions, bruises or injuries on various parts of her body. This included a skull fracture, broken noise, bruised inside of upper lip (without corresponding bruises on the outside of Barbara's mouth) and small marks on the skin surface of her neck. She also testified that the decedent's cricoid cartilage was fractured, but not the hyoid bone. The bulk of the many marks on the diagrams included many smaller abrasions and bruises of undetermined origin. Nevertheless, these smaller, and sometimes quite minor, injuries were described in detail at trial and marked on the diagrams shown to the jury. (e.g., "...a one-half inch bruise...", Doc. 125, p. 21). Dr. McCubbin did not opine how the smaller, minor injuries were caused or when they may have been caused, leaving the impression that they all arose out of one incident. ("..they appeared to be recent.", *Id.* at 65). Dr. McCubbin referred to the injuries diagramed in Ex. 6-9 as "true" injuries to distinguish them from the injuries resulting from treatment interventions and the harvesting of organs and tissue. Her use of the term "true" injuries implied that they all arose before CPR and treatment began at the scene.

On questioning by the prosecutor Dr. McCubbin said her injuries were "consistent with" manual strangulation and beating with fists. (Doc. 125, p. 94). However, on cross examination, she conceded that at the time of her autopsy when she made her initial determination that the injuries could not be caused in the manner described, she had been told little other than that a pipe had reportedly come through the windshield and struck the decedent. (*Id.* at 54-55). At the time of trial she had become aware of some other facts, including some of the physical manipulations the decedent experienced at the scene, and admitted that some of them could have caused some of the injuries she saw. (*Id.* at 56-57). However, she was not aware of the extent of the physical force Kendhammer needed to remove her from the car or "the specifics" needed to remove his wife's unconscious body from the seatbelt, out of the car and into a position suitable for CPR. (*Id.*). She could not give a precise mechanism of a number of the "true" injuries she documented but stuck with her opinion that the more lethal injuries, those to the head and neck, were not caused by the pipe impacting her body at high speed. (*Id.* at 63-4, 95-6, 97). She also disputed the idea that the cricoid fracture and nasal fracture could be caused by impact with a large "Bubba" cup Barbara Kendhammer had in her lap. (*Id.* at 98). She repeated her opinion that the injuries to the head and neck were "consistent"

with a beating and strangulation. (*Id.* at 93-4). Nothing the pathologist learned at trial affected her opinion. (*Id.* at 104, 109).[6]

The State also presented testimony from Wisconsin State Patrol Trooper Michael Marquardt about calculations he made about the effect of gravity on a falling pipe of the size and weight the defendant claimed accidentally penetrated the windshield. Marquardt assumed that the pipe had fallen off a truck traveling southbound on County M and flew through the windshield without first striking the ground. This was the version suggested by Sgt. Yehle during his interview as he took Todd to the hospital and which the State consistently relied upon thereafter. Marquardt stated that the laws of gravity meant that the pipe falling from a passing truck and flying into the Kendhammer vehicle would have had only 1/3 of a second to fall to the distance necessary to penetrate the windshield. (Doc. 127, at 10-11). Defense counsel did not introduce the Motor Vehicle Accident Report or PO Loeffelholz's report to impeach Marquardt's assumption that the pipe never hit the ground, and to show therefore that his calculations about the amount of time Todd would have had to see and react to the pipe before it penetrated the window were

[6]As argued *infra* at Section III.B.1., defense counsel presented no defense pathologist to express opinions contrary to Dr. McCubbin. Post-conviction counsel is prepared to call Dr. Shaku Teas, an experienced forensic pathologist who has conducted over 6,000 autopsies, who refutes most of Dr. McCubbin's opinions. Dr. Teas expressed the opinion that "the injuries Barbara Kendhammer sustained are consistent with the defendant's statements that a pipe flew through the Kendhammer vehicle windshield and struck his wife who was a passenger in the car and the subsequent sequence of events that occurred after the incident." *Affidavit of Dr. Shaku Teas* at ¶ 4.

not reliable. Nor did Trooper Marquardt consider any alternative scenarios in his calculations despite his access to the version of events reported in the official accident report and the West Salem officer's report.

The defense case led with an expert witness on glass characteristics and breakage patterns, Michael Meshulam, and a bio-mechanical engineer, Dr. Barry Bates. Both gave opinions that the damage to the windshield and Barbara's injuries were consistent with an accidental penetration of the pipe. Dr. Bates primarily limited his testimony to the head injuries and whiplash type injuries to the neck. Dr. Bates also testified in general about memory. On cross-examination, the State highlighted Dr. Bates's lack of expertise in criminal investigations and his lack of medical expertise or experience in forensic pathology. (*Id.* at 165-66). Dr. Bates had no answer for questions about the causation of the neck injuries, especially the cricoid fracture and said he did not even consider them in his evaluation. (Doc. 119, at 188). A juror also questioned his education and training to testify about memory and he had little to offer on that point. (*Id.* at 200).

The next day, the defense led with Dr. Steven Cook, a retired emergency room physician. He gave testimony about the consistency of the injuries with the scenario presented in Kendhammer's statement taking into consideration the dynamics of the accident and the aftermath. However, the State pointed out on cross-examination

that Dr. Cook had little or no experience determining the cause and manner of injuries and death and had last attended an autopsy years earlier. (Doc. 120, at 41). The doctor's credibility was severely weakened when he became confused and mixed up his references about the orientation of the wounds, apparently having not reviewed the materials in a week. (*Id.* at 45).

Todd Kendhammer testified similarly to his earlier statements. He said at first he thought the object was a bird because "I didn't think a pipe could fly". (*Id.* at 130). He talked about the trauma of the accident and his emotionality throughout the day, the decisions leading up to their presence on County M and the devastating impact of his wife's death. (*Id.* at 11-114, 146, 217). On cross-examination, the State focused on the lack of corroboration for Kendhammer's reasons for being on County M, the detour he took that morning would have made his wife late for work, and various unrelated, irrelevant issues such as two unpaid bills, his termination from a job over ten years earlier, and purported problems with an employee at work (*Id.* at 163, 173, 174). He accused Kendhammer of having a selective memory. (*Id.* at 182).

Defense counsel offered the testimony of Cindy Kohlmeier who about three weeks after the accident found a second pipe "in the left hand side of the road" on County M not far from the accident scene. (*Id.* at 235). However, defense counsel did not present any testimony from locals who could attest that trucks frequently

traveled on County M carrying various loads of metal, which could have increased the likelihood that a truck carrying scrap metal had lost something from its load the day of the Kendhammer accident. (*Affidavit of Jerome F. Buting*, Exhibit 11, Exhibit 12).

The final witnesses, including the Kendhammer children, close friends, and family members all testified about the close relationship between the couple, their mutual respect and cooperation, and the romanticism still alive in their marriage after twenty-five years. (Doc. 121). All of them saw the couple frequently and spent extended periods of time with Todd and Barbara, separately and together. They were a role model to their children and others who knew them. The defense also presented Capt. Zimmerman to catalog all of law enforcement's unsuccessful efforts to dig up dirt on the couple and the marriage, and their failure to find any forensic evidence to suggest that a beating occurred anywhere, or to find an instrumentality suitable to cause the injuries.

In closing argument, the State stuck to the same themes as the opening. The prosecutor called any lapse in memory a sign that Kendhammer lied. The State offered no explanation for why the murder would have occurred except to say "every marriage has its ups and downs." He could only speculate about what occurred and said "Something happened". (Doc.122, at 29, 34).

The defense responded:

> The State tells you no marriage is perfect. And the odds of that being true are great. But just because there might be a day when no marriage was perfect doesn't mean you're going to kill your spouse. That's just bizarre. Here they had a normal day in their relationship. No tension between them.

(Doc. 122, pp 50-51). Defense counsel pointed out that the GPS phone pings for both Todd and Barbara's phones corroborated the defendant's testimony about the movements that morning. (*Id.* at 53-54). He argued that the defendant's memory issues were due to the short duration of the accident and the trauma he experienced thereafter. (*Id.* at 59-60 "There's much he doesn't remember, because the only thing that was important to him at that time, the only thing, was his wife"). He argued that Dr. McCubbin was limited by her experience to deceased, not injured people.

> Dr. McCubbin is a very smart physician. She went to a great university in Madison, Wisconsin, and she got not one but two fellowships after she finished her residency. She's a very smart physician. But she's also new. She's only practiced for five years since completing her education. And her practice is with dead people not with injured people.

(*Id.* at 64). He contended that the defense emergency room doctor was more qualified to interpret the injuries Barbara Kendhammer received. (*Id.* at 64-65). He argued the police investigation suffered from tunnel vision from very early on. (*Id.* at 74-75, 78). Defense counsel conceded that the State doesn't have to prove motive but noted:

> But when you have no motive, and all the evidence suggests there is no motive, one has to ask where is the proof that this was some intentional assault? What reason would Todd Kendhammer ever have to harm his wife? Because every one they have tried to suggest not only is not supported by evidence, it makes no sense whatsoever.

(*Id.* at 83).

On rebuttal, the State focused again on the memory issues, claiming without evidence that even when accident victims are traumatized they are able to give a coherent story if not right away, "certainly later they could after they calmed down." (Doc. 122, at 92).[7] Despite the very short time frame when the murder would have had to have occurred, the State asserted that the fifty injuries they claimed Kendhammer inflicted on his wife, including a claim of fist beating and strangulation could all occur in an instant. (*Id.* at 94) ("There's a lot of blows you can land in three minutes. Even one minute.").

After nearly 10 hours of deliberations, the jury convicted Todd Kendhammer of first degree intentional homicide. (Doc. 122, p. 106-08). He was sentenced to life in prison with eligibility for parole after 30 years. (Doc. 109).

This post-conviction motion follows. Additional facts will be discussed in the appropriate argument sections.

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[7]*See infra* at Section III.B.2., for a discussion of this and other myths about human memory that were expounded upon by the prosecutor in this case.

ARGUMENT

I. The Defendant's Rights to Due Process, an Impartial Jury and the Presumption of Innocence Were Violated by the Court's *Sua Sponte* Order for an Anonymous "Numbers" Jury Without an Individualized Determination of Need and Precautions to Avoid Prejudice to the Defendant.

On the Wednesday before the trial began, the court issued an Order relating to "various documents submitted by counsel following the Final Pretrial Conference and disallowing any motion to be heard prior to Jury Selection." (Doc. 65; Doc. 66). The Order addressed witness lists, jury instructions, the practice of jurors asking questions of witnesses at trial, and a defense motion in limine of various procedures. No mention was made in the Order of restrictions on the use of juror names during voir dire or seating arrangements for spectators during trial. Neither party had moved for any restrictions on the identification of jurors on the record or any special seating arrangements for spectators.

In the evening of the Friday before trial the judge sent the attorneys for both parties an email which denied a joint request to strike certain jurors for cause. (Doc. 61). The judge's email also *sua sponte* ordered that "[d]uring voir dire counsel will refer to the jurors by their first name and seat position (number 1 through 29), to prevent their identities from becoming public due to the media coverage of this trial." (Doc. 61, p.2). No mention was made of any precautionary instruction that

would be given to the jurors to explain the reason for their anonymity and dispel any potential prejudice to the defendant.

The voir dire was conducted in two parts, first with a number of jurors the court determined should be individually questioned, followed by a general questioning of the entire group. Defense counsel did not object to the court's restrictions on the use of juror names during an exchange with the court.

> MR. BEDNAREK: And then I had read your order about not referencing the jurors by surname.
> THE COURT: Correct.
> MR. BEDNAREK: I certainly will comply with that. I'm just, so I can be as organized as possible, will we be referencing, at least on the way in the door, the jurors by ID number?
> THE COURT: I think when they come in initially it's the first 11 on the list alphabetically of the 33. But we can call them by their first name, you can call them by their juror number in lieu of their last name.

(Doc. 123, p.5). When the first 11 jurors arrived in the courtroom for individual voir dire they were sworn as a group and then the court dismissed all but one and then took subsequent jurors one by one into the courtroom in that manner. While the first 11 jurors were still assembled, the court said: "Now, I will keep – we'll go by first name and juror number." (*Id.* at 11). He gave no cautionary instruction to dispel potential prejudice against the defendant.

After the first group of 11 were sworn and then dismissed, the remaining 22 jurors were brought into the courtroom in groups of 11 and administered the oath

as a group each time before dismissing all but one. Despite having told the first eleven that surnames would not be used during voir dire, the court chose to say nothing more about the prohibition on the use of surnames during individual voir dire. When the whole group of prospective jurors were all reassembled in a group for general voir dire, (*Id.* at 148), the court stated: "We'll call the names for the records. It's just your first name and juror number." (*Id.* at 148). Once again, he gave no cautionary instruction. The judge repeated the prohibition before questioning began:

> I would ask counsel to identify for the record any juror who responds to any question of them by their first name and either their seat number or juror number. It may be better with seat number, for today's purpose.

(*Id.* at 153). At the end of the court's own jury questioning the prosecutor sought clarification of the practice. (*Id.* at 190-91). The judge said "I've been using seat numbers, so just use their first name and seat number." (*Id.* at 191). Again, there was no cautionary instruction.

Defense counsel did not object to the court's decision to preclude the use of juror surnames in court or the failure of the court to give a cautionary instruction to reduce prejudice to the defendant. This was deficient performance which prejudiced the defendant.

The law on the use of restrictions on juror names at a trial is clear. The Wisconsin court of appeals, in *State v. Britt*, 203 Wis. 2d, 553 N.W.2d 528 (Ct. App. 1996), first examined the recent practice of using anonymous juries. The court defined "anonymous" jury as when the court withholds, or bars the revelation of, information which would identify the jurors. *Id.*, at 31. The court said that although rare, anonymous juries have been used in criminal trials most often in cases involving organized crime. "The use of an anonymous jury has been approved if it is necessary to protect potential jurors and their families from harassment, intimidation, bribery, publicity and other potential interferences that might make an individual fearful or otherwise apprehensive about participating in such trials." *Id.* at 32.

In *Britt*, the state argued that the jury used was not truly "anonymous" because although the parties were precluded from publicly asking about certain juror information during voir dire, the parties nonetheless has access to the restricted information from juror questionnaires. *Id.* at 33. The court disagreed, finding that restrictions on pertinent public discussion of juror information made the jury anonymous. *Id.* at 34. Nevertheless, the court upheld the right of a court to use anonymous juries in an appropriate case and with a proper exercise of discretion. *Id.* The court did rule that "a court should not impanel an anonymous jury without

first concluding that there is strong reason to believe the jury needs protection," *Id.*, for example, a pretrial pattern of victim intimidation from which to infer the jury might also be subjected to tactics of fear and intimidation.

The Wisconsin Supreme Court reviewed the *Britt* decision seven years later in *State v. Tucker*, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374. The court first noted that while a trial court's decision to use an anonymous jury is discretionary, the court must demonstrate a reasoning process that considers the applicable law and the facts of record. 2003 WI 12, ¶ 10. Neither occurred in Kendhammer's case. Moreover, a trial court will be found to have erroneously exercised its discretion if it makes an error of law. *Id.* As will be discussed below, that is precisely what the trial court did in this case.

In *Tucker*, the supreme court said the jury in that case might more properly be called a "numbers" jury, instead of an "anonymous" jury since only the jurors names were withheld from the record. *Id.* at ¶ 11. Both parties had access to all the jury information, including their names, and the public could have accessed the names by inquiring at the clerk's office.[8] Despite this distinction, the *Tucker* court held that "[n]otwithstanding whether the jury in this case is characterized as an

[8]In Kendhammer's case the parties did have the jurors names, but the public did not have access to them and the record of jury information was later sealed by the trial court in its recent order. (Doc. 156).

"anonymous" or a "numbers" jury, if restrictions are placed on juror identification or information, due process concerns are raised regarding a defendant's rights to an impartial jury and a presumption of innocence."

Tucker approved the *Britt* two prong test which allowed an anonymous jury only (1) if there is a strong reason to believe that the jury needs protection; and (2) if reasonable precautions are taken to minimize any prejudicial effect to the defendant, so as to protect the defendant's rights to a fair and impartial jury. 2003 WI 12, ¶ 15. But the second prong of the test was not just designed to ensure a defendant has access to all the juror information.

> Serious concerns regarding a defendant's presumption of innocence are raised when juror information is restricted, as in this case. As observed by the Supreme Judicial Court of Massachusetts, "[t]he empanelment of an anonymous jury triggers due process scrutiny because this practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence." *Commonwealth v. Angiulo*, 415 Mass. 502, 615 N.E.2d 155, 171 (1993). Therefore, courts must attempt to ensure that "juror anonymity should not cast any adverse reflection upon the defendant...." *United States v. Scarfo*, 850 F.2d 1015, 1025 (3d Cir.1988).

2003 WI 12, ¶ 18. The trial court in *Tucker* did not give any cautionary instruction to the jurors about why it precluded counsel from referring to them by name in open court. The supreme court ruled that a general presumption of innocence instruction given to a jury is insufficient to protect a defendant's due process rights when a

court employs a "numbers" or "anonymous" jury panel. *Id.* at ¶ 23. *Tucker* therefore imposed the following rule for future cases:

> When jurors' names are withheld, as in this case, the circuit court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence. We recognize that in *Britt*, the circuit court apparently did not give a precautionary instruction to the jury; however, due to the potential for prejudice to the defendant, we conclude that such an instruction is *necessary*.

Id. (emphasis). The trial court's failure in Tucker to apply either prong of the *Britt* two-prong test was held to be an erroneous exercise of discretion and a failure to apply the correct standard of law. *Id.* at ¶ 20. The supreme court nevertheless found that error was harmless because there was an overwhelming evidence of guilt so that a rational jury would have found Tucker guilty notwithstanding the circuit court's error. *Id.* at ¶ 26. That evidence included Tucker's *Mirandized* confession that she possessed the cocaine and had been selling cocaine for a month and the fact that the cocaine found in her apartment was in a plastic bag marked with her name. *Id.*

In Kendhammer's case, the trial court erroneously exercised its discretion by failing to apply the *Britt/Tucker* two-pronged test before restricting counsel's reference to the juror names in open court.

First, the court made no record at the time of the order that the jury needed protection. This was not a mafia or gang trial and there was no indication before trial

of witness intimidation, as in *Britt*, 203 Wis. 2d at 35. The ruling came in a *sua sponte* order contained in an email on the Friday evening before the trial was to begin. The email said only that counsel was to refer to the juror's first name and seat position number "to prevent their identities from becoming public due to the media coverage of this trial." (Doc. 61, p. 2). But many trials these days have media coverage and that does not justify making the jury anonymous. Indeed, one of the very reasons we require an open trial is so the media can ensure the public that the law is being enforced and the criminal justice system is functioning.

> Where ... the State attempts to deny the right of [public] access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enter. Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 510, 104 S. Ct. 819, 824, 78 L. Ed. 2d 629 (1984) (internal citations omitted). The court in this case made no particularized findings that jurors would be "harassed" or "intimidated" by any members of the media or public, and indeed there were no facts articulated to support such an inference.

Second, the trial court failed the second prong of the *Britt/Tucker* test because the court gave no precautionary jury instructions to ensure that the restriction on the use of their full names in court did not negatively reflect on the defendant's guilt or character. 2003 WI 12, ¶ 27. Cf. *United States v. DeLuca*, 137 F.3d 24, 32 (1st Cir. 1998) (jury instructed that their identities would not be disclosed, so that no extrajudicial information could be communicated to them during trial, either by the public or by media, and thus protect the constitutional right of each defendant to a jury trial based exclusively on the evidence); *State v. Bowles*, 530 N.W.2d 521, 531 (Minn. 1995) (prior to jury selection, the court informed the venire they would remain anonymous to shield them from media harassment). This was especially necessary in Kendhammer's case because the final panel of twelve who rendered his verdict contained four jurors[9] who had served on prior juries and might have been familiar with the more typical practice of not restricting the reference by surnames. Indeed, the judge's specific direction to the lawyers in front of the jurors to use only first names and seat numbers, without a precautionary instruction for this unusual practice, might have highlighted for those with prior jury experience that something was amiss with this defendant.[10]

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[9]Juror numbers 3097, 547, 4237 & 1778. *See* sealed Doc. 165 and questionnaires for same.

[10]*See United States v. Scarfo*, 850 F.2d 1015, 1028 (3d Cir. 1988) for a careful precautionary instruction to reduce the risk of anonymity causing prejudice against the defendant.

Defense counsel neither objected to the use of a "numbers" jury, nor to the trial court's failure to give a cautionary instruction. This was clearly deficient performance because under the rule of *Britt/Tucker*, the trial court erroneously exercised its discretion by failing to apply the correct standard of law. *Tucker*, 2003 WI 12, ¶ 10, 20. Unlike *Tucker*, however, the error in Kendhammer was not harmless and thus the defendant was prejudiced by the deficient performance.

The State did not have an overwhelming evidence of guilt as it did in *Tucker*. In this case, there was no confession. Indeed there were hundreds of denials in his law enforcement interrogations and testimony. The State presented no motive, no clear timeline for the crime, no location where it occurred and no method or instrumentality that explained all the injuries they claimed were intentionally inflicted by the defendant. Even without the necessary expert witnesses the defense should have presented at trial (*see infra* at Sections III.B.1, 2 & 3), this was a close case. The State conceded at closing he did not know why Kendhammer would have killed his wife or how. The defendant "for some reason that I can't tell you, because he's the only one who knows, killed his wife and then tried to cover it up." (Doc. 122, p. 88, 99). Every witness who knew the couple testified that the defendant and his wife had a solid, happy marriage. The State was forced to rely on pure speculation that the couple had secrets: "And when I heard everybody talking about

the perfect marriage, every marriage has its ups and downs and everybody has secrets. Some more disturbing than others. Everybody's got things they don't tell other people. Kids don't tell their parents everything. Parents don't tell their kids everything." (*Id.* at 29).

In such a close case, the State cannot prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the court's error in violating *Tucker*, so the error was not harmless. The *Tucker* rule is designed to protect the presumption of innocence and ensure the defendant is not prejudiced by the anonymous jury practice negatively reflecting on his guilt or character. There is no assurance beyond a reasonable doubt that Kendhammer was not harmed here. Therefore, there is a reasonable probability of a different outcome if defense counsel had not been deficient in failing to object to the court's error.

Accordingly, the defendant was deprived of his constitutional right to the assistance of counsel and the conviction must be vacated.

II. The Defendant's Right to the Presumption of Innocence and His Right to a Public Trial Was Denied by the Court's Order That Any Spectators must Sit Evenly on the Prosecution and Defense Sides of the Courtroom or They Would Be Excluded from the Courtroom.

In the same email on the Friday evening before trial, the court also announced *sua sponte* a seating arrangement for spectators. The judge stated:

> The Court will reserve the right to instruct the public viewing the trial to sit where the Court decides they should sit or to exclude individuals

> as the Court deems appropriate to exclude. An Order concerning this will be posted outside the courtroom. The Court's intent is to assure a fair trial to both sides and if the Court deems any behaviors to be intimidating or threatening toward any witness, any party, or toward the jurors at large, such behavior will be immediately dealt with and any offending party will be removed from the courthouse.
>
> During the trial, the Court will not allow anyone to stand in the courtroom to view the trial. Furthermore, the public will be required to fill the seating from the front, evenly on each side of the courtroom. A deputy will be present to make sure that the public in the courtroom does not exceed the allowable number of people to be present in the courtroom. The deputy will be instructed to order any excess people or people violating the Court's expectations to leave the courtroom.

(Doc. 61, p.1). The judge identified no threats or particularized concerns about the anticipated spectators and gave no reason for the unusual order that spectators must sit evenly on both sides.

On the first day of trial the court stated his order on the record, again without any explanation to justify the ruling.

> I think the deputy made a point to the audience that since this is live stream, if I feel that there's any improper seating in the audience where they're all trying to sit behind one side or the other, I'm going to exclude them from the -- witnessing the trial in the courtroom. So they can keep that in mind.

The court then commented:

> Seems a little lopsided, so I'm going to have you even out or you're not going to be in here. If you don't understand what that means, the deputy can explain it to you.

(Doc. 123, p. 4).

Three years later, in a *sua sponte* order to seal juror information from the media, the judge attempted to add facts that shed light on his reasoning, but these supplied no legal justification. (Doc. 156). The court used the *Tucker* factors supporting an anonymous jury to justify its order denying public access to the juror names and addresses three years after the trial concluded.[11] One of those factors is the possibility that extensive publicity could enhance the possibility that jurors' could be exposed to "intimidation or harassment." 2003 WI 12, ¶ 22. The court stated that after the trial in 2017 the judge spoke to the jury and none wished to speak to the media at that time. (Doc. 156, p. 2). The court then added concerns related to the defense and its spectators at the trial in 2017.

> During the trial of this matter, the Court was concerned of efforts by the defense to send a message of support for the Defendant to the jury. Outside the presence of the jury, the Court instructed counsel, as well as spectators, that the spectators were not to amass themselves behind the Defendant but were to spread out throughout the courtroom. While the spectators appeared to act appropriately during the trial, especially while in the presence of the jury, the Court did not want any appearance of excessive support of the Defendant by how the courtroom was occupied. The Court was aware that potential spectators who would have been in support of the victim did not come to the courtroom to watch the proceedings and instead viewed the trial on various live streaming venues. The Court was further aware that these spectators did not want to be in the vicinity of those who they knew were supporting the Defendant.

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[11]Ironically, this caselaw was ignored at trial when the court ordered a "numbers" jury.

(*Id.* at 2-3). None of this information was stated on the record at the time of the court's unusual seating arrangement order, nor did the court provide any source for any of its new factual assertions in its recent order.[12] Importantly, none of it justified the court's order, which had the effect of interfering with the defendant's right to a public trial and his due process right to the presumption of innocence.

There was no support for the prosecution among those who knew the couple, including the deceased's family members, who disagreed with his prosecution and supported him at trial. Family and friends did not want to sit on the prosecution side of the courtroom because they did not support the State's decision to prosecute a man they believed to be innocent. The personal convictions of defense supporters are no less worthy of expression in a courtroom than supporters of victims who more typically pack courtrooms at trial and choose to sit only on the prosecution side of the courtroom. This "bride and groom wedding seating" is commonplace and, if not disruptive, should not be micro-managed by a judge entrusted to sit impartially at a trial.

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[12]Based on this recent information, it appears the judge may have based his order regarding spectator seating on off-the-record sources. Therefore, the judge may be a potential witness in the post-conviction hearing and may need to recuse himself. *See, e.g., State v. Harvey*, 139 Wis. 2d 353, 376-77, 407 N.W.2d 235 (1987) (judge recused on post-conviction to testify as witness to deny that he met with counsel in chambers and suggested the number of years in prison he would get if defendant entered plea bargain).

Post-conviction counsel has found no case reported anywhere in which a trial judge ordered family, friends or other supporters of a victim to sit evenly on both the prosecution and defense sides of the courtroom. The court's reasoning in its recent order that "the Court did not want any appearance of excessive support of the Defendant by how the courtroom was occupied" (Doc. 156, p. 3), is specious. The court conceded that the defense spectators acted appropriately during the trial, so what exactly is an "excessive show of support" and how would it justify an intrusive order? All defendants enjoy a constitutional due process right of a presumption of innocence, so the decision of defense supporters to sit only on the defendant's side in no way impacts the State's right to a fair trial. The purpose of the order was to create an appearance of fake support for the prosecution and reduce the defendant's presumption of innocence.

Private actors who appear in court in support of a victim wearing identifiable clothing or buttons are generally not excluded, nor held to violate a defendant's right to a fair trial. In *Carey v. Musladin*, 549 U.S. 70, 77, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006), the Supreme Court ruled that it did not violate the defendant's right to a fair trial to allow members of the victim's family to attend the trial while wearing buttons displaying the victim's picture. *See also, State v. Lord*, 161 Wash. 2d 276, 284, 165 P.3d 1251, 1256 (2007) (silent showing of sympathy or affiliation in a courtroom,

without more, is not inherently prejudicial). Similarly, in *United States v. Thomas*, 794 F.3d 705, 710–11 (7th Cir. 2015), the court found no prejudice to a defendant when twenty firefighters appeared in court in uniform to support the victim. *See also Smith v. Farley*, 59 F.3d 659, 664 (7th Cir.1995) (police spectators).

If such silent support by private citizen actors is routinely upheld in support of the prosecution, the court cannot prohibit orderly behavior that demonstrates support for the defendant. The trial court demonstrates partiality to the prosecution by such an order.[13]

The court's decision to restrict the seating of defense supporters in the courtroom and exclude anyone who did not wish to comply also violated his right to a public trial. The court's Friday-evening-before-trial email statement that "[s]ince the trial will be available to the public via live streaming on two different television networks, WKBT and WXOW, the public will be able to view the trial through that means" (Doc. 61, p.1), satisfies neither the statutory nor constitutional right to an open, public trial. Live streaming does not take the place of an open courtroom because much of a trial cannot be broadcast or filmed by media. This includes

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[13]The trial court's ruling targeted at defense spectators who did nothing improper also supports prior counsel's Motion to Recuse, (Doc. 92 & 93), which the court denied but which is preserved for appeal and need not be addressed in this post-conviction motion. A defendant need not file a post-conviction motion for issues that have already been raised and, thus, preserved in the trial court. *See* § 974.02(2); *State ex rel Rothering v. McCaughtry*, 205 Wis.2d at 678 n. 3, 556 N.W.2d 136.

filming during recess and filming jurors. *See* SCR. 61.08; SCR 61.11. But persons present in an open courtroom can watch the jurors and prospective jurors for many factors relevant to the public's right to transparency in its court proceedings, including a juror's facial expression, inattention or even sleeping jurors. In addition, Wis. Stats. § 757.14 states that "the sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examination of persons charged with crime...." There is no basis to order the spectators to sit behind the prosecution or face expulsion from the courtroom.

The right to a public trial is protected by the Sixth Amendment to the United States Constitution, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. The right to a public trial is not without exceptions, but a trial may be closed only if a court meets the four-part strict scrutiny test set forth in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984): (1) there must be an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure. Absent these exceptions, closing a trial to the public violates the constitution. *State v. Vanness*, 2007 WI App 195, ¶ 9, 304 Wis. 2d 692, 697, 738 N.W.2d

154, 157. The court in this case made no such findings or narrowly tailored its ruling excluding from court any defense supporting spectators who refused to sit on the prosecution side of the courtroom.

The importance of a public trial is not just to satisfy the public in criminal justice but to ensure the defendant's rights are protected:

> [t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....
>
> *Gannett*, 443 U.S. at 380, 99 S.Ct. 2898 (citation omitted). Recognizing the implications of this holding, we must still conclude this basic constitutional right requires an open trial, regardless of when it is conducted. "The Supreme Court has noted, '[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.' " *Walton*, 361 F.3d at 433 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 241-42, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Courts will simply have to devise methods which protect the accused's right to a public trial.

State v. Vanness, 2007 WI App 195, ¶ 18, 304 Wis. 2d 692, 700–01, 738 N.W.2d 154, 159.

The violation of one's right to a public trial is a structural error that will result in automatic reversal if counsel objects and preserves the issue. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910, 198 L. Ed. 2d 420 (2017). Kendhammer's defense

counsel did not object to the court's order restricting defense spectators. However, in some instances prejudice may be presumed. In *Weaver* the court noted that because *Strickland* allows prejudice to be presumed by a demonstration of fundamental unfairness, the issue of prejudice from the failure to object to a violation of the public trial right is whether that rendered the trial fundamentally unfair. *Id.* at 1913. In *Weaver* the trial judge excluded the defendant's mother and minister from the jury selection procedure. The court noted that "[i]t is of course possible that potential jurors might have behaved differently if petitioner's family had been present. And it is true that the presence of the public might have had some bearing on juror reaction." *Id.* at 1912. But no prejudice was found because the closure was limited and the judge was not involved in the decision.

In Kendhammer's case, however, the court's order restricting the seating of defense supporters remained for the entire trial and the bailiffs were directed to tell any spectator the rule. (Doc. 123: 4). The order came from the judge, not just a court officer, and the nature of the court's *sua sponte* order showed the court was not neutral in its purpose or conduct. The court gave no reason at trial for the order other than calling "improper" any seating where spectators sought to sit near Kendhammer. (Doc. 123, p. 4). Three years later the court explained that its order was made because it was concerned the defense would "send a message of support

for the Defendant to the jury," and the court "did not want any appearance of excessive support of the Defendant by how the courtroom was occupied." (Doc. 156, p. 2-3). Thus, the purpose was to affect the defendant's right to the presumption of innocence afforded by a show of supporters who believed in him, while restricting his right to a public trial by precluding his supporters from witnessing the trial from the courtroom if they refused to comply with the forced seating arrangement. This shows the court did not "approach [its] duties with the neutrality and serious purpose that our system demands." *Weaver*, 137 S. Ct. at 1913.[14] This "rendered the trial fundamentally unfair," so prejudice is presumed. *Id.* at 1913

Finally, the right to a public trial serves a role in ensuring the public that its criminal justice is fairly administered in accordance with the law by courts that are impartial. The public-trial right also furthers interests other than protecting the defendant against unjust conviction, including the rights of the press and of the public at large. *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 508-510 (1984). The supreme court has noted that "various constituencies of the public—the family of the accused, the family of the victim, members of the press, and other persons—all have their own interests in observing" a trial. *Weaver* 137 S. Ct. at 1909. Therefore, a defendant can assert the rights of third parties and the

[14]For other examples of the court's lack of neutrality throughout the trial see the affidavit of counsel which was part of the motion to recuse filed before sentencing. (Doc. 99).

general public in addition to his own when challenging violations of the right to a public trial. *Id.*

III. Todd Kendhammer Was Denied the Effective Assistance of Counsel.

The defendant was denied the effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.

A. Legal standards for effective assistance of counsel.

Courts employ a two-pronged test for the ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel must first "show that the counsel's representation fell below an objective standard of reasonableness." *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176, 181 (1986), quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case." *Strickland*, 466 U.S. at 690; *see, Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

Trial counsel's representation must be equal to that which the ordinarily prudent lawyer skilled and versed in criminal law would give to clients who had privately retained his services. *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973). Of course, the fact that an attorney is ineffective in a particular case is not a judgment on the general competence of the lawyer. Rather, it is merely a

determination that a particular defendant was not appropriately protected in a particular case. *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167 (1983). Our supreme court has observed:

> Ineffectiveness is neither a judgment on the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly: The question is not whether the defendant received the assistance of effective counsel, but whether he received the effective assistance of counsel. In applying this standard, judges should recognize that lawyers will be ineffective some of the time; the task is too difficult and the human being too fallible to expect otherwise.

Felton, 110 Wis. 2d at 499, quoting Bazelon, *The Realities of Gideon and Argersinger*, 64 Georgetown Law, J. 811, 822-23 (1976).

It is not necessary, of course, to demonstrate total incompetence of counsel, and the defendant does not claim that here. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel ... may in a particular case be violated by even an isolated error ... if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *State v. Moffett*, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "[A] counsel's performance prejudices the defense when the 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Johnson*, 395 N.W.2d at 183, *quoting Strickland*, 466 U.S. at 687." The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett*, 433 N.W.2d at 576, *quoting Strickland*, 466 U.S. at 693. Rather,

> The test is whether defense counsel's errors undermine confidence in the reliability of the results. The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt.

Moffett, 433 N.W.2d at 577 (citation omitted).

A defendant need not show prejudice beyond a reasonable doubt or even by a preponderance of the evidence. *State v. Dillard*, 2014 WI 123, ¶ 103, 358 Wis. 2d 543, 575, 859 N.W.2d 44, 59 (reasonable probability standard is lower than preponderance of evidence standard); *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985); *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The prejudice prong of the test for ineffective assistance is satisfied if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." *Strickland,* 466 U.S. at 694. If a defendant demonstrates such a reasonable probability then a conviction will be reversed because confidence in the reliability of the proceedings is undermined. *Pitsch,* 124 Wis. 2d at 642. The focus of the inquiry is upon fundamental fairness and whether there was a breakdown in the adversarial process that our system counts on to produce just results. *Id.*

B. Todd Kendhammer's Trial Attorneys Provided Ineffective Assistance of Counsel in Several Respects Which Cumulatively Prejudiced His Defense.

1. Trial counsel provided ineffective assistance by their failure to retain and present testimony from a defense forensic pathologist who would have contradicted the opinion of the State's pathologist and supported the defense that the injuries to the decedent were consistent with an accident.

With all due respect to both trial counsel, the failure to present testimony from a defense forensic pathologist in this case was objectively unreasonable. The central issue in this case was whether Barbara Kendhammer died as a result of a tragic accident or whether her husband intentionally killed her and staged the scene to make it appear to be an accident. The State's pathologist, Dr. McCubbin, had only part of the case facts when she first conducted her autopsy. She believed the overall injuries she saw on the decedent's body were not consistent with a single pipe crashing through the windshield and striking her. She was not initially given the details of all the innocent ways other parts of the decedent's body could have been

injured during the course of and after the accident. This included injuries she received during involuntary movement after the severe brain injury, her movement by the defendant taking her out of the car, dragging her unconscious body several feet to reposition her twice for CPR, treatment at the scene by the EMT, including failed intubation efforts, and her subsequent treatment at the hospital and extensive harvesting of organs. Dr. McCubbin's initial opinion was largely uninformed but dovetailed with the investigators' largely uninformed suspicions. The investigating officer who met with her the next day had interviewed the distraught and traumatized husband on the way to the hospital and the officer did not have an open mind. With his tunnel vision firmly entrenched, the officer did nothing to enlighten Dr. McCubbin about all the movements and manipulation of her body that could be consistent with the innocent explanation of many of the minor and more serious injuries. By the time Dr. McCubbin filed her autopsy report and testified at the preliminary hearing it would have been obvious to an objectively reasonable defense attorney that her opinions were fixed that the case was a homicide, not an accident. This was highly unlikely to change at trial.

The defense required an experienced, qualified forensic pathologist to evaluate the case and, if appropriate, rebut the State's expert. It was objectively unreasonable for trial counsel to assume that the State pathologist's opinions about

the manner in which the decedent was injured would somehow become favorable to the defense or that he could get her to change them. This was a huge problem for the defense because the State expert's unfavorable opinions - which she supported by a misleading diagram of the decedent's "injuries" - were obviously going to be crucial to a jury considering this defense.

Instead of presenting valid and contrary opinions from a qualified forensic pathologist, the defense relied on a biomechanical engineer and emergency room doctor to explain away Dr. McCubbin's opinions. But neither was qualified to refute the opinions of a forensic pathologist. In many ways, the engineer, Dr. Barry Bates, actually helped the State as much or more than the defense.

On cross-examination Bates admitted he had no medical degree (Doc. 119 at 166), yet both in his written report and his testimony on cross-examination he conceded that the injuries to her neck could possibly have come from strangulation, an opinion he was not qualified to give. (*Id.* at 173). He also told the prosecutor that he had "read the reports and the interviews" and conceded "there was no information about a pipe bouncing." (*Id.* at 178). This was wrong. Bates had either not reviewed all the reports in the discovery or missed the references, because there was such evidence. As argued, *infra* at Section III. B. 3. the accident report of

Kendhammer's earliest statements said that the "pipe bounced off the roadway" and he heard a loud bang before he saw the object.

Worse yet for the defense, Bates undercut the defendant's own testimony when he told the prosecutor "I don't believe [the pipe] came off of that truck and came through the windshield." (*Id.* at 180). The DA quickly replied: "Well, I don't either. That's the story you were given." (*Id.*).

Bates also gave a number of opinions that he was not qualified to give regarding blood spatter and other matters not within his area of expertise. For example, Bates had this damaging exchange with the DA:

> Q. Exhibit 34 is a [photo] of the scene, some blood spatter on the rim of the tire?
> A. Correct.
> Q. The injuries that we see, lacerations of the back of the head would be consistent with somebody bashing a head against the rim of the tire, would it not?
> A. Could be, yes.

(*Id.* at 183). He also was shown photographs of the decedent and said an apparent "bruise to the chin" would be "consistent with someone punching a person with the left hand hitting the right side of their face, would it not? A. Could be, yes." (*Id.*). And he said scratches on Barbara's neck "would be consistent with an attempted strangulation of a person scratching their neck to get the hands off their neck." (*Id.* at 184: "It's a possibility, yes"). He also was shown a photograph of scratches to

Todd Kendhammer's neck and said they could be "consistent with a struggle of two people facing each other in a car and fighting." (*Id.*). He also was asked to comment on the cricoid fracture in her neck, and overstated the findings of the State's pathologist by claiming there were "a lot of fractures in the neck throat region,"[15] but he did not deal with them in his evaluation because they were "medically oriented and I'm not a medical doctor." (*Id.* at 188). A juror also asked him a question "could the injuries to the back of her head be caused by the side of the pipe being swung like a bat?" He responded that it was possible, but he didn't believe there was "adequate space to swing the pipe inside the vehicle." (*Id.* at 199). This answer would not have dispelled the juror's potential concern that the injuries might have occurred by swinging the pipe at her when she was outside the vehicle. The bottom line is that Bates was not qualified to give any of these opinions and the defense failed to offer the evidence of an expert who could have answered these questions.

The emergency room doctor called by the defense could not substitute for a forensic pathologist. He was a medical doctor, not a forensic pathologist. He had never been an expert witness in a homicide case and never before testified about cause of death in a criminal case. (Doc. 120, p. 40). He had only attended one autopsy, approximately seven years earlier. (*Id.* at 41). He had no formal training in

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[15]Dr. McCubbin testified to only one fractured area in the neck/throat area, the cricoid cartilage fracture. (Doc. 125, pp. 41-42).

death investigation or crime scene investigation. (*Id.* at 42). He was found by the defense because someone on the defense team knew Dr. Cook's brother. (*Id.* at 43). His inexperience as a witness showed because either due to inadequate preparation for his testimony or something else, he got mixed up about which of the decedent's injuries were on the right side and which were on the left. (*Id.* at 44-48). On direct examination he incorrectly stated the hyoid bone was fractured (*Id.* at 28) and had to be corrected on cross-examination that the hyoid bone was intact and that it was only the cricoid cartilage that was fractured. (*Id.* at 51-51). In closing argument the prosecutor was able to ridicule his testimony:

> Dr. Cook had the injury wrong. He went back and forth on whether the left or right was caused first, then said he got his left and rights mixed up. He said the mug caused the abrasions on her neck, which I still don't understand how that would happen. He said the injury to the left happened first, disagreeing with Dr. Bates.

(Doc. 122, p.33).

It was deficient performance for defense counsel to not have presented a defense forensic pathologist in this case who could have directly confronted Dr. McCubbin's positions. In *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005), a defense attorney failed to consult or retain an arson expert who could have challenged the state's expert's conclusion that a fire was arson. The court found defense counsel's performance was deficient, in part because of the importance to the defense of

challenging the state's expert and the crucial role the state's expert played in the case. *Id.* at 328-29. The court also noted that defense counsel was aware early on that there was a need for a defense expert, yet failed to retain one. *Id.*

Similarly, Kendhammer's trial attorneys knew or should have known early in his representation that demonstrating that his wife died in an accident would require the support of a defense expert in forensic pathology. Yet they failed to retain one. The defense experts that were employed were highly vulnerable to the prosecutor's cross-examination and gave opinions that supported the State, which shows either that they were not well prepared, or were unqualified to use in a jury trial of homicide. *See Dugas*, 428 F.3d at 331.

Trial counsel obviously knew the State would call Dr. McCubbin at trial and she had expressed opinions contrary to the defense in her autopsy report and in testimony at a preliminary hearing. Yet, they failed to bring in a qualified witness to rebut her findings. This was objectively deficient performance.

Trial counsel's determination to proceed to trial without a defense forensic pathologist was, alone, deficient performance because of a failure to fully investigate and prepare a defense. Nor can this be deemed simply a matter of strategy which ends the inquiry. In *Adams v. Bertrand*, 453 F.3d 428, 436 (7th Cir. 2006), the Seventh Circuit reversed a conviction and ordered a new trial, rejecting a defense attorney's

claim of strategy to justify his failure to investigate a witness. The trial attorney claimed it was part of his strategy to not call any defense witnesses. He testified that because of this strategy it was not necessary to interview a witness who was present at several points before the alleged assault. The Seventh Circuit found the trial attorney provided ineffective assistance because he committed to a predetermined strategy without a reasonable investigation that could have resulted in the presentation of a pivotal witness. Here, Kendhammer's counsel apparently committed to a strategy before they undertook a full investigation, by consulting with a *forensic pathologist* to test the accuracy and foundation of Dr. McCubbin's opinions. Her preliminary hearing testimony showed that even on defense cross-examination she could not be shaken from her primary opinion that the case was a homicide, not an accident. This should have compelled them to find their own supporting expert. *See also Rompilla v. Beard*, 125 S.Ct. 2456, 2463 (2005)(attorney's failure to investigate material he knows prosecution will rely on is ineffective assistance).

It is not always necessary for a competent defense attorney to employ his or her own expert when the state proposes to do so, as there may be no reason to question the validity of the state's evidence. *See, e.g., United States v. Anderson*, 61 F.3d 1290, 1298-99 (7th Cir. 1995). But in an appropriate case defense counsel's duty

to investigate all available defenses includes the duty to seek an opinion from a qualified expert. *Rogers v. Israel*, 746 F.2d 1288 (7th Cir. 1984). Moreover, even counsel's otherwise admirable performance does not excuse the failure to consult an expert as part of counsel's duty to investigate. (*Id.*). *See Moore v. United States*, 432 F.2d 730, 739 (3d Cir.1970) (*en banc*) ("representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case ...").

When the expert evidence is crucial enough to the state's case and a defense expert is available to rebut the state's expert, the failure to employ a defense expert can alone be enough to constitute ineffective assistance of counsel. *See, e.g., Gennetten v. State*, 96 S.W.3d 143, 150-51 (Mo. App. 2003) (failure to utilize available expert was ineffective assistance where expert would say child's burns could have been received accidentally). *See also Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (failure to consult DNA, treadmark or footprint expert was deficient performance where such experts would have contradicted state's claims). *See also Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir.1987) (holding that counsel acts deficiently when he or she "fails to take an obvious and readily available investigatory step

which would have made the defense viable). Failure to obtain a forensic pathologist to challenge Dr. McCubbin was therefore deficient performance.

The defendant was prejudiced in this case because an expert to contradict Dr. McCubbin was available and could have provided testimony that would have given the jury "reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. A forensic pathologist such as Dr. Shaku Teas, whose affidavit is attached to this post-conviction motion, would have assisted the defense in challenging the State's expert. Contrary to Dr. McCubbin's opinion, Dr. Teas states:

> It is my opinion that the injuries Barbara Kendhammer sustained are consistent with the defendant's statements that a pipe flew through the Kendhammer vehicle windshield and struck his wife who was a passenger in the car and the subsequent sequence of events that occurred after the incident. Barbara Kendhammer died as a result of craniocerebral injures sustained as a result of a vehicular accident.

Affidavit of Dr. Shaku Teas, ¶ 4.

Dr. Shaku Teas is board certified in anatomic, clinical and forensic pathologist with thirteen years of experience as an assistant medical examiner in Chicago. She has performed more than 6,000 autopsies and served as a consultant for both the prosecution and defense. *Id.*, ¶ 1. She thoroughly reviewed material relevant to a medico-legal investigation of Barbara Kendhammer's death and the prosecution of the defendant, including the autopsy report and photos and the trial testimony of Dr. McCubbin and many other witnesses. *Id.* at ¶ 3.

Dr. McCubbin believed the injuries to Barbara were not consistent with her receiving a blow from a pipe coming through the windshield because she did not observe any "impact site on the body that to me had a pathognomic curvilinear aspect." (Doc. 125, at 95). Dr. Teas disagrees with Dr. McCubbin's opinion that a single blow from a pipe could not have caused the fatal injuries to Barbara Kendhammer's head:

> The lacerations observed and photographed by Dr. McCubbin on the occipital part of the head are consistent with a pipe hitting her head tangentially, grazing the head and causing the lacerations to the scalp as well as the skull fractures and subarachnoid bleeding and subdural hematomas, the cerebral injuries. They were not necessarily caused by the end of the pipe. They are consistent with being caused by the elongated, tubular part of the pipe hitting the head tangentially and hence they do not need to have "curvilinear mark" from the circular end of the pipe. A metal pipe hitting the head tangentially does not have to "avulse" the scalp. The lacerations have irregular edges and are deep especially the one to the right side. The area should have been shaved at the autopsy initially to better appreciate the appearance and configuration of the lacerations. The area was shaved at the time of reexamination the day after the autopsy after the head had already been opened.

(*Id.* at ¶5).

Dr. Teas could have also debunked the prosecution's theory, expounded upon in his rebuttal closing argument, that the head injuries to Barbara came from Kendhammer beating her with his fists while she was on the ground outside the car.

(Doc. 122 at 90).[16] Dr. Teas states: "The lacerations to her scalp and the skull fractures are inconsistent with blows from a person's fists. They are consistent with the defendant's statement that a pipe flew through the windshield and struck his wife as her head moved forward." (*Affidavit of Dr. Shaku Teas*, ¶ 6).

Dr. Teas also would have rebutted the prosecutor's argument that bruising on the inside of Barbara's upper and lower lips came from her husband holding his "hand over her mouth"pressing against her teeth. (Doc. 124, at 26; Doc. 122, at 40). While the prosecutor argued that this mechanism was a cause for the inside lip bruising, he never expressly received that opinion from his forensic pathologist. But he did get Dr. McCubbin to opine that there would have to be a "pretty forceful" blow to her face "to generate this amount of bruising on the inside of the lips." (Doc. 125, at 30-31). Dr. Teas, on the other hand, notes that "the mucous membrane inside the mouth is thin and the tissue loose, vascular and bruises easily and the bruises are easily visible." (*Affidavit of Dr. Shaku Teas*, ¶ 7). She concludes that the injuries to the inside of the decedent's upper and lower lips are consistent with injuries

[16]The prosecutor's actual theory of how and where Barbara Kendhammer's injuries occurred was never stated until his rebuttal closing argument. He offered no theory in his opening, instead focusing on what he claimed were untruths in the defendant's story of what happened, conceding that "I won't pretend to you that I know everything that happened that day, because I wasn't there. Barb unfortunately has passed away, and the only person that can tell us what happened is telling a story that is not true." (Doc. 124 at 36). He got Dr. McCubbin to say that some of her injuries "could be consistent with an assault or beating .. consistent with blunt force trauma from a fist." (Doc. 125, at 94). But it was not until his rebuttal closing that he presented his theory: "for Mr. Hurley to say that I never gave you an example of where these injuries came from or what would cause them. His fists." (Doc. 122, at 90).

which would occur in an automobile accident, when the head and face strike hard surfaces such as the dashboard." (*Id.*).

Dr. Teas also opines that the laceration to her forehead and nasal bone fracture are explained by the forehead, face and neck making contact with the dashboard during the accident. (*Id.*). Her opinion would undercut the State's doctor's opinion that it would "take some force to cause a [nasal] fracture, obviously." (Doc. 125, at 34). Dr. Teas notes that "[i]t does not take much force to fracture the thin, small nasal bone and nasal bone fractures commonly occur in automobile accidents." (*Affidavit of Dr. Shaku Teas*, ¶ 7).

The State also used a number of injuries to infer that Barbara Kendhammer was manually strangled by her husband. Dr. McCubbin noted that she had a fracture to her cricoid cartilage, a small area in her neck below the hyoid bone. (Doc. 125, at 41). Among the causes for such a fracture she listed "manual strangulation, where there's intense pressure on the cricoid." (*Id.* at 42). Dr. Teas, on the other hand, noted that there was no corresponding "fracture or damage to the thyroid cartilage or hyoid bone or hemorrhage in the musculature of the anterior neck." (*Affidavit of Dr. Shaku Teas*, ¶ 8). Therefore, she concluded:

> The comminuted cricoid cartilage fracture with depressed anterior fragment was not consistent with manual strangulation. An isolated comminuted cricoid cartilage fracture with displacement would be very unusual in strangulation. This cricoid fracture is more consistent

> with an automobile accident as her head struck the dashboard or other surfaces in the automobile. There was no evidence of strangulation.

(*Id.*).

Introducing Trial Exhibit 70 to the jury as a photo apparently taken while Barbara Kendhammer was still in the hospital, Dr. McCubbin pointed out abrasions on her neck that she described as "curvilinear and irregular," which could be consistent with fingernails. (*Id.* at 39-40). The doctor later said the abrasions were not only consistent with fingernails scratching her neck but were "possibly probable" as the cause because she could not envision another mechanism that would cause such an injury. (Doc. 125: 100). She said they could have been received during manual strangulation. (*Id.* at 94). The cricoid fracture and abrasions on her neck were obviously of great import in influencing Dr. McCubbin's opinion that Barbara Kendhammer died as the result of a homicide. She said that "in and of itself [sic] there are certain injuries that raise a high level of suspicion for me, and those would be, in combination, the abrasions on the neck and the fracture of the cricoid cartilage." (*Id.* at 102-03). The jury was left with no countervailing opinion from a qualified expert pathologist.[17]

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[17]Dr. Bates expressly declined to give an opinion about the neck injuries and did not consider them. (Doc. 119, p. 188).

In fact, Dr. Teas would have provided that contrary opinion about the neck abrasions as well as the cricoid fracture. Dr. Teas states:

> The neck abrasions depicted in a photograph designated Trial Exhibit 70 apparently taken at the hospital are inconsistent with fingernail markings. They are consistent with perimortem or post-mortem injuries from glass, gravel, coarse grass or other items and the cervical collar that was placed on the decedent. They are not curvilinear as would be expected if they were caused by fingernails.

(*Affidavit of Dr. Shaku Teas*, ¶ 9). Dr. Teas also notes that the neck was not properly examined at the autopsy: "Dr. McCubbin did not take any dedicated photographs of the neck or with the neck extended on a block. It also seems that the neck was not dissected in the manner recommended for strangulation cases—i.e., to dissect the neck last after all the organs had been removed and the brain removed to avoid artefactual neck hemorrhage." (*Id.*). Dr. Teas also explained that hemorrhage seen in the lateral neck muscles could have been caused by other innocent factors, including medical treatment and disorders: "Insertion of central line in the neck in left subclavian vein, difficult intubation at scene and at the hospital and development of disseminated intravascular coagulopathy (DIC) can account for some of the hemorrhage seen at autopsy. The comminuted cricoid fracture was also associated with hemorrhage and edema." (*Id.*).

In the State's opening statement, the prosecutor showed the jury a "full body chart that shows she had bruises and abrasions all over her body. Her legs have

bruises on them, her arms had marks and bruises, her chest area, her clavicle had bruises." (Doc. 124 at 25). In her testimony, Dr. McCubbin showed the jury that chart, which appeared to show multiple injuries all over Barbara Kendhammer's body. (Trial Exhibit 7; Doc. 125 at 59). The prosecutor had her point out numerous contusions on her torso and extremities, which the doctor said were "blunt impact injuries." (Doc. 125 at 64). In closing argument the state reviewed this testimony, claiming that the "location of the injuries and the type of injuries do not line up with a pipe in any way. They do line up with a beating. A fatal beating." (Doc. 122 at 10). The prosecutor related all the injuries on her head and body:

> Abrasion on her left clavicle. A bruise on her right and level clavicle. A bruise on her right lower back. A bruise on her left lower back. A bruise on her upper back. Abrasion on her left thumb. A bruise on her left hand. A bruise on her left forearm. A bruise on the left upper arm. Abrasions on her right hand. Two abrasions on the right ring finger. An abrasion on the right index finger. A bruise on the back upper arm on the right. The right elbow. Bruises on the left mid lower leg. Bruise on the left lower leg. Bruise on the back of the left calf. The center right thigh. The right groin. Two bruises above her knee. Her right shin and her right calf.
>
> This is a woman that was in a fight. This is a woman that was fighting for her life. This is a woman that was getting beat all over her body.

(Doc. 122, at 11).

However, had defense counsel employed their own forensic pathologist they could have refuted all of this. Dr. Teas states:

> The multitude of bruises and abrasions of the extremities (arms and legs) marked in the autopsy diagram are minor and can easily be explained by medical intervention and the process of organ and long bone retrieval for transplantation especially in an individual who has developed DIC as evidenced by the abnormal laboratory values. Most of these bruises were not documented by the medical personnel (paramedics and hospital personnel) who examined Barbara at the scene and when she arrived at the hospital. The bruise on the right side of the cheek and chin was very obvious at autopsy but not noted prior to the application of the neck collar. The bruises are easily explained by medical intervention, the accident and the events that followed.
>
> The minor markings on the decedent's hands, fingers or fingernails are insignificant and do not signify defensive wounds. Many of the injuries to the fingernails and hands were healing and consistent with Barbara's occupation.

(*Affidavit of Dr. Shaku Teas*, ¶¶ 11-12).

Dr. Teas found support for her opinion in the records of Barbara Kendhammer at Gunderson Hospital, none of which were introduced by defense counsel at trial. Absolutely no mention was made in the hospital records of injuries to Barbara's extremities or any of the many alleged "injuries" Dr. McCubbin showed the jury in Trial Exhibit 7 (diagram of body). Dr. Teas reports:

> In my review of the Gunderson Hospital medical records I noted that in the Emergency Room, the doctors who performed a rapid and primary trauma check observed that she was "*without evidence of trauma other than to head and small contusion to L Hand.*" (Gunderson Hospital report, printed 10/27/16, p. 14). No mention was made of the numerous injuries on her extremities that are noted in Trial Exhibit 7, the body diagram created by Dr. McCubbin. Trial Ex. 7 depicts injuries across her body and extremities, including more than twenty contusions and abrasions on her upper and lower legs, arms, back, and

> chest, many of them minor or superficial. In my opinion, nearly all of these minor and superficial injuries noted on Ex. 7 are consistent with the necessary handling of the patient on the shoulder of the road at the scene, during transport, medical care and autopsy, not with a beating using fists or an instrument. Many of these apparent injuries are also consistent with injuries that commonly occur with little force when a patient begins to experience disseminated intravascular coagulation (DIC). *These are not consistent with beating with fists or objects.*

(*Affidavit of Dr. Shaku Teas*, ¶ 14) (emphasis added). Dr. Teas concludes: "My opinion is that the pattern of injuries is consistent with the series of events the decedent experienced as a result of the vehicular accident, the attempts at resuscitation, medical care, movement of the patient, organ harvesting and the autopsy." (*Id.* at ¶ 13).

Defense counsel's cross-examination of Dr. McCubbin was simply not sufficient to substitute for testimony from another forensic pathologist who did not agree with many of Dr. McCubbin's opinions and conclusions. Whatever points defense counsel scored in cross-examination, such as getting Dr. McCubbin to concede it was "possible" the contusions to the inner lips of the decedent may have been caused by something other than pressure from the defendant's hand covering her mouth (Doc. 125, at 73-74), were limited and short-lived after redirect by the prosecutor:

> Q. Was there specifically any questions that Mr. Hurley asked you or things that he brought up that would impact your opinion on the cause of death of Barb Kendhammer?

A. No. My cause, my cause of death remains the same, regardless of any additional information that was brought up today.

Q. And are you still of the opinion that the pattern of injuries that was reported by Mr. Kendhammer is -- or the pattern of injuries is inconsistent with the events related by Mr. Kendhammer?

A. Yes, I am. For the reasons I stated previously, the multitude of injuries, the lack of any impact that I feel is consistent with a pipe impaling her, and the concerning injuries on the neck in particular.

(Id. at 104-05). Dr. McCubbin summarized her opinion that the "totality of injuries" were inconsistent with the defendant's explanation of the accident.

Q. In your autopsy report, you also state, and the defense brought this up when they were questioning you, it is your opinion that a single impact from a pipe, with or without subsequent breaking and possible whiplash-type injury, could not account for the multitude of injuries. Can you tell me why that's your opinion?

A. So that's my opinion because -- for a couple different reasons. The first one is looking at the totality of the injuries. Looking at the injuries on multiple sides of the head, the three lacerations on the back of the head is particularly concerning to me because I don't feel that that's likely consistent with the pipe striking the back of the head, and then you have multiple injuries on the front of the head. And then in and of itself there are certain injuries that raise a high level of suspicion for me, and those would be, in combination, the abrasions on the neck and the fracture of the cricoid cartilage, because I don't see an alternative mechanism that I feel would be consistent with causing that injury in this scenario.

(Doc. 125, at 102-03).

Dr. Teas would have contradicted this devastating testimony by the State's expert:

> The unusual incident, sequence of events after the incident, the movement of the body from the vehicle to the ground and movement to the ambulance, the resuscitation by the husband and paramedics, the difficult intubation, the treatment at the hospital, development of DIC, organ and bone retrieval for organ donation may have made it difficult for the medical examiner to interpret some of the injuries.
>
> It is my opinion that Barbara Kendhammer died as a result of Craniocerebral Injuries sustained as a result of an automobile accident. Injuries sustained in automobile incidents are classified as Blunt Force Injuries. Barbara sustained other injuries in the accident such as the nasal bone fracture, comminuted fracture of the cricoid cartilage, laceration of the forehead and other minor bruises. These other injuries are also consistent with the overall description of the accident and the series of events that followed it. There was no evidence of strangulation.

(*Affidavit of Dr. Shaku Teas*, ¶¶ 15- 16). This was exactly the sort of expert opinion Todd Kendhammer's defense needed, both to support his theory of defense and to supply reasonable doubt as to the State's charges. The defendant was thus prejudiced by defense counsel's failure to present testimony from a forensic pathologist like Dr. Teas.

The forensic pathology evidence presented by Dr. McCubbin on behalf of the State was critical in establishing that the death of Barbara Kendhammer was a homicide, not an accident. There is clearly "a reasonable probability that, absent the

errors, the fact-finder would have had a reasonable doubt respecting guilt," *Strickland* 466 U.S. at 695, had defense counsel presented another pathologist who had a contrary opinion, that the injures to Barbara Kendhammer were consistent with an accidental death. Thus, defense counsel's deficient performance in failing to present countervailing testimony by another forensic pathologist severely prejudiced the defendant and constitutes constitutional ineffective assistance of counsel.

But for the unrebutted testimony of Dr. McCubbin that Barbara's death was not consistent with the defendant's version of the accident, there is a reasonable probability of a different outcome. The State's case was certainly not overwhelming. There were no witnesses to the incident leading to the death of Barbara Kendhammer except the defendant. The defendant promptly called 911 and the tape of that call and the observation of the officers at the scene confirmed the defendant was highly traumatized and demonstrated great concern for the condition of his wife. The State could find no motive for the defendant to kill his wife, no financial gain, no history of domestic violence, no witnesses that he ever even got angry with her in 25 years of marriage. There was no argument on the morning as the two left the home, and a very short time frame for the defendant to have

inexplicably "snapped" and beaten his wife to death. The State could only speculate in its closing argument that "something happened:"

> So what did happen? What truth can we come up with? First, they were driving to work. Barb was dressed for work that day. She planned to go to work by 8 o'clock. He was going to drive her to work, but something happened. I don't know if it was the stress over the camping, work, bills, change in hours. She said something he didn't like. He said something she didn't like. Something happened.

(Doc. 122, at 34).[18] It was really the unrebutted forensic pathologist's testimony that carried the day because, as the prosecutor argued, "we've proved how those injuries didn't happen." (Doc. 122, at 185).

> And we've proven to you how those injuries happened. We've also proved to you how they did not happen and could not have happened. And we've proven to you that Mr. Kendhammer, for some reason that I can't tell you, because he's the only one who knows, killed his wife and then tried to cover it up, and then came into court and lied to you to try to get away with it. Don't let him get away with it.

(*Id.* at 98-99).

Lacking his own expert, Attorney Hurley could do no more than hope his own powers of persuasion could convince the jury not to credit Dr. McCubbin's testimony. Defense counsel's failure to support the accident defense with expert testimony, such as that presented now by Dr. Teas, thus seriously prejudiced Todd Kendhammer's defense.

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[18]The State's proposed triggers for the sudden homicidal rage that was at the heart of its case seem absurd when placed against the genuine history of the couple.

It bears repeating that a defendant is not required to show prejudice beyond a reasonable doubt or even by a preponderance of the evidence. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). Todd Kendhammer has satisfied the prejudice prong of the test for ineffective assistance if there is a "reasonable *probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The defendant submits that confidence in the reliability of these proceedings is undermined, because his trial attorney's failure to utilize crucial testimony from an expert in forensic pathology demonstrates there was "a breakdown in the adversarial process that our system counts on to produce just results." *State v. Pitsch*, 124 Wis. 2d at 642.

2. Trial counsel provided ineffective assistance by failing to present expert psychological testimony concerning human perception and memory and the effect of trauma on a person's ability to recall details of an event.

a. Legal standards on expert psychological testimony.

The law in Wisconsin regarding the use of expert testimony is well established. Testimony by experts is allowed if it will assist the trier of fact to understand the evidence to hear from a witness who is qualified as an expert by knowledge, skill, experience, training or education. § 907.02(1), Wis. Stats. The standard for admissibility of expert testimony is whether it is relevant, that is,

whether it relates to a fact or proposition that is of consequence to the determination of the action and the evidence must have probative value. *State v. Davis,* 254 Wis. 2d 1, 14, 645 N.W.2d 913 (2002).

The same test applies to testimony from psychologists. For example, expert testimony regarding characteristics of battered women may be admitted to explain why a woman in a "violent relationship does not leave." *State v. Richardson,* 189 Wis. 2d 418, 422, 525 N.W.2d 378 (Ct. App. 1994). Similar testimony regarding characteristics of victims, including common reactions to traumatic experiences, are also allowed. Testimony comparing characteristics common to abuse victims and the subject of the testimony, either defendant or victim, has been allowed to assist the jury in understanding the behavior at issue. *State v. Jensen,* 147 Wis. 2d 240, 245, 432 N.W.2d 913 (1988).

Expert testimony on memory is necessary in some cases to explain matters which are not commonly understood, or for which there are counterintuitive scientific evidence:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

State v. Bednarz, 179 Wis. 2d 460, 467, 507 N.W.2d 164 (Ct. App. 1993).

Expert testimony regarding faulty memory has also been ruled admissible. In *State v. Hernandez*, 192 Wis. 2d 251, 255, 531 N.W.2d 348, 349 (Ct. App. 1995), *overruled on other grounds by State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), an expert testified on the State's behalf that faulty memory is just another condition related to a child's behavior after a crime occurs. The court ruled that faulty memory is a post-traumatic behavior similar to other behaviors, such as delayed reporting, and a jury may be assisted by expert testimony about the impact of sexual trauma on all these behaviors. Expert opinion evidence on faulty memory is admissible because it is something outside the realm of everyday experiences normally understood by a juror. "It is information about the child's behavior that the jury might otherwise attribute to inaccuracy or prevarication." *Id.* Thus, expert testimony will be permitted if it serves the "particularly useful role [of] disabusing the jury about widely held misconceptions." *State v. Robinson*, 146 Wis.2d 315, 431 N.W.2d 165 (1988).

The Wisconsin Supreme Court has also noted that scientific studies on the fallibility of human memory has led to new guidelines for eyewitnesses in recent decades. In *State v. Shomberg*, 2006 WI 9, ¶ 17, 288 Wis. 2d 1, 14, 709 N.W.2d 370, 376, although the court upheld the trial judge's decision to exclude expert testimony on

eyewitness identification in 2002, the court noted that given developments in the understanding of human memory since the time of trial "it is highly likely that the judge would have allowed the expert to testify on factors that influence identification and memory" had the trial been held a few years later.

b. Defense counsel failed to present a qualified expert on trauma and memory.

Defense counsel raised the impact of trauma on memory in a truncated form from a witness who had only a limited knowledge on the subject and whose expertise was directly challenged by a juror. Yet, Kendhammer's memory issues were the linchpin of the State's argument that he was lying, and therefore had killed his wife, because "innocent people don't need to lie." (Doc. 122, p. 90). It was essential that the defense provide the jury with testimony from a qualified expert to help them understand how the traumatic events he experienced impacted his memory. The effect of severe emotional trauma on one's memory is not something lay jurors know from common experience, and neither is it commonly understood that trauma impacts the reliability of memory or that other elements may also affect the content of memory.

Human memory played a critical role in both the investigation and trial of this case. The prosecutor relied on common myths many people have about how memory works to persuade the jury that Todd Kendhammer was lying and

therefore must be guilty of murdering his wife. Indeed, the supposed "lies" the DA referenced repeatedly in his opening statement and closing argument were more likely the result of trauma[19] and suggestive questioning[20] that made his memory unreliable about the facts. This included the defendant's memory of how the pipe struck the Kendhammer vehicle, where it came from and the description of a truck he gave after repeated suggestive questioning.

In his opening statement the prosecutor argued Todd Kendhammer was:

> vague about the injuries and how it happened, where the pipe hit her. He was vague about taking her out of the car. He did say a few times that he didn't take her out too nice. And he wasn't sure how the blood got on the rear tire if her head was up at the road when the first responder responded to do CPR on the road. He did not hear any

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[19]"The suffering that flows from beholding the agony or death of a spouse, parent, child, grandparent, grandchild or sibling is unique in human experience. . . Witnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs is an extraordinary experience." *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 656-58, 517 N.W.2d 432, 444-45 (1994). Indeed the first responder asked the police officer to take Kendhammer farther away so he would not have to witness the rescue measures.

[20]Ironically, police are taught to use "trauma-informed" interview techniques when questioning alleged victims of crimes, which teaches that memory loss, inconsistencies or non-linear narratives in their stories does not mean they are lying. *See Trauma-Informed Victim Interviewing*, from the Office of Justice Programs, Office for Victims of Crime, which states:

> The effects of trauma can influence behavior of a victim during an interview. Memory loss, lack of focus, emotional reactivity, and multiple versions of a story can all be signs of trauma exhibited during interviews. Interviewers should be familiar with the signs of trauma and not assume the victim is evading the truth. For example, lack of linear memory is often a sign of trauma.

https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/ (last viewed February 11, 2021). The investigation in Kendhammer's case did not recognize this. Defense counsel did not impeach law enforcement's tunnel vision with government training materials on the effect of trauma.

> arguments. He didn't say he had any blackouts. No drinking or drugs involved. *No memory problems*. Nothing else.

(Doc. 124, at 34) (emphasis added). The State's case also relied on the memory of a witness, Randy Erler, who was late to work and happened to drive by the scene where the Kendhammer vehicle was parked on Bergum Coulee Road and noticed no damage to the windshield. (*Id.* at 34-36). What the jury was not told, by either the State or defense, was that Erler was not interviewed by the police until a week after the incident when a memory which he would have had no particular reason to retain (like an ordinary event of driving by a car on the road when thinking about being late) was likely to be contaminated by news in the media or local gossip.

In his closing argument, the prosecutor repeatedly presented false myths about memory, essentially testifying as an expert himself.

> He always says he doesn't remember. I think that would be burned into your mind. He forgets a lot of things that happen that day that I think most people would say would be burned into their memory forever. Where the pipe hit her. Where she was injured. What was going on. How he got in the ditch. All of that is very vague because he's lying.
>
> . . .
>
> So this is not an accident. This is not something where she fell and hit her head. That's not what's happening. And most importantly, afterwards he's lying and he's covering it up. The only reason to do that is if you caused the injuries. An innocent accident, the truth will be easy to tell. Things like where you were going and what time does she work at are easy when it's an honest accident. When you're innocent. Your story doesn't change when you're innocent.

(*Id.* at 23-24, 31).

In his rebuttal closing argument, the prosecutor continued to present misconceptions about how memory works and what is expected to be retained in one's memory and what is not.

> I would not expect him to know every fact that happened in a split second in something traumatic. I understand that. I wouldn't expect you to give us all the details. But how about any detail? How about what were you talking about? You don't remember your wife's last words to you? How about where did the pipe hit her? Where did you see the injury? Some things you're not going to remember, like the last car you saw on your way to the courthouse this morning you would not remember.[21] But when there's something traumatic happening, that does seem to stimulate your memory a little bit. Where were you when you heard about 911? JFK's assassination? You can describe those in very good detail.

(*Id.* at 92-93). That gave the jury the false impression that the prosecutor's statements were accurate and authoritative, when, in fact, they were neither. That is not at all how memory works. As argued below, a defense expert could have dispelled the many common misconceptions about memory that the State relied upon, and which would mislead a jury lacking expert testimony on memory and trauma. Defense counsel was deficient in not using an expert to explain to the jury the science of human perception and memory and how the statements made by the State have

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[21]Ironically, this was exactly the mundane experience Randy Erler had driving by the Kendhammer car when he was late for work. Any possible observations he might have had were unlikely to be remembered.

been disproved in study after study. Indeed, testimony from a memory expert at trial would have precluded the prosecutor from even arguing myths that scientific studies have shown to be demonstrably false.

The prosecutor relied upon one particular unreliable statement extracted from the defendant when he was traumatized and subjected to precisely the kind of questioning that has a high risk of contaminating one's memory. While Sgt. Yehle was driving a severely traumatized Kendhammer to the hospital where EMT's had taken his gravely injured wife, he pressed Kendhammer to describe the accident. For example, the question of whether the pipe bounced on the road before coming up to penetrate the windshield or whether it fell off a truck and impaled the windshield without ever striking the ground was crucial at trial. The prosecutor argued it was a physical impossibility for him to have had enough time to see, react and punch the windshield to deflect the pipe. Trooper Marquardt said Kendhammer would have had only 1/3 of a second to do if the pipe did not first strike the roadway. (Doc. 127, pp. 10-11). However, this version did not come from the earlier memory of the defendant; it was suggested during questioning by Sgt. Yehle. A memory expert could have explained that many of the details the defendant told the police, and later the jury, were confabulated and not facts that a person would be likely to have retained in the person's memory under the circumstances.

Dr. Geoffrey Loftus is one of the nation's premier experts on memory. He is an emeritus professor of psychology at the University of Washington in Seattle where he has taught since 1972. He has worked in the field of human perception and memory for nearly 50 years, written 8 books and 110 articles, presented at least 160 times in 9 countries and received continuous funding for 41 years from the National Science Foundation, the National Institutes of Health and other agencies for his scholarship on human memory. (*Affidavit of Geoffrey Loftus*, ¶¶ 1-2). He has been qualified as an expert and testified at trial in perception and memory in at least 460 cases in state and federal courts across 16 states in the United States, as well as Canada and Italy. (*Id.* at ¶ 3). He reviewed the Todd Kendhammer case at post-conviction counsel's request and could have provided testimony at trial to educate the jury about how perception and memory affects witnesses under the circumstances of the defendant and the State's witness Randy Erler.

A memory expert like Dr. Loftus could have explained to the jury in Kendhammer's case that much of what lay people (and the prosecutor in this case) believe about memory is false. Human perception and memory has been extensively studied over the last few decades and much research has been published that defense counsel in this case could have investigated and presented at trial.

Dr. Loftus explains that human perception and memory is not like a constantly running tape recording of all that a witness experiences. Rather, "memory of an event goes through a process during which various factors may affect the reliability of the memory."

> First, initial perceptions are fragmented, disorganized, and incomplete.
>
> Second, beginning when the event ends, the witness's memory of the event changes over time in such a way as to become more detailed, more coherent, more organized, and more complete.
>
> Third, the memory changes may, unbeknownst to the witness, cause the memory to be less accurate, rather than more accurate. Hence, while the witness's eventual memory is strong, detailed, real-seeming, and confidence-inducing, it is nonetheless potentially incorrect in important respects. Examples of such false memories abound, both in the scientific laboratory and in everyday life.

Affidavit of Geoffrey R. Loftus, ¶ 12 a, pp. 6-7. Importantly, memory can fail under any of three circumstances, all of which occurred in this case.

> The first involves factors operating at the time of the original event that diminish or preclude a witness's ability to accurately identify the sequence or the nature of the events (e.g., high stress, limited time to perceive, or lack of attention).
>
> The second involves events occurring during the retention interval that intervenes between the time of the original event and the time that the witness is called upon to recollect something about the event (e.g., for any of a variety of reasons, a witness is induced to reconstruct his or her memory on the basis of post-event information). *See, infra* ¶ 12(f).
>
> The third involves the procedures by which information is elicited from the witness's memory.

(*Id.* at ¶ 12 b). Dr. Loftus also states that, contrary to the State's argument and popular belief, mental functioning, and thus memory, function differently and with less accuracy when the subject is experiencing a high stress event.

> In other words, because of high stress, a witness's ability to perceive and memorize critical details of the accident as it is unfolding is diminished.
>
> Lay people typically believe, incorrectly, that a vivid and accurate representation of a traumatic or highly stressful event, replete with many details, is "stamped into a witness's memory" (e.g., Neisser & Harsch, 1999). To the contrary, the scientifically based finding is that there is a negative relation between a witness's stress level during some event and the accuracy of the witness's eventual memory of the event. In other words, the accuracy of a memory is reduced at the higher stress level. This well-founded conclusion runs contrary to common intuition that many lay people assume is true.

(*Id.* at ¶ 12 c, p. 8). This is the very myth that the prosecutor argued to jury, unrebutted by any defense expert testimony, about the defendant's failure to recall certain details of the accident. (Doc. 122, at 23: "He forgets a lot of things that happened that day that I think most people would say would be burned into their memory forever. Where the pipe hit her. Where she was injured. What was going on.").

Dr. Loftus also states that scientific research on how human perception and memory work shows that the situations relevant to the experience of Todd

Kendhammer cause witnesses to end up with some "strong, vivid, detailed and real-seeming" memories that are not necessarily accurate. (*Id.*).

> The reason for this is that a traumatic or stressful event is also almost always a salient or important event – i.e., an event that the witness subsequently thinks about, talks about, is interviewed about, possibly testifies about, and so on. Accordingly, a stressful event is one in which few accurate details about the original event are memorized from the start, but are added later. To compound the problem, there is substantial opportunity for this originally minimal memory to be supplemented with post-event information that is of dubious origin. Post-event information can come from a wide variety of sources; discussions with family, friends or law enforcement, news reports, and internal ruminations. Even questions that are focused or suggestive can affect the memory. Accordingly, the witness's eventual memory of a traumatic or high stressful event is one that is typically replete with details and other richly represented, real-seeming information – but information that, unbeknownst to the witness is potentially false in important ways. This phenomena is widely recognized in the scientific community but is counter intuitive to the beliefs of lay people, including jurors, law enforcement and lawyers.

(*Id.*). Dr. Loftus's testimony would provide important details to a jury about the factors that affect the accuracy of memory. For example, the degree of attention paid to specific elements of an event can affect accuracy, and this would apply not only to Todd Kendhammer's memory of the accident, but also Randy Erler's testimony about his observation of the allegedly undamaged Kendhammer vehicle windshield. Attention is a critical component of the human brain, which must filter out vast amounts of information bombarding the brain at any given instant to avoid being

overwhelmed by stimuli. (*Id.* at ¶12d, p. 9). Information relevant to the task at hand is in focus, while irrelevant information fades to the background. (*Id.*).

> Most generally, attention is a serial process that moves from one area of the world to another. An apt metaphor is that of an "attentional spotlight beam" that moves from one part of the witness's sensory world to another part and focusing on that area at a given time.
>
> When any element of some event is not attended to, it is lost to the witness; i.e., it is not remembered later on. That element does not make it into the final memory because it was not in the "attentional spotlight beam." A witness fails to attend to – and hence will not remember – an eventually important element of an event under either of two circumstances:
>
> > The first is when the element is not relevant to the witness's task at hand and is filtered out.
> >
> > The second is when there are numerous elements of the event that are all relevant to the witness's task at hand, and thus compete for the witness's attention. In this latter kind of event, the witness must sacrifice paying attention to some elements of the event in order to pay attention to other elements of the event that are potentially more important. This may explain why a witness will not remember details such as the color of a car involved in an accident or, as in this case, whether or not an oncoming pipe hit the ground or not. The witness at the time the memory is forming may be simply attending to elements of his environment that are more important such as getting help for an injured person or, as in this case, trying to protect and help his wife.

(*Id.*). Dr. Loftus also explains that the shorter the duration of an event the less perceptual information is available for an original memory. (*Id.* at 12 e, p. 10). He

points out that while some of that is common sense, less well understood by lay people is the concept of "functional duration." This means that of the total duration of an event "only a fraction of that time is available to the witness for memorizing what will later be relevant. " (*Id.*).

Importantly, Dr. Loftus explains that much research has been conducted about the effect of "post-event information" on human memory. This is defined as information about an event that may or may not be correct, that is acquired by a witness after the event and gets integrated into the witness's memory.

> When and to the degree that post-event information is false, its addition to the memory causes the memory to become stronger and more confidence-inducing, but at the same time less accurate. Addition of such post-event information is typically an unconscious act; that is, a witness is later unable to distinguish which aspects of an eventual memory are based on original events, versus those based on post-event information added subsequent to the event. *Leading questions which introduce subject matter may also be integrated into a memory and cause inaccuracy.*

(*Id.* at 12 f, p. 10) (emphasis added).

Critical to an understanding of the fallibility of human memory is that a witness may be confident in their memory and yet it can be inaccurate.

> A witness testifying inaccurately about some critical fact is not necessarily lying; rather decades of scientific research have indicated that *a witness may be testifying honestly about the contents of a memory that seems very real but that, for any number of reasons, is itself false.*

(*Id.* at 12 g, p. 11).

No witness, of course, can give an opinion in testimony about whether or not another witness testified truthfully. *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). But a human perception and memory expert would not have run afoul of that rule in this case. Instead, Dr. Loftus would have disabused the jury of common misconceptions about memory and perception, misconceptions that the prosecutor expressly argued to the jury. Modern social science knowledge presented by Dr. Loftus - who has personally conducted research in this field - would have provided the jury with specialized information that could aid in their determination of the facts in issue. § 907.02(1), Wis. Stats.; *State v. Shomberg*, 2006 WI 9, ¶ 17, 288 Wis. 2d 1, 14, 709 N.W.2d 370, 376 (recognizing almost 15 years ago that developments in the understanding of identification and memory "it is highly likely that the judge would have allowed the expert to testify on factors that influence identification and memory").

Defense counsel made a fleeting attempt to address the issue of memory by using an unqualified expert, Barry Bates, at trial. He testified, without objection by the State, about short-term memory versus long-term memory. (Doc. 122, at 160-64). However, he did not testify about any of the common misconceptions about memory argued by the prosecutor, including the incorrect expectation that a witness experiencing a traumatic event would have it "burned into their memory." (Doc.

122, at 23-24). More importantly, Bates was not qualified as a psychologist or social scientist with specialized knowledge or experience in memory science, a fact at least one juror quickly discerned. At the end of his testimony a juror asked about his qualifications, asking "what is your expertise or training in memory."(Doc. 119, at 199-200; Exhibit 523). Bates, who was a biomechanical engineer, answered "only through reading and studying research literature that's been done recently on memory and - and the brain." (*Id.* at 200).

Defense counsel needed a qualified expert on memory to dispel common myths and explain to the jury how a person in Todd Kendhammer's position would be subject to flawed and unreliable memories. A memory expert could also have supported the defense argument that a critical witness for the State, Randy Erler, who was just passing by the scene where the Kendhammer vehicle was stopped and claimed there was no damage to the windshield, would not likely have noticed or recalled that fact a week later when he was first interviewed by the La Crosse Sheriff's Department investigator. (*Affidavit of Jerome F. Buting*, Exhibit 8, BWS 74-75).

On post-conviction review Dr. Loftus applied the science of human perception and memory to two witnesses in this case: Todd Kendhammer and Randy Erler. He notes in his affidavit, however, that in his testimony he does not issue judgments

about "whether a particular witness's perception and/or memory is correct or incorrect." (*Affidavit of Geoffrey R. Loftus*, ¶ 14, p. 14). "Instead, I provide the fact finder with information about the scientific bases of various relevant aspects of perception and memory. The hope is that the fact finder can use this information as a tool to help carry out the job of assessing the reliability of assertions made by eyewitnesses. Normally, I do not mention case participants by name when I testify; I do so in this report to more clearly articulate the relevance of my proposed testimony to this case."

On post-conviction, Kendhammer notes that much of Dr. Loftus's affidavit applying the science of memory to the facts in this case could have been established by defense counsel through hypothetical questions, and then in closing argument if he had introduced supporting expert testimony about the scientific bases of memory and perception with an expert like Dr. Loftus. As Dr. Loftus notes:

> The memories of both Mr. Kendhammer and Mr. Erler were at issue in this case. As I understand the arguments, the State argued that Mr. Kendhammer was lying because some of the details in his statements were not confirmed in the investigation. The State also argued that Mr. Erler's memory was accurate, in part, because of the great confidence he expressed about his memory of the windshield's condition when he passed the car. Regarding both of these issues the fact finder would have benefitted from hearing about what the science tells us about memory.
>
> The first question is: should a witness expressing a false memory, even with confidence, be construed as lying? The answer implied by a large

> body of scientific work is: no. A witness, even though testifying inaccurately, is not lying in the critical sense that he is honestly relating the contents of his memory; however the contents of his memory are false.
>
> The second question is: to what degree should an eyewitness's confidence in some memory be construed as evidence that the eyewitness's memory is accurate? The answer supported by a large body of scientific work is: not necessarily. If certain facts characterize the event in question, then a witness's confidence cannot be used as a reliable indicator of the witness's accuracy. A memory is still subject to many factors individual to the person and the circumstances no matter how confident the witness appears in repeating it.

(*Id.* at ¶ 15).

Regarding the first question, the State presented testimony that investigators were unable to locate a truck which matched the description the defendant gave. (Doc. 124, at 116-24). And the prosecutor argued repeatedly that the defendant's story that the pipe fell off a truck, flew through the air and penetrated the windshield without first hitting the ground and that he punched the windshield in a failed attempt to deflect it defied the laws of gravity and physics. (Doc. 122, at 16, 34, 44, 89). But the description the defendant gave of a truck and how the pipe fell were all derived from the interview by Sgt. Yehle of a traumatized Kendhammer on his way to the hospital to see his severely injured wife.

Dr. Loftus notes that Sgt. Yehle suggested in his question to Mr. Kendhammer that the pipe did not hit the ground before it struck the car:

MY: Did you realize it was a pipe before it hit the windshield?
TK: No, because it was coming right straight at us...
MY: Okay.
TK: lt wasn't sideways, it wasn't tipped.
MY: You said it came off the truck, never hit the ground and...
TK: No, it just come right straight off the truck...
MY: Straight off the truck, huh?

TK: And, and, and it, it looked just like a, I mean it, it, you couldn't see a side to it so I didn't know it was a pipe.
MY: Okay.
TK: And then at the last minute I seen it, that it was a pipe because it was kind of at an angle and that's when I lunged forward.

(*Affidavit of Geoffrey R. Loftus*, ¶8 f; Trial Exhibit 290, p. 15) (emphasis added).[22]

As argued *infra* at Section III.B.3., there was evidence not introduced at trial that the defendant told another investigator before the Yehle interview that the pipe bounced on the road and then flew up to penetrate the windshield. *(Affidavit of Jerome F. Buting*, Exhibit 3, BWS 34). As Dr. Loftus states,

> Had the jury in Mr. Kendhammer's trial had the benefit of expert testimony, the jurors would have been provided with information to assist the defense in the following ways: (1) It would have explained why Mr. Kendhammer may have believed to be true his affirmation of Sgt. Yehle's statement that the pipe punctured the windshield without first bouncing off the ground, when in fact his memory of this detail may not have been accurate and could explain why other details about the incident were not confirmed by the investigation (the direction the truck was traveling, its color, matters regarding speed, the belief that a bird was the object, how the inside of the windshield was damaged, etc.).

[22]"MY"signifies Sgt. Mark Yehle, "TK", the defendant Todd Kendhammer.

(*Affidavit of Geoffrey R. Loftus*, ¶ 15, p. 12). Again, Dr. Loftus could have dispelled common myths the State relied upon:

> Given common misconceptions about memory, the jurors in this case could have reasonably concluded that if Mr. Kendhammer's wife's death was caused by the pipe accident, then he would have had a strong memory of the accident's details – including whether or not the pipe initially hit the ground. They could have also believed that he would have had a similarly recording-like memory of all the details about the accident. The State's argument that Mr. Kendhammer's detailed account conflicted with physically possible reality, would therefore be persuasive to the jury that Mr. Kendhammer's detailed account must have been of an event that never actually happened, and therefore that he was lying.
>
> In reality, Mr. Kendhammer likely had very little original perceptual information about the details of the accident, including whether or not the pipe hit the ground prior to puncturing the windshield and details such as the description of the truck and other items of interest. It is equally likely that he later had detailed memories that included potentially incorrect details, such as the pipe never hitting the ground or the type or color of the truck, or the exact mechanism of the propelled pipe.

(*Id.* at ¶¶ 20-21, p. 14-15).

As described below, an expert's testimony about the effect of attention, functional duration of events, post-event information and a highly traumatic and stressful and emotional event would have helped the jury to evaluate the reliability of Todd Kendhammer's memory of critical facts the State unfairly argued was proof of his lying:

> Mr. Kendhammer's attentional focus was likely on how to avoid or deflect the pipe rather than on the details of the pipe's journey from the truck to his car.
>
> . . .
>
> In this case, what is relevant with respect to Mr. Kendhammer's memory are the details of the pipe's journey from truck to windshield.... The functional duration relevant to Mr. Kendhammer's ability to accurately perceive the pipe's journey included only that time during which he, simultaneously, (a) had the pipe in his field of view, (b) was looking in the area where the pipe was, and (c) various other necessary conditions as well.... [I]t would have been important for the jury to understand that even if an event itself lasts several seconds, a witness's functional duration for perceiving and memorizing what will eventually be relevant could, therefore, be as low as zero.
>
> In the present case, potentially relevant post-event information includes, but is not necessarily limited to, unconscious inferences.....In Mr. Kendhammer's case, it is important to point out that, according to Sergeant Yehle's testimony (Trial Day 3, December 6, 2017, pp. 126-27), he strongly pressed Mr. Kendhammer, during his initial interview for exact details of the event – details that Mr. Kendhammer simply did not have because he had never memorized them in the first place.
>
> [In addition] because of the highly traumatic and stressful and emotional nature of the event Mr. Kendhammer experienced, his ability to perceive and memorize critical details of the accident as it was unfolding was diminished. This negatively impacted his ability to recreate the events accurately and rendered him more open to post-event information, including suggestive questions by Sgt. Yehle, including that the pipe "came off the truck, never hit the ground."

(*Id.* at ¶ 21, pp. 15-17).

A memory expert could also have assisted the defense by explaining that the witness Randy Erler's memory might have been inaccurate, notwithstanding his

confidence in his opinion at trial. The State argued Erler had no reason to lie and had no stake in the case and therefore was a more reliable witness than the defendant. (Doc. 122: 8, 27, 42). Erler's apparent confidence in his memory that there was no damage to the Kendhammer windshield when he drove by was compelling. His testimony supported the State's theory that the defendant staged the pipe accident later, after he had killed his wife. Dr. Loftus states that research shows why a confident witness sways jurors:

> The reason, quite simply is that in most of normal, everyday life, high confidence is predictive of high accuracy. Therefore it makes sense that an average juror would believe intuitively that high confidence is always associated with high accuracy, or at least that the juror should use this premise as a default assumption in evaluating the credibility of a witness's memory. Witnesses who sound positive about the accuracy of their memories have a meaningful impact on jury decision-making on those points about which the witnesses claim confidence in the memory.
>
> However, contrary to intuition, this premise does not necessarily hold true, and a great deal of scientific research has delineated the circumstances under which an eyewitness' memory can be challenged on the basis of research. These circumstances include (a) an original event that does not lend itself to a witness's being able to easily form an accurate memory of some critical detail of an event (e.g., Mr. Kendhammer's memory of the accident details formed under conditions of extreme stress or Mr. Erler's forming a memory of no windshield damage while driving past the scene and not having a reason to pay particular attention to the windshield) along with (b) some form of suggestive post-event information that would bias the witness to reconstruct his or her memory in some fashion. For example, Mr. Kendhammer was in a position where he was likely to infer details that might have happened when responding to Sergeant Yehle's

> questions. Similarly, community gossip implying Mr. Kendhammer's culpability could easily have affected the content and accuracy of Mr. Erler's memory. In both instances, the witness's memory could well have become strong and confidence-inducing. Accordingly, although nonintuitively, the witness's subsequent confident memory is based on potentially inaccurate perception of and/or potentially inaccurate post-event information about some critical aspect of the event and not on information acquired at the time of the original event.
>
> While this combination of circumstances is rare in most people's experience, it is relatively common in incidents such as the horrific event experienced by Mr. Kendhammer or Mr. Erler's seemingly unimportant at the time but later-important view of Mr. Kendhammer's car. It is also clear, based on confirming laboratory studies, and on outcomes of real-life trials, that a highly confident eyewitness can be viewed by a jury as either lying (if the eyewitness's assertions are demonstrably false) or persuasive (if the eyewitness's assertions are plausible). Accordingly, an expert in perception and memory would testify about the scientifically understood circumstances under which a witness' expression of confidence should not be taken as a sign that the testimony is accurate.

(*Id.* at ¶¶ 17-18, pp. 13-14).

Applying the scientific data to Erler's testimony, defense counsel could have established that Erler had no particular reason to pay attention to the exact state of the windshield. Other concerns, like being late for work, would have required his attention instead. The functional duration of Erler's ability to perceive was limited as he drove past the scene. Post-event information, such as media coverage and local gossip, would also have been absorbed by Erler prior to his first interview by La

Crosse County Sheriff's Investigator Leinfelder a week after the accident.[23] All of these facts would have been supported by scientific studies showing confidence in a memory does not make it more accurate.

The failure of defense counsel to present testimony from a qualified memory expert was deficient performance, especially since they clearly knew well before trial that the State would characterize their client's statements as lies rather than mistaken memory. *Rompilla v. Beard*, 125 S.Ct. 2456, 2463 (2005) (attorney's failure to investigate material he knows prosecution will rely on is ineffective assistance). Given the reliance the State placed on Todd Kendhammer's supposed "lies" and his comparison to Randy Erler, who had "absolutely no reason to lie" (Doc. 122, p.27), the lack of a memory expert to dispel the myths the prosecutor spouted was especially damaging.

The defendant was prejudiced by his counsel's failure to use a memory expert because the memories of the defendant as to the details like the description of the truck, etc. was central to both the state and defense. There is a reasonable probability

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[23]Law enforcement investigators in this case understood the power of suggestion. Defense counsel told the court in a pretrial hearing that "[w]e have received reports from our investigator that certain members of the sheriff's department were talking to witnesses to express their belief to the witnesses that Mr. Kendhammer was guilty of having murdered his wife, efforts to persuade these witnesses that he was guilty, not just some witnesses, but members of his family as well." (Doc. 45, at 8). It is no stretch to assume these expressions by investigators spread quickly in the small community, including to Erler.

of a different outcome had defense counsel presented testimony from a memory expert, such as Dr. Geoffrey Loftus.

3. Trial counsel provided ineffective assistance by failing to introduce evidence that the defendant's early version of events recorded in the Motor Vehicle Accident Report by first responding law enforcement was that the pipe bounced on the road before flying through his car's windshield, and by counsels' failure to introduce at trial videos of experiments conducted by the State which showed that a pipe falling off a passing truck could bounce on the road, turn in various ways and fly up to potentially penetrate a car's windshield.

a. Counsel failed to introduce the defendant's early memories of the accident.

As noted earlier, the State's case relied a great deal on challenging a version of the accident where the pipe fell off a truck and flew through the Kendhammer vehicle without first striking the ground. That version of events was proven to be virtually impossible because the laws of gravity and physics would have given the defendant only 1/3 of a second to see the object, discern that it was a pipe and react by punching the windshield in a failed attempt to deflect it. But as noted above, that version was adopted by the defendant after he experienced severe trauma, was distracted by his worry about his wife and was influenced by suggestive questioning by Sgt. Yehle. In fact, there was evidence, not introduced by either side, which supported an earlier version given by the defendant that he heard a loud bang and that the pipe bounced on the road before flying up and penetrating the windshield. This scenario would have provided much more time for the defendant to see the

object, which he first thought was a bird, then discern that it was a pipe and react by punching the windshield.

The timeline of events that morning is worth noting. From Google Dashboard data on both of the Kendhammer phones it was determined that the vehicle came to rest at the Bergum Coulee Road location at approximately 8:02 a.m. (Doc. 119: 152; Trial Exhibits 46 & 47). Two calls to 911 were made by Kendhammer at 8:05 & 8:06 a.m. (Exhibits 285, 286). La Crosse County Sheriff's Deputy Adam Wickland, Sgt. Michael Valencia and Deputy Robert Kachel were all dispatched at 8:09 a.m. (*Affidavit of Jerome F. Buting*, Exhibit 5, BWS 8; Exhibit 9, BWS 14). Deputy Kachel was one of the first officers to arrive at the scene at 8:19 a.m. (*Id.* at Exhibit 3, BWS 34, MVA report). He reported that only West Salem Police Department Officer Lance Loeffelholz and a first responder were present when he arrived. (*Id.* at Exhibit 9, BWS 14). Kachel, Wickland & Loeffelholz were all present at the scene talking to the defendant for some time prior to the arrival of Sgt. Yehle. The precise time of Yehle's interview in the squad car with Todd is not clear from records, but Yehle did not leave the scene with Todd and begin recording the interview until after the Tri-State Ambulance left with Barbara Kendhammer. Records show the ambulance left the scene at 8:39 a.m. en route to the hospital. (*Id.* at Exhibit 10, BWS 133). It was not

until that interview with Yehle when Yehle suggested that "it came off the truck, never hit the ground" that Todd adopted that version. (Ex. 290, p. 15).

Deputy Kachel, on the other hand, prepared his own report from his investigation, including his early arrival at the scene, apparent interviews with the defendant , measurement and other details. He filed the official Wisconsin Motor Vehicle Accident report later that same day, when his investigation was fresh in mind, and he stated in that report that: "THE DRIVER OF UNIT ONE STATED THERE WAS A FLATBED TRUCK TRAVELING SOUTHBOUND ON COUNTY M. THE SOUTHBOUND TRUCK LOST A 53 INCH METAL PIPE FROM HIS LOAD. THE PIPE BOUNCED OFF THE ROADWAY AND IMPALED THE FRONT WINDSHIELD...." (*Affidavit of Jerome F. Buting*, Exhibit 3, BWS 34) (Upper case font in original). Neither the State nor the defense introduced the Motor Vehicle Accident Report or called Kachel as a witness at trial. This was deficient performance by defense counsel because the report was documentary evidence from an early arriving officer which apparently related the defendant's earliest explanation that "the pipe bounced off the roadway" before hitting the Kendhammer windshield. This evidence would have undercut the State's entire argument that the laws of physics proved the defendant's story was impossible, ergo he was lying and must have killed his wife.

Defense counsel also failed to elicit other evidence which undercut the State's claim that the defendant's story was impossible. In Officer Loeffelholz's report he described speaking to the defendant at the scene. He reported the defendant told him "They were coming around the bend just before Bergum Coulee Road in this stretch when he heard a loud bang and observed a pipe coming through the windshield which he says he tried to deflect or stop but he hit the windshield and then the pipe hit his wife." (*Id.* at Exhibit 4, BWS 13). This statement that he heard a bang first and then saw the pipe and tried to deflect it is consistent with the pipe banging on the roadway first, or perhaps being kicked up by an oncoming vehicle. Officer Loeffelholz did testify at trial but was not cross-examined about information in his written report, nor was that report filed in the trial record.

b. Counsel failed to use the State's pipe drop experiments to support the defense.

In addition, pretrial discovery included reports and several videos of a pipe drop re-enactment at the scene on County M that the State's investigators set up on October 28, 2016. (*Id.* at Exhibit 1, Exhibit 2, BWS 619, 653). Trooper Marquardt assisted with the La Crosse Sheriff's Department, DCI and the Wisconsin State Patrol. (*Id.*). A total of 9 tests were done by driving a truck on the same stretch of roadway and dropping a similar pipe from various heights and various speeds. (*Id.*). Each test was recorded by several video cameras set up at different locations and

angles and some recording at super slow speed that depicted the way the pipe came off the truck, flew through the air, struck the ground and on some occasions bounced up, twisted and torqued in unpredictable ways each time. (*Id.* at Exhibit 1, Videotaped Experiments; *Affidavit of Alexander Jason*, ¶¶ 6-9). All of these videotapes and reports of the tests were given to defense counsel in discovery. Counsel provided them to their defense expert, Dr. Bates, who prepared a report that was filed as a trial exhibit. (Ex. 260). Dr. Bates discussed the pipe drop tests in his report:

> Video M2U00183 (D2S#60) shows a typical pipe drop that lands approximately parallel to the road surface in the direction of the dropping vehicle. The pipe rebounds from the road surface with a low bounce moving forward and to the left with minimum rotation. Results like this and other similar tests would not cause the accident as described by T. Kendhammer. Other pipe drop tests, however, that had varied pre-impact contact angles produce more dynamic post-impact trajectories and orientations. Examples include D6#66 - DCI Video-Pipe Reenactment: Tests 7 and 9 and State Patrol High Speed Video: CIMG1921-Test#7. None of these tests achieved the optimal pre-impact conditions but *their results in conjunction with the physics of impact suggests that the pipe trajectory and orientation necessary to penetrate the windshield is possible.*

(Trial Exhibit 260, p. 7) (emphasis added). However, though Bates's report was filed and admitted as an exhibit at trial, this discussion of the State's pipe drop experiments and his opinion that the videos showed it was possible for a pipe falling off a truck and bouncing to reach the orientation and trajectory consistent with the defendant's statement of events was not presented to the jury. Exhibit 260 itself was

not sent to the deliberating jury so this expert opinion was never provided to the jury.

Likewise, the defense glass expert, Mark Meshulam, also reviewed the videos of the pipe drop experiments that law enforcement conducted. He had objections to some aspects of the experiments which were not scientific but were illustrative, but he also expressed the opinion in his report that "in 6 of the 12 pipe droppings, the pipe could have impacted the windshield of an oncoming car on the passenger side (00004, 00006, 00009, 00010, 0001 l, 00012) and in most other cases, could have impacted the driver's side."(Trial Exhibit 259). His report was admitted as a trial exhibit, but again the State's videos of pipe drop experiments were not discussed in his testimony and the report did not go to the jury for deliberations, so once again his opinion was not heard by the jury.

Defense counsel did question Trooper Marquardt at trial about other ways a pipe could be "kicked aloft," another scenario consistent with Kendhammer's first statements, and extracted Marquardt's concession that he "didn't analyze other ways" beyond his assumption that it fell off a truck and struck the Kendhammer vehicle without hitting the ground. (Doc. 127: at 19-20). He also did question Bates about an alternate theory on redirect to rehabilitate the defense expert's answer on the DA's cross that he did not believe the pipe fell off a truck. (Doc. 119: 180). Bates

said that he did not believe the pipe could have rolled off an oncoming vehicle because it "would only have a .35 second time to fall and strike the windshield." (*Id.* at 193). This admission by the defense expert corroborated the testimony by State's witness Trooper Marquardt. But Bates said he did believe it was possible the pipe could have been "kicked up by an oncoming vehicle," a view supported by the "loud bang" Kendhammer heard. (*Id.*). Defense counsel tried to elicit his opinion that this is what occurred in this case, but the court sustained an objection by the DA that this opinion was not revealed before trial. (*Id.* at 193-94). Defense counsel did not point out that Bates had expressed a similar opinion (as noted above) in his report filed with the DA before trial, which would have shown defense compliance with ¶ 971.23(2m)(am), Wis. Stats. Neither did counsel use Bates or any other witness to introduce the pipe drop experiment videos to show the jury the type of trajectory a pipe might have taken if it bounced off the roadway in a certain manner, whether by falling from a truck or being run over by another vehicle.

Post-conviction counsel retained Alexander Jason, a crime scene analyst, to review materials from the Kendhammer case. Mr. Jason is a renowned crime scene analyst who has testified as an expert witness in state and federal courts in Alaska, California, Colorado, Florida, Kansas, Maryland, Missouri, New Jersey, New York, Texas, Washington, and West Virginia. (*Affidavit of Alexander Jason*, ¶ 1). He is a

board certified crime scene analyst and past president, fellow and distinguished member of the Association for Crime Scene Reconstruction. (*Id.*). He has consulted with the U.S. Army, federal agencies, major corporations, law enforcement agencies and several popular TV shows, including CSI, Law & Order, and NBC, CBS, ABC, PBS/NOVA, and appeared numerous times on CNN, Fox News, MSNBC and other news shows. (*Id.*). Mr. Jason reviewed the trial testimony in the Kendhammer case of the defense and State expert witnesses and Trooper Marquardt. Among the other materials he reviewed were reports describing the various "pipe drop" experiments conducted by law enforcement agencies on the highway where the defendant stated his vehicle was struck by a pipe. He also reviewed video tape recordings of these pipe drop experiments. He states: "I believe these recordings to be important to a possible series of events that support the defendant's rendition of the event as an accident." (*Id.* at 2).

Mr. Jason explains:

> Trooper Marquardt's report and testimony assumed that the pipe did not strike the ground and bounce up before striking the defendant's car. He gave no opinion about whether this latter scenario could have caused a falling and bouncing pipe to pierce the Kendhammer windshield. . . . At trial, Marquardt conceded that he "didn't analyze other ways" the pipe could have been "kicked aloft."

(*Id.* at ¶ 4). Mr. Jason notes that the official motor vehicle accident report describes the "pipe bounced off the roadway and impaled the windshield passenger side" of

the Kendhammer vehicle. (*Id.* at ¶ 5). Mr. Jason then explains the importance of the pipe drop experiments conducted by law enforcement:

> The reports I have reviewed indicate that on October 28, 2016, the La Crosse Sheriff's Department, the Division of Criminal Investigation (DCI) and the Wisconsin State Patrol conducted a series of experiments where they attempted to observe and measure the behavior of a similar pipe falling off a flatbed truck from various heights and speeds at the same highway location the defendant claimed the accident occurred. A total of nine tests were conducted and each was videotaped from several angles. On information and belief, these "pipe drop" experiments were not presented at or discussed during the trial, but it is my understanding that they were contained in discovery materials.
>
> The reports and videos I reviewed show that the experiments were performed by using a flatbed truck with an adjustable ramp to release a similar metal pipe from various heights, positions, and speeds. The truck traveled southbound on County Highway M (CTH M) at the approximate location where the defendant said his northbound vehicle was struck and the pipe was released down the ramp while cameras at various locations recorded its flight through the air and the behavior of the pipe as it struck the ground.
>
> The videos show that the pipe rolled off the truck and struck the ground in different orientations each time and behaved differently each time after impacting the ground. On some of the drops the pipe hit the ground in a relatively flat orientation and bounced up very little. On others the pipe hit the ground with one of the ends striking the ground first which caused the pipe to bounce up and torque and spin in various orientations. On one of the experiments the pipe bounced up and tumbled end over end in the northbound roadway. On at least one of the nine drop experiments the pipe bounced and torqued in a manner that almost aligned with penetration of the passenger side of the windshield of an oncoming car, as generally described by the defendant in this case. With so few tests experiments run by the government, it cannot be ruled out that a pipe falling from an

> oncoming truck might have penetrated the passenger side of the windshield as the defendant stated.
>
> The experiments demonstrate to me that a pipe falling off of an oncoming truck on that highway could bounce in unpredictable ways, especially if one of the pipe ends impacted the roadway first. The pipe could have torqued or even tumbled end over end in a manner that might have supported the defendant's claim that a pipe falling off a truck impaled his windshield in the manner he described. Once the pipe impacted the roadway and bounced into the air it may have remained airborne for a significant length of time to allow a driver to see it and react.

(*Id.* at ¶¶ 6-9). This opinion demonstrates that within the discovery provided to the defense there was evidence that could have rebutted the State's claim that the falling pipe story was physically impossible. Defense counsel later argued in his closing, that the defendant's version of what happened with the pipe may not be accurate:

> It may not have fallen off a car. We don't know. It could have been laying in the road to be kicked up by a passing vehicle either oncoming or passing. We don't know and the State doesn't know.

(Doc. 122, p. 81).

But defense counsel did not use the Motor Vehicle Accident Report, the report of Officer Loeffelholz, the videotaped experiments, or testimony from Dr. Bates, or testimony from another expert like Alexander Jason, to provide the jury with documentary, visual and expert opinion evidence to supply a reasonable hypothesis consistent with the defendant's innocence. It was deficient performance for counsel not use such evidence that was readily available.

The defendant was prejudiced by this deficient performance. As noted previously, this was a close circumstantial case where the State provided no motive and no place, time or manner in which Kendhammer could have killed his wife. They used the laws of physics to prove the one version used at trial of the defendant's explanation of the accident was impossible. Again, the defendant is not required to show prejudice beyond a reasonable doubt or even by a preponderance of the evidence. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). He satisfies the prejudice prong of *Strickland* if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The defendant submits that confidence in the reliability of the trial is undermined, because his trial attorney's failure to utilize crucial reports, videos and testimony from experts to explain how a bouncing pipe could indeed have impaled the Kendhammer vehicle as the defendant described demonstrates there was "a breakdown in the adversarial process that our system counts on to produce just results." *State v. Pitsch*, 124 Wis. 2d at 642.

4. Trial counsel provided ineffective assistance by not moving to redact from the video played to the jury of the defendant's Sheriff's Department interview assertions made by detectives about physics and mathematical probabilities of such an accidental event occurring which they were unqualified to make, and then failing to present evidence at trial to show the possibility of such an accident was not remote because trucks carrying scrap metal frequently traveled the road where the defendant said the accident occurred.

a. Failure to redact Sheriff's Department video interview of defendant.

During the interview of Todd Kendhammer at the Sheriff's Department, the detectives challenged him by making several references about the pathology of injuries Barbara Kendhammer received, the laws of physics, terminal velocity and the mathematical improbability of the accident occurring as he claimed.

> INVESTIGATOR LEINFELDER: And these injuries did not occur in the mechanism that you had described to us with a pipe going through the windshield. The pipe - the plausibility of a pipe falling off of a truck in any way, shape, or form and going directly through your windshield is one thing we look at, which is very unlikely to have happened.
> MR. KENDHAMMER: Yep.
> INVESTIGATOR LEINFELDER: You agree to that -
> MR. KENDHAMMER: Yep.
> INVESTIGATOR LEINFELDER: That's a --
> MR. KENDHAMMER: Yep.
> INVESTIGATOR LEINFELDER: Number two, that at those rates of speed, it's not going to stop where it was.
> MR. KENDHAMMER: Yep.
> INVESTIGATOR LEINFELDER: That's going to go right out through -- and through the backseat. Let alone the windows. It's going to go - mean, if it hit a window, it would go through the windows. That's a - a flying spear.

MR. KENDHAMMER: Yep
INVESTIGATOR LEINFELDER: It would go through and destroy anything that it comes in contact with. So the pipe isn't something that caused these injuries.

(Trial Exhibit 288, pp. 97-98). The detectives later said the accident was not just implausible, it was so mathematically improbable as to be impossible.

SERGEANT YEHLE: well, you know, we -- we just had a little conversation. What are the odds, first of all, of coming down a road that isn't heavily traveled and have a pipe come through your windshield?
MR. KENDHAMMER: But that road is heavily traveled in the mornings and evenings.
SERGEANT YEHLE: Well, not like an interstate or a U.S. highway. So there are regular –
MR. KENDHAMMER: Right.
SERGEANT YEHLE: - vehicles, and out of all of those vehicles, very few of them are going to be carrying pipe. Even fewer of them are going to have a pipe come loose, even less odds that it's going to land where it did in the manner it did and then sustain injuries that she had. And, in addition to that, what are the odds be that that would happen to a guy that changes windshields? I mean, what do you suppose those odds are? *One in a trillion, if at all*?
INVESTIGATOR LEINFELDER: Astronomical.

(*Id.* at 183-84) (emphasis added). Shortly after that, the detective started expounding on "terminal velocity" and physics:

INVESTIGATOR LEINFELDER: Do you know what terminal velocity is?
MR. KENDHAMMER: No.
INVESTIGATOR LEINFELDER: Terminal velocity is the rate at which things fall - mass times drag times gravity. So if I have this -
MR. KENDHAMMER: Yep.

> INVESTIGATOR LEINFELDER: - and it's sitting here, and it drops, that was the terminal velocity. You can calculate that. So a pipe weighing what it was with very little drag – because it's aerodynamic so there's no drag to it - being affected by gravity at a certain rate. So you get mass and then you can determine that. So if you're talking – even if you're talking it's raised up from the flatbed of a truck, and it comes off - rolls off – comes off, it's going to – the rate of that speed is accelerated as gravity hits it, and it accelerates as it goes to the ground.
>
> So you're saying it was a flatbed truck. You don't know how high it is. It's going to roll off, and it's going to roll off the truck here, and it's going to go - it's not going to roll off and go that way with wind. It's going to roll off and go that way. As you're coming by, that pipe, in your explanation, then rolls off, flies to the side, goes all the way to the opposite side of your vehicle, and goes through the windshield, and that with the laws of physics is impossible.
> MR. KENDHAMMER: I can show you right here nothing's impossible anymore.
> INVESTIGATOR LEINFELDER: Where?
> MR. KENDHAMMER: This accident right here that we're dealing.

(*Id.* at 225-226). No foundation was laid at trial that the detectives had any training, education or specialized expertise in the mathematical probabilities or terminal velocity or the laws of physics about which they were pontificating. The videotape of this interview was played in full to the jury. Defense counsel did not object during or before trial to these portions of the recording. Therefore, the jury heard these statements from the detectives as if they were scientifically truthful and reliable evidence. The State provided no other "real" expert testimony to corroborate these claims. The jury was left to ponder just how improbable such an accident must have been.

In fact, debris flying through windshields, though infrequent, is not an improbable event.[24] The glass expert called by the defense, Mark Meshulam, contained several examples in his report of reported incidents of debris falling from vehicles, and occasionally causing fatalities. (Trial Exhibit 255, pp. 34-45). But none of those were discussed during his testimony and his report did not go to the jury. Given the unredacted law enforcement interview of the defendant where the detectives expressed opinions about the probability of this accident occurring, the State opened the door to testimony by the defense expert about a number of reported incidents he found from a simple search of the internet. Yet no attempt was made by defense counsel to do so.

b. Trucks frequently haul metal on County M.

Moreover, defense counsel called no witnesses to testify about the frequency with which trucks carrying scrap metal traveled on County M where the accident occurred, so that the jury would understand the possibility of such an accident was not remote. In fact, pretrial defense investigation uncovered two witnesses who

[24]Indeed, just a few months after the Kendhammer trial a remarkably similar pipe flew up and through a vehicle's windshield in Houston, landing in the passenger seat and it was only because that seat was vacant that no one was killed. https://www.click2houston.com/news/2018/09/05/pipe-flies-through-windshield-narrowly-misses-driver-on-north-freeway/ (last visited February 14, 2021).

lived in the area who would both have been able to testify on this issue, but neither were called by the defense.

Steven Petranek lived on Bergum Coulee Road just a half mile away from County M. He told the investigator that"he lives in a very rural area and there are always trucks driving by with scrap iron on them. He stated that even though the price of iron has gone down, there are still plenty of people scrapping metal out in his area."[25] (*Affidavit of Jerome F. Buting*, Exhibit 12).

The defense investigator discovered another witness, James Hemker, who owned and farmed a 200 acre farm on County M very close to the accident site. Hemker told the investigator that since he has owned the farm he has seen "quite a few trucks" hauling "junk and scrap" on County M, and over the years has found tin on the road and after the accident he even found a 24" galvanized pipe on the road just north of the accident, near the quarry. (*Id.* at Exhibit 11).[26]

It was deficient performance for trial counsel to have failed to call available witnesses who could have explained to the jury that they had personal knowledge from living nearby that trucks frequently hauled junk and metal on County M. This

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[25]Petranek also told the defense investigator that he spoke to police on September 27, 2016, who insinuated that Kendhammer was lying about the accident, but no mention of him is contained in discovery located in trial counsel's file. (*Id.*). *See* further discussion, *infra*, at Section IV., motion for post-conviction discovery.

[26]Hemker also said the police spoke to him, but he is not mentioned in discovery, *See infra* at Section IV., requesting post-conviction discovery.

would have supported the possibility that a vehicle traveling on that road might have accidentally lost a pipe that flew into the Kendhammer vehicle, striking Barbara and causing her death, just as the defendant claimed. The defendant was prejudiced by this failure because this could have been corroboration for his story that law enforcement so readily dismissed as a lie. There is a reasonable probability of a different result if the jury had learned this evidence.

5. Trial counsel provided ineffective assistance by failing to move for a change of venue when jury questionnaires received before trial showed the undue prejudice of pretrial publicity had infected the jury pool.

The court sent juror questionnaires to the pool of prospective jurors several weeks before trial. (Doc. 32, 34). The completed questionnaires were received and distributed to both sides and discussed at a hearing on November 14, 2017. (Doc. 45). At the hearing, defense counsel advised the court that he was "very concerned after reviewing the jury questionnaires." (*Id.* at 8). He explained that 36 of the jurors said they believed the defendant was guilty and another 15 expressed the belief that he was probably guilty. (*Id.*). He said that about a month earlier he expressed concerns to the DA about the negative pretrial publicity and that he had learned law enforcement was talking to witnesses and trying to persuade them that Todd Kendhammer was guilty of murdering his wife. (*Id.*). After receiving the completed

juror questionnaires he saw how all the pretrial publicity was effecting the jury and said "I'm quite concerned." (*Id.*). He told the court:

> We're trying to figure out what to do here. I want to give you a heads-up to say that we are considering whether we should make a motion for a change of venue or to bring a jury in from another county. We haven't made up our minds. Weighing against this for us is the desire of Mr. Kendhammer to have this trial commence and finish in – in the hope that he can get on with his life. We're gonna take a couple more days going through these questionnaires again to evaluate them, both to accomplish the task that you've asked us to do today and to make up our minds in consultation with our client about whether we need to make this motion, and I -- I just wanted to give you all that heads-up; and we will let you know just as quickly as we can make that decision.

(*Id.* at 9). This exchanged followed:

> MR. GRUENKE: Well, just that my review of the questionnaires shows not much difference from any of the other homicide trials that I've had where a relatively small town and media market people either know people or follow the case, and if Mr. Hurley wants to make that motion, I mean, he can make it. I have no control over that. So if he wants to file the motion, we'll -- it just has to be done relatively quick and decided pretty quick.
>
> THE COURT: Well, I agree with that. Um, my re -- recollection that I asked if he wished to, um, change venue earlier on, and they did not want to at that point; and, um, I don't know how we're going to change venue and keep the trial date the way it is either. That's going to be a major hurdle. So you better get your decision done very quickly, Mr. Hurley.
>
> MR. HURLEY: Yes, sir.

(*Id.* at 9-10).

Post-conviction counsel's review of trial counsel's file reveals that an extensive motion to change venue or jury venire was in fact prepared by the defense law firm. (*Affidavit of Jerome F. Buting*, Exhibit 13). The file contains a largely completed 20 page draft motion and brief dated November 17, 2017, just three days after the above status hearing. The motion states:

> This case involves the confluence of pretrial publicity involving inflammatory, prejudicial, extraneous or inadmissible information; and the reaction of the potential jurors as evidenced by their responses to the jury questionnaire - which show that almost half of the jury venire has already formed the opinion that Todd Kendhammer is guilty. For these reasons, together with the practical need for finality and certainty as to scheduling and trial preparation a change of venue or jury venire should be ordered.

(*Affidavit of Jerome F. Buting*, ¶4, Exhibit 13). Also contained in trial counsel's file is an affidavit from paralegal Shavon Caygill along with approximately 290 pages of articles, images and videos reported by the La Crosse Tribune, other media outlets (including La Crosse television stations), and internet searches where the defendant's name came up relative to the pending homicide charge. (*Id.*, ¶ 4).[27] Clearly, trial counsel had done the work necessary to prepare a thorough motion to change venue or the jury venire. Yet it was never filed with the court.

[27]The Shavon Caygill affidavit and attachments were later filed after the conviction as attachments in support of a Motion to Recuse the court before sentencing, so they are part of the trial court record. (Doc. 95, 96, 97 & 98).

The voir dire of the prospective jurors did nothing to alleviate defense counsel's concerns that pretrial publicity had infected the jury pool and affected juror opinions.

Eighteen of the first twenty-nine jurors questioned individually said they had formed opinions of guilt and did not think they could set those aside and therefore were struck for cause. Other jurors (including two of the final twelve) talked about how overwhelmingly negative the media coverage was, including, but not limited to: Juror #2532:"from what I read and what the news channels say that, you know, the evidence [of guilt] seems to be overwhelming;" Juror #1741: "I believe he killed his wife;"Juror #3655: "Improbable story, how pipe could fly off random vehicle;" Juror #547: (member of final 12 verdict jury) "I think he's probably guilty... the story didn't add up;"Juror #2005: "guilty... it was all over ... hard not to watch the news;" Juror #3097 (member of final 12 verdict jury): "Woman was murdered ...injuries inconsistent ... glass in wrong place;" Juror #1651 "unlikely it was accident; Juror #4176: "He's trying to get away with murder;" Juror #1549: "from reading all the articles..probably guilty."

With a limited number of peremptory strikes and other reasons typically encountered in any jury with no pretrial publicity, defense counsel did not have enough strikes to remove all the jurors who had heard the mostly negative local

media coverage. Two sat on the final panel to reach a verdict. (Jurors #547 and #3097).

From the written questionnaires alone it should have been obvious to trial counsel that the panel of prospective jurors had been exposed to a great deal of negative pretrial publicity, but that became more clear in the individual questioning of jurors. Defense counsel had already prepared a motion for change of venue or venire and could have filed it after individual questioning of the jurors. The court would not have been pleased with such a late decision, but the law sets no specific time limit within which to file such a motion. If it becomes clear during jury selection that the jury pool is unfairly tainted, whether by pretrial publicity or any other reason, courts can and do strike the panel and adjourn a trial for another time.

It was deficient performance for Kendhammer's attorneys not to have filed a motion to change venue or venire at any time. Whether or not counsel's decision was a strategy, it should be noted that labeling counsel's decisions as "strategy" does not insulate them from review, for even tactics "must stand the scrutiny of common sense. " *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984); *see State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161, 169 (1983). A reviewing court thus "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather

than judgment." *Felton*, 329 N.W.2d at 169. *See also Washington v. Smith*, 219 F.3d 620, 629-32 (7th Cir. 2000). *See also Foster vs. Lockhart*, 9 F.3d 722 (8th Cir. 1993) (rejecting a trial attorney's claim of "strategy" in failing to present a second complimentary defense); *Genius v. Pepe*, 50 F.3d 60, 61 (1st Cir. 1995), *Proffitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987). Defense counsel's decision not to move to change venue was irrational so it cannot be excused as a tactical decision.

The defendant was prejudiced when two people sat on his jury and rendered a verdict who had been exposed to publicity that was negative enough that they formed the opinion before trial that he was probably guilty (#547: "I think he's probably guilty... the story didn't add up;" #3097: "Woman was murdered ...injuries inconsistent ... glass in wrong place"). Confidence in the outcome has been undermined and a new trial should be ordered.

6. The cumulative effect of trial counsel errors caused prejudice to the defendant.

Finally, it must be remembered that defense counsels' deficiencies cannot be viewed in isolation, as their cumulative effect may undermine confidence in the outcome of the proceeding. *See State v. Thiel*, 2003 WI 111, ¶ 50, 264 Wis. 2d. 571, 606:

> Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding. Therefore, in determining

> whether a defendant has been prejudiced as a result of counsel's deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under *Strickland. Id.* At 60.

Defense counsels' deficiencies in this case, judged cumulatively, do undermine confidence in the outcome of these proceedings such that a new trial for Todd Kendhammer must be ordered.

IV. The Defendant Moves the Court to Order the State to Produce Discovery That Was Never Given to the Defense Before Trial Including Numerous Law Enforcement Interviews with and Documents Received from Persons Who Had Knowledge of Trucks Carrying Metal on County M at the Time of the Accident.

A. Legal standards for post-conviction discovery.

It is well-established that under the due process clause, criminal defendants must be given a meaningful opportunity to present a complete defense. *State v. Shiffra*, 175 Wis.2d 600, 605, 499 N.W.2d 719 (Ct.App.1993) *(citing California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). The integrity of the justice system requires that the jury have an opportunity to hear and evaluate critical, relevant and material evidence because "[o]nly then can we say with confidence that justice has prevailed." *State v. Hicks*, 202 Wis.2d 150, 172-73, 549 N.W.2d 435, 444 (1996). After conviction the defendant "has a right to post-conviction discovery when the sought after evidence is relevant to an issue of consequence." *State v. O'Brien*, 223 Wis.2d 303, 321, 588 N.W.2d 8, 16 (1999).

Evidence of consequence is evidence that has a reasonable probability of changing the outcome of a trial. *State v. Del Real*, 225 Wis.2d 565, 571, 573–74, 593 N.W.2d 461 (Ct.App.1999) (defendant entitled to a new trial where post conviction testing demonstrated that swabs in the State's possession were negative for gunshot residue).

B. The La Crosse County Sheriff's Department interviewed at least three individuals and three area businesses and they reviewed and/or picked up records that may have revealed vehicles that were carrying metal on the day of the accident, yet no reports of that were provided to the defense in pretrial discovery.

At least three individuals and three businesses told defense investigators that law enforcement agents spoke to them but they are not mentioned in the pretrial discovery. Steven Petranek, James Hemker and Emma Johnson, and employees at the La Crosse Landfill, Alter Trading and the Overhead Door Company in Holmen, WI, all told defense investigators that the La Crosse County Sheriff's investigators spoke to them during the investigation. None are listed anywhere in the pretrial discovery provided to defense counsel.

The defense investigator spoke to Emma Johnson who rented a farm house at N5857 County M, near the accident site. She said an officer in an unmarked county car came to her house a few days after the accident and told her that he frequently drove past her farm and saw pipes laying out near the end of the field

road onto her property from County M. She felt he was insinuating that the pipe came from her property. The officer did not identify himself to her but she called the farm owner, James Hemker and told him about the police encounter. James Hemker told the defense investigator that the police did come by to talk to him but he denied leaving any pipes out near County M. There are no law enforcement investigation reports in the defense discovery that mention Hemker or Johnson. It should be noted that this officer, if identified before trial in discovery, could have been called by the defense to testify about his personal observation of pipes laying near the road on County M.[28]

Steven Petranek spoke to the paralegal for trial counsel and told her the police came to his house on Bergum Coulee Rd and spoke with him a few days after the accident. He did not recall the name of the officer he spoke with, but the officer alluded to him that they were talking to people because they did not believe Todd Kendhammer's story. No mention of any law enforcement interview with Petranek is contained in defense discovery.

The paralegal also spoke by phone with an employee with the La Crosse County landfill who advised that they had records of vehicles that entered the

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[28]As such, the failure to provide exculpatory evidence may rise to the level of a *Brady v. Maryland* , 373 U.S. 83 (1963). Post-conviction counsel will need to evaluate that issue after receiving post-conviction discovery.

landfill and descriptions of material dropped off there. The defense investigator later spoke to employees at the landfill and learned that after the defense paralegal called them they contacted the attorney for the landfill. The employee said shortly after that La Crosse County Sheriff's investigators visited and they were given all of the records of vehicles that came to the landfill on September 16th. It was learned that approximately 200 customers a day typically come to the landfill, including a number of home made farmer-type pickups and converted flatbeds that dump at the site. There is no mention in the defense pretrial discovery of law enforcement investigators picking up records from the landfill, nor copies of the records themselves, nor of any interviews with any employees at the business.

The defense private investigator also learned that law enforcement had visited Alter Trading, the primary scrap metal recycling company in the La Crosse area, and spoke to employees. The investigator was told that there are many pickups and home made flatbeds that brought scrap to their yard. But the employees told the private investigator that he would have to talk to the law enforcement investigators to find out any more details. The defense pretrial discovery makes no mention of law enforcement investigating Alter Trading or interviewing its employees.

In addition, post-conviction counsel's investigator spoke to an employee at the Overhead Door Company, a business that another witness said frequently

transported metal pipes on County M. The employee said that law enforcement investigators had visited the company at the time of the Kendhammer investigation and they inquired about the location of the company's trucks on the date in question. The employee would not disclose to the private investigator whether records existed and/or were turned over to law enforcement, directing any further inquiries to the Sheriff's Department. Once again, the pretrial discovery makes no mention of law enforcement investigating the Overhead Door Company or interviewing its employees.

In Kendhammer's case, each of these individuals, businesses and/or business records concern law enforcement's investigation of a possible source for an accidental circumstance of a pipe penetrating the Kendhammer vehicle and killing Barbara. The defense that Barbara's death was caused by an accident was obviously an issue of consequence at the trial. Any and all investigation reports or records related to that issue should have been disclosed in pretrial discovery, including officer memo books. *State v. Groh*, 69 Wis. 2d 481, 485, 230 N.W.2d 745, 748 (1975) (officer memo books discoverable).

Accordingly, the defendant moves the court for post-conviction discovery of all interviews and/or records obtained from Steven Petranek, Emma Johnson, James Hemker, and any employees or owners at Alter Trading, Overhead Door, and the La Crosse County landfill, or any other law enforcement investigation reports or

memo books of the investigation of individuals or businesses that might be responsible for the accident in this case.

For all of these reasons, the defendant's post-conviction motion for discovery of law enforcement's complete investigation of a possible source for the pipe having accidentally killed Barbara Kendhammer satisfies the requirements of *State v. O'Brien*, 223 Wis.2d 303, 321, 588 N.W.2d 8, 16 (1999) and this court should grant his request.

CONCLUSION

FOR ALL OF THE REASONS STATED ABOVE, the defendant respectfully requests this Court to schedule a date for an evidentiary hearing. *State v. Love*, 2005 WI 116, ¶ 26, 284 Wis. 2d 111, 700 N.W.2d 62. Thereafter, the defendant will request the Court to vacate the conviction and order a new trial.

Date Signed: February 16, 2021

Electronically Signed For:
Jerome F. Buting by BAS
Attorney for Defendant
SBN 1002856
and
Kathleen B. Stilling by BAS
Attorney for Defendant
SBN 1002998

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STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

Case No. 2016 CF 909

TODD A. KENDHAMMER,

Defendant.

AFFIDAVIT OF DR. SHAKU S. TEAS

STATE OF ILLINOIS)
) SS
COUNTY OF KING)

I, Shaku Teas, being duly sworn, state the following:

1. I am a forensic pathologist, am board certified in anatomic, clinical and forensic pathology and have conducted over 6,000 autopsies involving homicides, including those with blunt force trauma including vehicular incidents and assault and/or evidence of strangulation. I worked for the Cook County Medical Examiner's office, Chicago, IL from 1977 to early 1991, and conducted autopsies for the coroners of Illinois from 1991 to 2005 and still do consultation and occasional second autopsies in forensic cases.

2. I was retained to review the materials related to the death of Barbara Kendhammer in the above-entitled case.

3. I reviewed the following documents and photographs in the case, including the autopsy report and photographs taken by the Dane County Medical Examiner's Office and Dr. Kathleen McCubbin taken on the day of the autopsy and the following day during a second

examination; photographs apparently taken at the hospital after Barbara Kendhammer was declared deceased; photographs taken at the scene of the accident; photographs of the defendant's injuries and the pipe; photographs taken at the Crime Lab; trial testimony of Dr. Kathleen McCubbin's testimony and trial exhibits; trial testimony transcripts of Wisconsin Crime Lab Analyst Nick Stahlke, State Trooper Michael Marquardt, Dr. Steven Cook (defense ER doctor, with exhibits), Dr. Barry Bates (defense biomechanical engineer, with exhibits), Mr. Mark Meshulam (defense glass expert, with exhibits); Gunderson Tristate ambulance records; Gunderson Hospital records on Barbara Kendhammer; imaging studies taken at Gunderson hospital on Barbara Kendhammer; La Crosse Sheriff's department reports including transcripts of defendant's statements and transcripts of squad car's video; various photographs and videos of law enforcement efforts to manually create the same damage to the windshield of other salvage vehicles; all discovery documents provided by the state to the defense pretrial including criminal complaint; and the transcript of the closing arguments of the state and defense.

4. It is my opinion that the injuries Barbara Kendhammer sustained are consistent with the defendant's statements that a pipe flew through the Kendhammer vehicle windshield and struck his wife who was a passenger in the car and the subsequent sequence of events that occurred after the incident. Barbara Kendhammer died as a result of craniocerebral injures sustained as a result of a vehicular accident.

5. The lacerations observed and photographed by Dr. McCubbins on the occipital part of the head are consistent with a pipe hitting her head tangentially, grazing the head and causing the lacerations to the scalp as well as the skull fractures and subarachnoid bleeding and subdural hematomas, the cerebral injuries. They were not necessarily caused by the end of

the pipe. They are consistent with being caused by the elongated, tubular part of the pipe hitting the head tangentially and hence they do not need to have "curvilinear mark" from the circular end of the pipe. A metal pipe hitting the head tangentially does not have to "avulse" the scalp. The lacerations have irregular edges and are deep especially the one to the right side. The area should have been shaved at the autopsy initially to better appreciate the appearance and configuration of the lacerations. The area was shaved at the time of reexamination the day after the autopsy after the head had already been opened.

6. The lacerations to her scalp and the skull fractures are inconsistent with blows from a person's fists. They are consistent with the defendant's statement that a pipe flew through the windshield and struck his wife as her head moved forward.

7. The injuries to the inside of the decedent's upper and lower lips are consistent with injuries which would occur in an automobile accident, when the head and face strike hard surfaces such as the dashboard, perhaps more than once as often occurs in automobile accidents during swerving and braking. The mucous membrane inside the mouth is thin and the tissue loose, vascular and bruises easily and the bruises are easily visible. The extensive tongue hemorrhage, the forehead laceration and nasal bone fracture are also explained by the forehead, face and neck making contact with the dashboard during the accident. It does not take much force to fracture the thin, small nasal bone and nasal bone fractures commonly occur in automobile accidents.

8. There was no fracture or damage to the thyroid cartilage or hyoid bone or hemorrhage in the musculature of the anterior neck. The comminuted cricoid cartilage fracture with depressed anterior fragment was not consistent with manual strangulation. An isolated

comminuted cricoid cartilage fracture with displacement would be very unusual in strangulation. This cricoid fracture is more consistent with an automobile accident as her head struck the dashboard or other surfaces in the automobile. There was no evidence of strangulation.

9. The neck abrasions depicted in a photograph designated Trial Exhibit 70 apparently taken at the hospital are inconsistent with fingernail markings. They are consistent with peri-mortem or post-mortem injuries from glass, gravel, coarse grass or other items and the cervical collar that was placed on the decedent. They are not curvilinear as would be expected if they were caused by fingernails. Dr. McCubbins did not take any dedicated photographs of the neck or with the neck extended on a block. It also seems that the neck was not dissected in the manner recommended for strangulation cases—i.e., to dissect the neck last after all the organs had been removed and the brain removed to avoid artefactual neck hemorrhage. There was hemorrhage seen in the lateral neck muscles. Insertion of central line in the neck in left subclavian vein, difficult intubation at scene and at the hospital and development of disseminated intravascular coagulopathy (DIC) can account for some of the hemorrhage seen at autopsy. The comminuted cricoid fracture was also associated with hemorrhage and edema.

10. The small superficial abrasions on the cheeks are minor and most likely occurred when Barbara was moved to the grassy area where the car came to a stop.

11. The multitude of bruises and abrasions of the extremities (arms and legs) marked in the autopsy diagram are minor and can easily be explained by medical intervention and the process of organ and long bone retrieval for transplantation especially in an individual with who has developed DIC as evidenced by the abnormal laboratory values. Most of these

bruises were not documented by the medical personnel (paramedics and hospital personnel) who examined Barbara at the scene and when she arrived at the hospital. The bruise on the right side of the cheek and chin was very obvious at autopsy but not noted prior to the application of the neck collar. The bruises are easily explained by medical intervention, the accident and the events that followed.

12. The minor markings on the decedent's hands, fingers or fingernails are insignificant and do not signify defensive wounds. Many of the injuries to the fingernails and hands were healing and consistent with Barbara's occupation.

13. My opinion is that the pattern of injuries is consistent with the series of events the decedent experienced as a result of the vehicular accident, the attempts at resuscitation, medical care, movement of the patient, organ harvesting and the autopsy.

14. In my review of the Gunderson Hospital medical records I noted that in the Emergency Room, the doctors who performed a rapid and primary trauma check observed that she was "without evidence of trauma other than to head and small contusion to L Hand." (Gunderson Hospital report, printed 10/27/16, p. 14). No mention was made of the numerous injuries on her extremities that are noted in Trial Exhibit 7, the body diagram created by Dr. McCubbins. Trial Ex. 7 depicts injuries across her body and extremities, including more than twenty contusions and abrasions on her upper and lower legs, arms, back, and chest, many of them minor or superficial. In my opinion, nearly all of these minor and superficial injuries noted on Ex. 7 are consistent with the necessary handling of the patient on the shoulder of the road at the scene, during transport, medical care and autopsy, not with a beating using fists or an instrument. Many of these apparent injuries are also consistent with injuries that commonly occur with little force when a patient begins to

experience disseminated intravascular coagulation (DIC). These are not consistent with beating with fists or objects.

15. The unusual incident, sequence of events after the incident, the movement of the body from the vehicle to the ground and movement to the ambulance, the resuscitation by the husband and paramedics, the difficult intubation, the treatment at the hospital, development of DIC, organ and bone retrieval for organ donation may have made it difficult for the medical examiner to interpret some of the injuries.

16. It is my opinion that Barbara Kendhammer died as a result of Craniocerebral Injuries sustained as a result of an automobile accident. Injuries sustained in automobile incidents are classified as Blunt Force Injuries. Barbara sustained other injuries in the accident such as the nasal bone fracture, comminuted fracture of the cricoid cartilage, laceration of the forehead and other minor bruises. These other injuries are also consistent with the overall description of the accident and the series of events that followed it. There was no evidence of strangulation.

17. My opinions in this case are held to a reasonable degree of medical certainty and based on my education and experience and the materials available to me. If further information becomes available, I reserve the right to modify my opinions.

Shaku S.Teas M.D. (Forensic Pathologist)

Subscribed and sworn to before me
this 22 day of January, 2021.

Notary Public, State of Illinois
My Commission expires: Aug 30, 2023

DEVON NASH
Official Seal
Notary Public - State of Illinois
My Commission Expires Aug 30, 2023

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 2016 CF 909

TODD A. KENDHAMMER,

Defendant.

AFFIDAVIT OF GEOFFREY R. LOFTUS

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I, Geoffrey R. Loftus, being duly sworn, state the following:

I. Qualifications and Background.

1. My name is Geoffrey R. Loftus. I am Emeritus Professor of Psychology at the University of Washington in Seattle where I have taught since 1972. My area of expertise, in which I have been working for approximately 50 years, is human perception and memory.

2. My professional experience includes, among other things, co-authorship of 8 books and approximately 110 articles, presentation of approximately 160 invited addresses in 9 countries, 41 years of continuous grant funding from the National Science Foundation, the National Institutes of Health, and other funding agencies, assorted journal editing, assorted government grant reviewing, and assorted consulting. This experience is described more fully in my CV which can be found at, http://faculty.washington.edu/gloftus/CV/CV.html.

3. Over the past 37 years, I have been qualified and testified at trial as an expert in perception and memory in approximately 460 cases. These cases have been tried in superior courts in 55 counties across 16 states in the U.S., in U.S. Federal courts in 11 cities, in U.S. Military court in Sigonella, Italy, and in Canadian court in Winnipeg, Manitoba.

4. I was asked to prepare this report by Mr. Buting, who sent me copies of a 911 call, police reports, and trial transcripts. I reviewed the documents, and my opinions and summaries are based on these materials.

II. Fact Summary.

5. During the morning of September 16, 2016, Todd Kendhammer and his wife Barbara were driving northbound along Bergum Coulee Road/County Road M in West Salem, Wisconsin. According to Mr. Kendhammer's accounts, a pipe suddenly fell from a passing southbound flatbed truck, came through the passenger side of his car's windshield, and hit Barbara in the head. According to the official Wisconsin Motor Vehicle Accident Report, Mr. Kendhammer apparently first stated that the pipe fell off the truck "bounced off the roadway and impaled the front windshield passenger side." As discussed below, during suggestive questioning by an officer, that rendition changed to the pipe not striking the ground. Mr. Kendhammer related that he punched his windshield in an unsuccessful effort to deflect the pipe. He further related that he stopped his vehicle, going into a roadside ditch in the process, threw the pipe toward the rear of his car, started CPR on his wife, and called 911. Mr. Kendhammer sounded distraught on the phone to the dispatcher and seemed to have difficulty understanding or attending to her instructions and comments.

6. West Salem police and county emergency personnel arrived. Police found a pipe in the vicinity, a hole in his vehicle's windshield, consistent with a pipe breaking through it, and a punched-out area on the driver's side windshield, consistent with Mr. Kendhammer's having punched the windshield. Emergency personnel asked police to remove Mr. Kendhammer from the immediate area while they attended his wife because of his extreme distress. Shortly thereafter, Mr. Kendhammer apparently witnessed emergency personnel place Ms. Kendhammer in the ambulance to take her to the hospital. Two officers commented on Mr. Kendhammer's condition. PO Loeffelholz commented that he was visibly shaken up. (Discovery, p. 13). Deputy Wickland stated, "I made contact with Todd and observed that he was very visibly shaken by the crash that had occurred. He was speaking very quickly and was unsteady on his feet and looked as though he was surprised by what had occurred." (Discovery, p. 2).

7. Mr. Kendhammer was driven to the hospital by La Crosse Sheriff's Department Sergeant Mark Yehle who interviewed him while enroute. During this interview, Sergeant Yehle pressed Mr. Kendhammer for minute details of the accident. Throughout the interview, Mr. Kendhammer was distraught and repeatedly asked about how his wife was and when he could see her. While understandably highly stressed, Mr. Kendhammer nonetheless tried to comply with Sergeant Yehle's requests and related that:

a. The truck in question was a dark-colored (either dark blue or dark green, but possibly black) pickup style cab. He guessed it was 3/4 ton with a "makeshift" steel flatbed with 18" to 2' high metal sides. He thought it was around a 2000 model although he was unable to identify the manufacturer. There was no remarkable damage or signage. Mr. Kendhammer could not say if the driver was male or female.

b. As they approached Bergum Coulee Rd. the pipe came off the back of the truck and passed through the windshield hitting Barbara.

c. He saw a thing coming at him and he thought it was a bird until he saw it on an angle and realized it was a pipe.

d. He reached out, not really thinking what he was doing and struck the windshield in an attempt to prevent the pipe from hitting Barbara.

8. However, Dep. Yehle repeatedly pressed Mr. Kendhammer even when he said he could not remember things, used leading questions and encouraged him to guess.

a. Mr. Kendhammer said he did not recall details because his attention was elsewhere.

MY: Do you know if it was a Chevy? Ford?
TK: I, I didn't even look really, I, I, we were dicking around and she was drinking water and we were screwing around not, ya know, talking and bullshitting and, and then, and looked up and, and I, I seen the thing coming and...
(Discovery, p. 37).[1]

b. Mr. Kendhammer said he did not look at the truck.

TK: I, yeah, I seen it when it started coming off, I mean it, it like it rolled off and was headed right, I mean...
MY: Okay. What else was he hauling?
TK: I didn't see. I didn't, I didn't even look at the truck. I honestly."
MY: Didn't look like it...
TK: I wasn't looking.

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[1]In these excerpts of the squad car recording on the way to the hospital, the initials "MY" reference La Crosse Sheriff's Department Sgt. Mark Yehle, while TK references Todd Kendhammer.

(Discovery, p. 38)

c. Mr. Kendhammer said did not even know his wife had been struck at first.

TK: I don't know if I tried to stop it or what I tried to do, but, ah, I reached out for it and it hit her and I didn't think it hit her at first cause I was dicking with my, I hit the windshield I was dicking with my hand and she started flailing really bad. Just...
(Discovery, p. 37)

d. The injury to his wife was very traumatic to him.

TK: And she started just profusely thrashing.
MY: Okay.
TK: And, and spitting blood and just bleeding and...
MY: You were still driving at this time?
TK: I was still driving. So that's when I, I reached over and pulled the pipe out a little bit.
(Discovery, p. 45)

e. Mr. Kendhammer said he was very concerned about his wife.

TK: ls she gonna be okay?
(unintelligible voice)
TK: She don't like to be alone.
MY: No?
TK: No. I wanted to go with in the ambulance and they wouldn't let me (crying).
MY: Hang in there okay? You've got to be strong.
TK: (crying) (unintelligible).
(Discovery, p. 48)

f. Sgt. Yehle suggested in his question to Mr. Kendhammer that the pipe did not hit the ground before it struck the car.

MY: Did you realize it was a pipe before it hit the windshield?
TK: No, because it was coming right straight at us...
MY: Okay.
TK: lt wasn't sideways, it wasn't tipped.
MY: You said it came off the truck, never hit the ground and...
TK: No, it just come right straight off the truck...

MY: Straight off the truck, huh?
TK: And, and, and it, it looked just like a, I mean it, it, you couldn't see a side to it so I didn't know it was a pipe.
MY: Okay.
TK: And then at the last minute I seen it, that it was a pipe because it was kind of at an angle and that's when I lunged forward.
(Discovery, p. 50)

g. Mr. Kendhammer said he did not even know it was a pipe until it was in the air.

MY: It didn't look ... , was that overloaded or anything?
TK: I, I didn't even, I didn't even, I didn't, I, I thought it was a bird at first...
MY: Sure.
TK: And then it kept coming and I, I, I, I just, and I didn't even look at the truck. I just, I didn't think it was coming from that truck.
MY: No chance that you saw a driver either?
TK: I didn't even, I didn't. I seen...
(Discovery, p.49)

9. Several lines of evidence led authorities to question Mr. Kendhammer's account of Barbara's death. Of relevance to this report are two of them.

a. The first is Mr. Kendhammer's aforementioned acceptance of Sergeant Yehle's suggestion that the pipe did not strike the ground before it passed through the windshield. Subsequent attempts to recreate the accident based on the perceived circumstances indicated that, according to the State, it was highly unlikely that a pipe falling from a truck could have come into contact with the windshield of Mr. Kendhammer's car without having hit the ground first.

b. The second is that, at some point after the incident a witness, Randy Erler, reported that he had driven by the accident scene after Mr. Kendhammer's car had stopped, but before police arrived. Mr. Erler indicated that he saw no damage to the car windshield. Mr. Erler's report was consistent with a prosecution view that Barbara's death was not caused by a pipe puncturing the windshield, but rather that her death was caused by some other means: that Mr. Kendhammer had lied about the pipe and had himself punctured the windshield in an

effort to provide a plausible cause for Barbara's death.

10. On December 6, 2016, Mr. Kendhammer was arrested in conjunction with Barbara's death, and in December of 2017, he was tried and convicted of her murder.

III. Testimony Specifics Concerning Scientific Principles of Memory.

Perception and memory have been the subject of substantial research over a period of decades.

11. The information discussed below is generally accepted in the field of Psychology (see, e.g., Kassin, Ellsworth, & Smith, 1989; Kassin, Tubb, Hosch & Memon, 2001; Schmechel, O'Toole, Easterly & Loftus, 2006). The information has been gathered over the past century primarily using controlled laboratory research as a means of identifying basic scientific laws. Such research has typically been funded by research grants from national agencies, including the National Science Foundation, the National Institutes of Health, along with military research. The results of such research studies have been published in peer-reviewed journals mainly in the fields of Biology, Computer Science, Neuroscience, and psychology, as well as in the premier cross-discipline journals, principally *Nature* and *Science*.

12. Once a hypothesis or series of hypotheses has been validated in the study, researchers can compare the conclusions to observations of real life incidents that bear on the research conclusions. This allows researchers to develop generalizations regarding the laws formulated under scientifically controlled settings to the world outside the laboratory. In addition, in the area of research hypotheses pertaining to witnesses in criminal justice situations, researchers have had the benefit of case studies from cases of eventually exonerated individuals convicted on the basis of highly confident, yet demonstrably false, memories described by witnesses. Thus, the research and prior cases can illuminate questions regarding the eyewitness accounts of Todd Kendhammer and the witness Randy Erler just as it would with any other eyewitness.

a. Memory of an event goes through a process during which various factors may affect the reliability of the memory.

There exists a longstanding theory that describes how perception and memory operate. This theory has been described in many places, initially by Neisser (1967); see also Neisser Hyman (1999), and applications of it to legal issues have been described elsewhere (e.g., Busy & G. Loftus, 2007; G. Loftus, 2010a, 2010b; E. Loftus, 1979; E. Loftus & Doyle, 1997). Briefly, three points are most relevant to legal issues:

First, initial perceptions are fragmented, disorganized, and incomplete.

Second, beginning when the event ends, the witness's memory of the event changes over time in such a way as to become more detailed, more coherent, more organized, and more complete.

Third, the memory changes may, unbeknownst to the witness, cause the memory to be less accurate, rather than more accurate. Hence, while the witness's eventual memory is strong, detailed, real-seeming, and confidence-inducing, it is nonetheless potentially incorrect in important respects. Examples of such false memories abound, both in the scientific laboratory and in everyday life.

b. Memory can fail under three circumstances.

The first involves factors operating at the time of the original event that diminish or preclude a witness's ability to accurately identify the sequence or the nature of the events (e.g., high stress limited time to perceive, or lack of attention).

The second involves events occurring during the *retention interval* that intervenes between the time of the original event and the time that the witness is called upon to recollect something about the event (e.g., for any of a variety of reasons, a witness is induced to reconstruct his or her memory on the basis of post-event information). *See, infra* ¶ 12(f).

The third involves the procedures by which information is elicited from the witness's memory.

c. Mental functioning is poorer during traumatic or highly stressful events than less stressful events.

Accidents and other highly traumatic events are extremely stressful for witnesses. Generally speaking, and contrary to popular belief, mental functioning during a high-stress experience is poorer than mental functioning during a moderate-stress experience (e.g., Baddeley, 1972; Berkun, Bialek, Kern, & Yagi, 1962; Morgan, Hazlett, Doran, Garrett, Hoyt, Thomas, Baranoski, & Southwick, 2004; Nourkova, Bernstein, &

Loftus, 2004: Yerkes & Dodson, 1908). In other words, because of high stress, a witness's ability to perceive and memorize critical details of the accident as it is unfolding is diminished.

Lay people typically believe, incorrectly, that a vivid and accurate representation of a traumatic or highly stressful event, replete with many details, is "stamped into a witness's memory" (e.g., Neisser & Harsch, 1999). To the contrary, the scientifically based finding is that there is a negative relation between a witness's stress level during some event and the accuracy of the witness's eventual memory of the event. In other words, the accuracy of a memory is reduced at the higher stress level. This well-founded conclusion runs contrary to common intuition that many lay people assume is true.

The scientific research on how human perception and memory work as outlined in this affidavit instead supports the existence of situations where a witness would end up with a *strong, vivid, detailed, and real-seeming* memory of the event – but a memory that is *not* necessarily accurate.

The reason for this is that a traumatic or stressful event is also almost always a salient or important event – i.e., an event that the witness subsequently thinks about, talks about, is interviewed about, possibly testifies about, and so on. Accordingly, a stressful event is one in which few accurate details about the original event are memorized from the start, but are added later. To compound the problem, there is substantial opportunity for this originally minimal memory to be supplemented with post-event information that is of dubious origin. Post-event information can come from a wide variety of sources; discussions with family, friends or law enforcement, news reports, and internal ruminations. Even questions that are focused or suggestive can affect the memory. Accordingly, the witness's eventual memory of a traumatic or high stressful event is one that is typically replete with details and other richly represented, real-seeming information – but information that, unbeknownst to the witness is potentially false in important ways. This phenomena is widely recognized in the scientific community but is counter intuitive to the beliefs of lay people, including jurors, law enforcement and lawyers.

d. The degree of attention paid to specific elements of an event affects that which is accurately retained in memory.

A witness's attention is divided when many aspects of the environment

compete for attention. In other words, when the witness is bombarded by stimuli during an event, the witness's attention is divided and this can affect the reliability of the memory. Attention is a central focus of study in numerous scientific fields; for detailed accounts see, among many other articles, Moray (1969), Norman (1976), Sperling & Melchner (1978), Bundeser (1990), Loftus, Hanna, & Lester (1988), Pasherl (1998), Reinitz (1990).

Attention is a critical component of the human brain whose purpose is to filter the vast amount of information from the world that impinges on the brain at any given instant. Information that is *relevant* to the task at hand is supposed to remain in focus while that information that is *irrelevant* to the task at hand should fade into the background. Most generally, attention is a serial process that moves from one area of the world to another. An apt metaphor is that of an "attentional spotlight beam" that moves from one part of the witness's sensory world to another part and focusing on that area at a given time.

When any element of some event is not attended to, it is lost to the witness; i.e., it is not remembered later on. That element does not make it into the final memory because it was not in the "attentional spotlight beam." A witness fails to attend to – and hence will not remember – an eventually important element of an event under either of two circumstances:

> **The first** is when the element is not relevant to the witness's task at hand and is filtered out.
>
> **The second** is when there are numerous elements of the event that are *all* relevant to the witness's task at hand, and thus compete for the witness's attention. In this latter kind of event, the witness must sacrifice paying attention to some elements of the event in order to pay attention to other elements of the event that are potentially more important. This may explain why a witness will not remember details such as the color of a car involved in an accident or, as in this case, whether or not an oncoming pipe hit the ground or not. The witness at the time the memory is forming may be simply attending to elements of his environment that are more important such as getting help for an injured person or, as in this case, trying to protect and help his wife.

e. **The shorter the event the less relevant information the witness has available for the memory.**

Although a matter of common sense, it is an important part of the whole picture to point out that when the event is of short duration, less perceptual information is available to the witness as a basis to form an original memory.

What is less apparent to common sense and the understanding of lay people is the concept of *functional duration.* Typically, of the total duration comprising some event, only a fraction of that time is available to the witness for memorizing what will later be relevant. The shorter the duration of the event, the less time there is to perceive and memorize what is occurring. In some cases, the relevant information may be zero.

f. **Suggestive post-event information, correct or incorrect, can impact a witness's memory and later confidence.**

Post-event information is event-relevant information, which can be either correct or incorrect, that is acquired by a witness after the event and integrated into the witness's memory. Post-event information has been the subject of a substantial body of research over the past 40 years; see Loftus (1979); Loftus & Ketcham (1991); Schacter (1995). When and to the degree that post-event information is false, its addition to the memory causes the memory to become stronger and more confidence-inducing, but at the same time less accurate. Addition of such post-event information is typically an unconscious act; that is, a witness is later unable to distinguish which aspects of an eventual memory are based on original events, versus those based on post-event information added subsequent to the event. Leading questions which introduce subject matter may also be integrated into a memory and cause inaccuracy.

g. **Scientific evidence illuminates circumstances under which high confidence does not necessarily imply high accuracy**.

Generally speaking, and contrary to common sense, confidence in some memory cannot be used as an index of accuracy when circumstances for perceiving are poor (e.g., Bradfield, Wells, & Olson, 2002; Busey, Tunnicliff, Loftus, & Loftus, 2000; Deffenbacher, 1980; Penrod & Cutler, 1995; Wells, Fegueson & Lindsay, 1981). As discussed later, circumstances

for perceiving were indeed limited, both for Mr. Kendhammer and for Mr. Erler.

A witness testifying inaccurately about some critical fact is not necessarily lying; rather decades of scientific research have indicated that a witness may be testifying honestly about the contents of a memory that seems very real but that, for any number of reasons, is itself false.

IV. Application to the Facts in this Case and Rationale for Testimony.

13. I have evaluated the following issues using the materials described and the research findings discussed in the preceding paragraphs: (1) the reliability of Mr. Kendhammer's detailed accounts of the accident that he initially provided to Sergeant Yehle, and subsequently reiterated in trial testimony; and (2) the reliability of Mr. Erler's assertion that the windshield of Mr. Kendhammer's car was undamaged just after the accident occurred.

14. Before going through the two topics, however, I would like to clarify two issues.

First, I do not as a matter of course, issue judgments about whether a particular witness's perception and/or memory is correct or incorrect. Instead, I provide the fact finder with information about the scientific bases of various relevant aspects of perception and memory. The hope is that the fact finder can use this information as a tool to help carry out the job of assessing the reliability of assertions made by eyewitnesses. Normally, I do not mention case participants by name when I testify; I do so in this report to more clearly articulate the relevance of my proposed testimony to this case.

Second, the science has demonstrated and perception-memory experts can state with accuracy that, contrary to common sense, under well-understood circumstances, a witness is perfectly capable of developing a memory that is strong, detailed, and real-seeming – yet a memory that is false in potentially critical respects. The witness may then relate and even testify about that memory, false though it may be, with great confidence.

15. The research on memory would have provided the jury with information critical to two questions raised in this case. The memories of both Mr. Kendhammer and Mr. Erler were at issue in this case. As I understand the arguments, the State argued that Mr. Kendhammer was lying because some of the details in his statements were not confirmed in the investigation. The State also argued that Mr. Erler's memory was accurate, in part, because of the great confidence he expressed about his memory of the

windshield's condition when he passed the car. Regarding both of these issues the fact finder would have benefitted from hearing about what the science tells us about memory.

The first question is: should a witness expressing a false memory, even with confidence, be construed as a lying? The answer implied by a large body of scientific work is: no. A witness, even though testifying inaccurately, *is not lying* in the critical sense that he is honestly relating the contents of his memory; however the contents of his memory are false.

The second question is: to what degree should an eyewitness's confidence in some memory be construed as evidence that the eyewitness's memory is accurate? The answer supported by a large body of scientific work is: not necessarily. If certain facts characterize the event in question, then a witness's confidence cannot be used as a reliable indicator of the witness's accuracy. A memory is still subject to many factors individual to the person and the circumstances no matter how confident the witness appears in repeating it.

These issues are relevant in subtly different ways to the testimony of both Mr. Kendhammer and Mr. Erler. Had the jury in Mr. Kendhammer's trial had the benefit of expert testimony, the jurors would have been provided with information to assist the defense in the following ways: (1) It would have explained why Mr. Kendhammer may have believed to be true his affirmation of Sgt. Yehle's statement that the pipe punctured the windshield without first bouncing off the ground, when in fact his memory of this detail may not have been accurate and could explain why other details about the incident were not confirmed by the investigation (the direction the truck was traveling, its color, matters regarding speed, the belief that a bird was the object, how the inside of the windshield was damaged, etc.); and (2) It would have also given the jury information that would allow them to view Mr. Erler's confident assertion the windshield he recalled as exhibiting no damage with appropriate skepticism.

16. Over the past three decades, research revolving around false yet honest memories has been attracting the attention of both the judicial community and the public, largely because of the increasing number of cases in which convicted, but eventually exonerated individuals, are found to have been originally convicted on the basis of confident, yet false, memories expressed by witnesses at trial.

New Jersey Attorney General John Farmer cogently described the problem in a 2001 memo issued by that accompanied new guidelines for eyewitness identification procedures in his state. He noted the importance of guarding against procedures which may invest a witness with a false sense of confidence, pointing out that, "Studies have

established that the confidence level that witnesses demonstrate regarding their identifications is the primary determinant of whether jurors accept identifications as accurate and reliable." This is certainly correct - see, e.g., Penrod & Cutler, 1995; Cutler, Penrod, & Dexter, 1989. An expert in perception and memory is in a position to alert jurors to situations which, on the basis of scientific studies, are known to lead to such a false sense of confidence.

Obviously, in this case identification is not at issue. However, scientific findings related to confidence and accuracy apply to *any* eyewitness memory, not just a witness's memory of what a perpetrator looked like. In this case, as indicated, two central questions that a jury should have considered are: (1) does the alleged impossibility of facts asserted by Mr. Kendhammer about the manner in which the pipe struck his vehicle or other unconfirmed details imply that Mr. Kendhammer is lying and (2) to what degree should Mr. Erler's presumed confidence in his memory that there was no damage to Mr. Kendhammer's car's windshield be interpreted as an indication that Mr. Erler's memory is *accurate*, i.e., that indeed there was no damage to the windshield?

17. It is important first to establish why a confident witness sways jurors. The reason, quite simply is that in most of normal, everyday life, high confidence *is* predictive of high accuracy. Therefore it makes sense that an average juror would believe intuitively that high confidence is always associated with high accuracy, or at least that the juror should use this premise as a default assumption in evaluating the credibility of a witness's memory. Witnesses who sound positive about the accuracy of their memories have a meaningful impact on jury decision-making on those points about which the witnesses claim confidence in the memory.

However, contrary to intuition, this premise does not necessarily hold true, and a great deal of scientific research has delineated the circumstances under which an eyewitness' memory can be challenged on the basis of research. These circumstances include (a) an original event that does not lend itself to a witness's being able to easily form an accurate memory of some critical detail of an event (e.g., Mr. Kendhammer's memory of the accident details formed under conditions of extreme stress or Mr. Erler's forming a memory of no windshield damage while driving past the scene and not having a reason to pay particular attention to the windshield) along with (b) some form of suggestive *post-event information* that would bias the witness to reconstruct his or her memory in some fashion. For example, Mr. Kendhammer was in a position where he was likely to infer details that *might have* happened when responding to Sergeant Yehle's questions. Similarly, community gossip implying Mr. Kendhammer's culpability could easily have affected the content and accuracy of Mr. Erler's memory. In both instances, the witness's memory could well have become strong and confidence-inducing.

Accordingly, although nonintuitively, the witness's subsequent confident memory is based on potentially inaccurate perception of and/or potentially inaccurate post-event information about some critical aspect of the event and not on information acquired at the time of the original event.

18. While this combination of circumstances is rare in most people's experience, it is relatively common in incidents such as the horrific event experienced by Mr. Kendhammer or Mr. Erler's seemingly unimportant at the time but later-important view of Mr. Kendhammer's car. It is also clear, based on confirming laboratory studies, and on outcomes of real-life trials, that a highly confident eyewitness can be viewed by a jury as either lying (if the eyewitness's assertions are demonstrably false) or persuasive (if the eyewitness's assertions are plausible). Accordingly, an expert in perception and memory would testify about the scientifically understood circumstances under which a witness' expression of confidence should not be taken as a sign that the testimony is accurate. The application of these circumstances to the facts of the case at hand can be established though hypothetical questions from the defense attorney and/or the prosecuting attorney.

This combination of information allows the jury to evaluate in a reasonably informed and principled fashion the implications of whatever degree of confidence a witness displays in his or her memory of some critical detail or an event. More generally, a jury must consider what prior circumstances are consistent with a witness's confident assertions whose validity is strongly favorable to the prosecution case and detrimental to the defense case.[2]

19. Finally, I wish to emphasize that any testimony on my part about eyewitness perception and memory would not have been offered to suggest that Mr. Kendhammer was innocent, only that the jury should reasonably have viewed all relevant witnesses' memories with appropriate information about research and memory in deciding whether or not to convict Mr. Kendhammer.

V. Factors that would have diminished Mr. Kendhammer's and/or Mr. Erler's ability to perceive critical details.

20. In this section, I identify several factors that would have contributed to poor initial perception by Mr. Kendhammer and/or Mr. Erler about critical details that they

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[2]Or vice-versa as in, e.g., *State of Alaska v. Korakahn Phornsavanh* 3AN-13-06468CR, wherein I consulted and testified at trial for the State about many of the same issues that I discuss in this report.

later described as having seen.

Given common misconceptions about memory, the jurors in this case could have reasonably concluded that *if* Mr. Kendhammer's wife's death was caused by the pipe accident, then he would have had a strong memory of the accident's details – *including* whether or not the pipe initially hit the ground. They could have also believed that he would have had a similarly recording-like memory of all the details about the accident. The State's argument that Mr. Kendhammer's detailed account conflicted with physically possible reality, would therefore be persuasive to the jury that Mr. Kendhammer's detailed account must have been of an event that never actually happened, and therefore that he was lying.

21. In reality, Mr. Kendhammer likely had very little original perceptual information about the details of the accident, including whether or not the pipe hit the ground prior to puncturing the windshield and details such as the description of the truck and other items of interest. It is equally likely that he later had detailed memories that included potentially incorrect details, such as the pipe never hitting the ground or the type or color of the truck, or the exact mechanism of the propelled pipe.

a. Attention and lack of attention.

The relevance of attention to this case has been sketched above. Mr. Kendhammer's attentional focus was likely on how to avoid or deflect the pipe rather than on the details of the pipe's journey from the truck to his car. Similarly, Mr. Erler, driving by the accident scene, had no reason to pay attention to the exact state of the windshield; other things such as his safe driving and arriving at his work job site late would have required his attention under the circumstances instead.[3]

b. Functional duration of events.

In this case, what is relevant with respect to Mr. Kendhammer's memory are the details of the pipe's journey from truck to windshield; what is relevant with respect to Mr. Erler is the time he had to perceive the exact nature of Mr. Kendhammer's car's windshield.

The functional duration relevant to Mr. Kendhammer's ability to accurately

[3]My understanding is that additionally, Mr. Erler viewed Mr. Kendhammer's car from an angle that made it visually difficult to see any windshield damage that may have existed. Evidence of this perceptual lack on Mr. Erler's part is described in other documents related to Mr. Kendhammer's case.

perceive the pipe's journey included only that time during which he, simultaneously, (a) had the pipe in his field of view, (b) was looking in the area where the pipe was, and (c) various other necessary conditions as well. The functional duration relevant to Mr. Erler's ability to accurately perceive the state of Mr. Kendhammer's car's windshield was limited in the same manner.

In either case, it would have been important for the jury to understand that even if an event itself lasts several seconds, a witness's functional duration for perceiving and memorizing what will eventually be relevant could, therefore, be as low as zero.

c. Post-event information.

In the present case, potentially relevant post-event information includes, but is not necessarily limited to, unconscious *inferences*, both on Mr. Kendhammer's part and on Mr. Erler's part about they had seen.[4]

In Mr. Kendhammer's case, it is important to point out that, according to Sergeant Yehle's testimony (Trial Day 3, December 6, 2017, pp. 126-27), he strongly pressed Mr. Kendhammer, during his initial interview for exact details of the event – details that Mr. Kendhammer simply did not have because he had never memorized them in the first place.[5]

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[4]Inferences are internally generated forms of post-event information. Numerous experiments have investigated the way in which inferences can alter memory. As an example, Hannigan and Reinitz (2001) reported an experiment in which observers viewed slide sequences depicting some common activity. One such activity, to use an arbitrary example, involved a woman who was shopping in a supermarket. Each sequence of the activity had two critical successive slides. In the supermarket sequence the two successive slides depicted, first a woman contemplating a pile of oranges and next, the woman looking embarrassed, staring at the oranges scattered over the supermarket floor. Later, the observers confidently asserted that they had a seen a picture that depicted a possible cause of this situation, specifically, a slide of a woman pulling an orange from the bottom of the pile – when in fact they had never seen this slide. These and related results imply that, in these situations, viewers make inferences about what must have happened (in this case that the woman must have pulled an orange from the bottom of the pile), and incorporate the results of such inferences into their memory of the event.

[5]Although not an exact analog of this situation, it is worthwhile to consider experiments indicating that, following repeated questioning, people are capable of forming memories of entire, fictional, sometimes upsetting events (see, e.g., Loftus, Coan, & Pickrell, 1996; Loftus & Ketcham, 1994; Loftus & Pickrell, 1995). As an example, in an experiment reported by Hyman, Husband, & Billings, 1995, college students were asked whether they remembered a relatively unusual, and entirely fictional event (for example, attending a wedding reception and accidentally spilling a punch bowl on the parents of the bride) that subjects were told occurred when they were relatively young (around 5 years old).

Several results emerged from this procedure. To begin with, initially, no one remembered these

d. Highly traumatic and stressful and emotional event (as to Mr. Kendhammer).

Because of the highly traumatic and stressful and emotional nature of the event Mr. Kendhammer experienced, his ability to perceive and memorize critical details of the accident as it was unfolding was diminished. This negatively impacted his ability to recreate the events accurately and rendered him more open to post-event information, including suggestive questions by Sgt. Yehle, including that the pipe "came off the truck, never hit the ground." (Discovery p. 50).

In my opinion, the factual circumstances in this case lent themselves to a reasonable probability that the memories testified to by both witnesses were negatively affected by the extremely short functional duration of the event, lack of attention and post-event information they received. In addition, the accuracy of Mr. Kendhammer's memories would also have been negatively impacted by the highly traumatic and stressful and emotional nature of the event.

Dated this 4 day of February, 2021.

Geoffrey R. Loftus

Subscribed and sworn to before me
this day of February 4th, 2021.

MILES DOBIN
Notary Public
State of Washington
My Appointment Expires
Nov 29, 2021

Notary Public, State of Washington
My Commission expires: Nov 29, 2021

Miles Dobin

events. However, following two interviews about the "event" a substantial proportion of the students reported quite clear "memories" for parts or all the events. Indeed, many of the students began "remembering" details that had never been presented to them (and which, of course, could not have corresponded to objectively reality). To illustrate, one subject initially had no recall of the wedding event, but by the second interview, stated, "It was an outdoor wedding, and I think we were running around and knocked something over like the punch bowl or something and, um, made a big mess and of course got yelled at for it."

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Education

B.A.: Brown University, Experimental Psychology, 1967

Ph.D.: Stanford University, Experimental Psychology, 1971 (Adviser: Richard C. Atkinson)

Postdoctoral: New York University, 1971-72 (Sponsor: George Sperling)

Employment

Warm-up

Honeywell Corporation: computer programmer (machine-code and assembly-language), summers, 1966, 1967

Stanford University, Department of Psychology: research assistant/teaching assistant, 1967-1971

New York University: postdoctoral research fellow, 1971-72

Permanent

University of Washington: assistant, associate, full, emeritus professor, 1972-present

Visiting

Stanford University, Department of Psychology: visiting professor, summers, 1972, 1979

National Institutes of Health: National Institute on Aging: visiting scholar, autumn, 1986

MIT, Department of Brain and Cognitive Sciences: 1995-1996

Awards and Honors

Fellowships

University Fellow, Stanford University: 1967-70

NSF fellowship, New York University: 1971-72

Visiting Scholar, Stanford University: autumn, 1978, summers, 1979, 1980

NIMH MERIT Award 1989-1999

Research Grants

National Science Foundation	$31,000	6/73-5/75	Eye fixations
National Science Foundation	$43,500	6/75-12/77	Short-term memory
National Science Foundation	$37,660	1/78-5/79	Picture memory
National Science Foundation	$101,03	6/79-9/82	Picture memory
UW Grad School Research Fund	$4,962	10/79-6/80	Picture memory

National Science Foundation	$167,362	10/82-5/86	Visual perception
NIMH	$202,096	6/86-5/89	Visual perception
UW Royalty Research Fund	$24,000	3/96-2/97	Attention
NIMH	$1,082,187	6/89-8/99	Visual perception (MERIT award)
NIMH	$650,570	9/99-2/05	Visual perception
Institute for Learning and Brain Science	$75,202	3/01-6/02	Developmental perception
NIMH	$1,227,220	3/05-2/11	Visual perception (.pdf)
UW Royalty Research Fund	$35,000	3/13-2/14	Visual perception

Professional Memberships

American Association for the Advancement of Science (Fellow)

American Psychological Society (Fellow)

Association for Research in Vision and Ophthalmology

Psychonomic Society (Publications Board 1997-2001)

Society for Computers in Psychology (President 1983-84)

Society of Experimental Psychologists

Other Professional Experience

Grant reviewing

NIMH Basic Behavioral Processes Study Section (1983-1987)

NIMH Cognition and Perception Study Section (2003-2007)

Ad hoc reviewer for numerous other granting agencies in the U.S. and elsewhere

Journal editorships

Editor: *Memory & Cognition* (1993-1997)

Associate Editor, *Cognitive Psychology* (1975-1996; 1999-2006)

Journal editorial boards:

JEP: Learning, Memory, and Cognition (1977-1988; 2000-2002)

JEP: General (1977-1990)

Psychological Science (1999-2004)

Psychological Review (2004-2011)

Consulting work

Permitted to testify as an expert witness on perception, memory, statistics, and video-game behavior in approximately 460 civil and criminal cases (1980-present). Testimony admitted in,

Superior Courts: 64 counties in Alaska, Arizona, California, Colorado, Illinois, Indiana, Hawaii, Massachusetts, Michigan, Montana, Nevada, New Jersey, New York, Oregon, Washington, Wyoming

Federal Courts: Anchorage, AK; Chicago, IL; El Paso, TX; Kansas City, MO; Newark, NJ; Philadelphia, PA; Sacramento, CA; San Francisco, CA; Tacoma WA; Tucson, AZ; Yakima, WA

U.S. Military Court: U.S. Navy, Sigonella, Italy

Canada: Winnipeg, Manitoba

Publications

Books

Loftus, G.R., & Loftus, E.F. (1976). *Human Memory: The Processing of Information.* Hillsdale, NJ: Lawrence Erlbaum Associates.

Loftus, G.R., & Loftus E.F. (1982). *Essence of Statistics*Monterey: Brooks-Cole.

Loftus, G.R., & Loftus, E.F. (1983). *Mind at Play: The Psychology of Video Games.* New York: Basic Books.

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Nolen-Hoeksema, S., Fredrickson, B., Loftus, G.R., & Wagenaar, W. (2009). *Hilgard's Introduction to Psychology, Fifteenth Edition*. London, UK: Cengage.

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Loftus G.R. (1974). Acquisition of information from rapidly presented verbal and nonverbal stimuli. *Memory and Cognition, 2,* 545-548. (pdf)

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Hanna, A. & Loftus, G.R. (1993). A model for conceptual processing of naturalistic scenes. *Canadian Journal of Psychology, 47*, 548-569. (pdf)

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Busey, T.A. & Loftus, G.R. (1994). Sensory and cognitive components of visual information acquisition. *Psychological Review, 101*, 446-469. (pdf)

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Loftus, G.R. & Harley, E.M. (2005). Why is it easier to recognize someone close than far away? *Psychonomic Bulletin & Review*, 12, 43-65. (pdf)

Loftus, G.R. (2006). Elizabeth F. Loftus: The early years. In Garry, M., & Hayne, H. (Eds.). *Do Justice and Let the Sky Fall: Elizabeth Loftus and her Contributions to science, law, and academic freedom.*, Hillsdale NJ: Erlbaum. (pdf)

Bernstein, D.M., Atance, C., Meltzoff, A.N., & Loftus, G.R. (2007). Hindsight bias and developing theories of mind. *Child Development, July/August, 78,* 1374-1394. (pdf)

Busey, T.A. & Loftus, G.R. (2007). Cognitive science and the law: Moving science from the laboratory to the courtroom. *Trends in Cognitive Science, 11,* 112-117. (pdf)

Fidler, F. & Loftus, G.R. (2009). Why hypothesis testing is misunderstood: Hypotheses and Data. *Zeitschrift fuer Psychologie, 217,* 27-27. (pdf)

Loftus, G.R. (2010). The null hypothesis. *Encyclopedia of Research Design*: Sage Publications. (in press) (pdf)

Loftus, G.R. (2010). What can a perception-memory expert tell a jury? *Psychonomic Bulletin & Review,* 17, 143-148. (pdf)

Loftus, G.R. (2010). Processi Cognitive, testimonianza dell'esterto e teorie su eventi di pertinenza legale. *Sistemi Intelligenti a. XXII, n. 2, Agosto 2.* (pdf) (English Translation: Cognition, expert testimony, and theories of legally relevant events). (pdf)

Bernstein, D.M., Erdfelder, E., Meltzoff, A.N. Peria, W. &. Loftus, G.R. (2011). Hindsight bias from 3 to 95 years of age. *Journal of Experimental Psychology: Learning, Memory, & Cognition, 37,* 378-391.(.pdf)

Reinitz, M.T., Peria, W., Séguin, J.A., &. Loftus, G.R. (2011). Different confidence-accuracy relationships for feature-based and familiarity-based memories. *Journal of Experimental Psychology: Learning, Memory, & Cognition* (in press). (pdf)

De Cesarei, A. &. Loftus, G.R. (2011). Global and local vision in natural scene identification. *Psychonomic Bulletin & Review DOI 10.3758/s13423-011-0133-6.* (.pdf)

Franz, V. &. Loftus, G.R. (2012). Standard errors and confidence intervals in withi-subject designs: Generalizing Loftus & Masson (1994) and avoiding biases of alternative accounts.*Psychonomic Bulletin & Review, DOI 10.3758/s13423-012-0230-1.* (pdf)

Reinitz, M.T., Séguin, J.A., Peria, W., &. Loftus, G.R. (2012). Confidence-accuracy relations for faces and scenes: Roles of features and familiarity. *Psychonomic Bulletin & Review, 19,* 1085-1096.

Reinitz, M.T. &. Loftus, G.R. (2016). Conjunction faces alter confidence-accuracy relations for old faces. *Journal of Experimental Psychology: Learning, Memory & Cognition.*

De Cesarei, A., Loftus, G.R., Mastria, S., & Dodispoti, M. (2017). Understanding natural scenes: Contributions of image statistics. *Neuroscience & Biobehavioral Reviews* (in press).

Invited Addresses

1972

University of Oregon, Eugene, OR
New York University, New York, NY
Bell Telephone Laboratories, Murray Hill, NJ
State University of, New York, Oswego, NY
Brown University, Providence, RI
University of Pennsylvania, Philadelphia, PA

1974

National Academy of Sciences Specialists Meeting, Princeton, NJ

1975

University of California, Irvine, CA
University of Wisconsin, Madison, WI
Temple University, Philadelphia, PA
University of California, Los Angeles, CA
University of Toronto, Toronto, ON, Canada

1976

Simon Fraser University, Burnaby, BC, Canada
University of Oregon, Eugene, OR
Interdisciplinary Conference, Jackson Hole, WY
Advanced Projects Research Agency Conference on C3 Systems, Cambridge, MA
Advanced Projects Research Agency Conference on Cartography, San Francisco, CA

1977

University of California, San Diego, La Jolla, CA
University of Rochester, Rochester, NY
Simon Fraser University, Burnaby, BC, Canada
University of California, Irvine, CA

1978

Center for Advanced Studies in the Behavioral Sciences, Stanford, CA
University of Michigan, Ann Arbor, MI
Swarthmore College, Swathmore, PA
University of California, Berkeley, CA
NASA/Ames, Mountain View, CA

1980

University of Denver, Denver, CO

1981

University of Lethbridge, Lethbridge, Alberta, Canada
Stanford University, Stanford, CA
British Psychology Society, Plymouth, England
Craik Society, Cambridge University, Cambridge, England
Copenhagen University, Denmark
Sloan Conference on Reading, Amherst, Mass.
Yale University

1982

University of Utah
Max Planck Institute, Berlin, Germany
NASA/Ames, Mountain View

1983

University of California, Santa Cruz, CA
Max Planck Institute, Berlin, Germany

1984

Stanford University, Stanford, CA
University of Toronto, Toronto, CA
Society for Computers in Society (Presidential address), San Antonio, TX
Arizona Public Defender's Office, Tucson, AZ
California State College System, Courseware Conference, San Francisco, Ca
Concordia University, Montreal, Canada
Hebrew University, Jerusalem, Israel

1985

Western Psychological Association, San Francisco, CA
Williams College, Williamstown MA
U.S. Army Conference on C3 Systems, Fort Walton Beach, FL
University of Toronto, Toronto, Canada

Institute for Perception, Amsterdam, the Netherlands
Leiden University, Leiden, the Netherlands
University of North Carolina, Chapel Hill NC

1986

Brown University, Providence, RI
Duke University, Durham, NC
IBM Research Labs, Yorktown Heights, NY
John Hopkins University, Baltimore, MD
National Institute on Aging, Bethesda, MD
Northwest Courseware Conference, SeaTac, WA
Simon Fraser University, Burnaby, BC, Canada
SUNY, Stony Brook, Stony Brook, NY
University of Delaware, Newark DE
University of Maryland, College Park, MD

1987

Association of Federal Public Defenders, Seattle, WA
New York University, New York, NY
Society for the Visually Impaired

1988

University of Alberta, Edmonton, Alberta, Canada
Banff Conference on Cognitive Science, Banff, Alberta, Canada
University of Illinois, Champaign, IL
New York University, New York, NY

1989

New York University, New York, NY

1990

Amherst conference on eye movements, Amherst, MA
Ann Arbor conference on human/machine vision, Ann Arbor, MI
Boston University, Boston, MA
Leiden University, Leiden, the Netherlands
National Research Council meeting on vision, Irvine, CA
Stanford University, Stanford, CA
University of Padua, Italy

1991

National Center for Geographic Information and Analysis Conference on Visualization and Spatial Quality, Castine, Maine
Nuclear Regulatory Commission conference on systems for regulatory research, Livermore, CA

1992

Child Guidance Center, Tacoma, WA
Western Psychological Association, Portland, OR
Free University, Amsterdam, The Netherlands
Max Planck Institute, Berlin, Germany
Tucson Public Defender's Office, Tucson, AZ
Spokane WA Public Defender's Office, Spokane, WA

1993

Harvard University, Cambridge, MA
Smith-Kettlewell Institute, San Francisco, CA

University of California, Santa Barbara, CA
University of California, Santa Cruz, CA
University of Texas, Austin, TX
Washington Defender's Association, Winthrop WA

1994

American Psychological Association
Applied Psychology Unit, Cambridge, UK
Brown University, Providence, RI
Stanford University, Stanford, CA
University of St. Andrews, St. Andrews, Scotland
University of Toronto, Toronto, Canada

1995

American Psychological Society, New York, NY
Boston University, Boston, MA
Boston VA Medical Center, Boston, MA
Brown University, Providence, RI
Massachusetts Institute of Technology, Cambridge, MA
Society of Experimental Psychologists, Phoenix, AZ
Tufts University, Medford, MA
Wellesley College, Wellesley, MA

1996

Brandeis University, Waltham, MA
Dartmouth College (Kohler Memorial Lecturer), Hanover, NH
Indiana University, Bloomington, IN
Japanese Educational Psychology Society, Tokyo, Japan
National Institute of Bioscience and Human Technology, Tsukuba, Japan
Northeastern University, Boston, MA
Tsukuba University,. Tsukuba, Japan)
University of Massachusetts, Amherst, MA
Waseda University, Tokyo, Japan

1997

American Psychological Association, Chicago, IL
Birkbeck College, London, UK
Brandeis University, Waltham, MA
City University, London, UK
University of East London, London, UK

1998

American Psychological Association, San Francisco, CA
City of Chicago Corporation Counsel's Office, Chicago, IL
Military Prosecutors Conference, Everett Naval Base, Everett, WA
Princeton University, Princeton, NJ
Seattle Forensic Institute, Seattle, WA

1999

Cities conference, Rutgers University, New Brunswick, NJ

2000

Alaska Trial Lawyers Convention, Anchorage, AK
Arizona Trial Lawyers Convention, Long Beach CA

Microsoft Corporation, Redmond, WA

2001

Society of Counsel Representing Accused Persons, Seattle, WA)
University of Puget Sound, Tacoma, WA
National Science Foundation Conference on Augmented Cognition, Washington DC
Society of Counsel Representing Accused Persons (Kent, WA)
Public Defender's Office, Seattle, WA

2002

Society for the Quantitative Analysis of Behavior, Toronto (Invited Preeminent Tutorial)
Northwest Defenders Association, Seattle, WA
Inns of Court, Puget Sound Chapter, Tacoma WA

2003

Henry Art Gallery, Seattle, WA
University of Victoria, Victoria, BC, Canada

2004

University of Alberta, Edmonton, Alberta, Canada
Washington State Trial Lawyers Association, Seattle, WA

2005

Society for Applied Research in Memory and Cognition, Wellington, New Zealand
Honolulu Public Defender's Association, Honolulu HI
Western Psychological Association, Portland OR

2006

Santa Clara, San Mateo, San Francisco Public Defender Seminar, San Mateo, CA

2008

MIT Symposium on object recognition, Cambridge, MA
Giessen University, Giessen, Germany

2009

Society for Applied Research in Memory and Cognition, Kyoto, Japan
Università di Bologna, Bologna, Italy

2010

NOWCAM Conference, Bellingham, WA (Keynote speaker)
Cook County Public Defender's conference, Oakbrook, IL

2011

Washington Association of Criminal Defense Lawyers, Annual Conference, Chelan, WA
Society for Applied Research in Memory and Cognition, New York, NY

2012-2013

Inns of Court, Puget Sound Chapter, Seattle WA
Roosevelt University, Chicago, IL
University of Washington Edwards Lecture, Seattle, WA

2014

Syracuse University, Syracuse, NY
Kwantlen Polytechnic University, Vancouver, BC, Canada

2015

Contra Costa County Public Defender's Office, Martinez, CA
District of Hawaii Federal Courts Conference, Honolulu, HI

2016

Canadian Psychological Association, annual meeting, Victoria, BC, Canada

2017

National Seminar on Forensics Evidence and The Criminal Law, Seattle WA
Università di Bologna, Bologna, Italy

2018

University of Melbourne, School of Psychological Science, Melbourne, Victoria, Australia
University of Melbourne, History and Philosophy of Science, Melbourne, Victoria, Australia
University of Sydney, School of Psychology, Sydney, NSW, Australia

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.: 2016 CF 909

TODD A. KENDHAMMER,

Defendant.

AFFIDAVIT OF ALEXANDER JASON

STATE OF CALIFORNIA)
) SS.
CONTRA COSTA COUNTY)

1. I am self employed as a Board-Certified Senior Crime Scene Analyst (IAI), based in Pinole, CA. I began my career at the San Francisco Police Department (1970-74) working as an investigator in the Intelligence Unit. I also spent three years assisting at the U.S. Army's Institute of Research in the wound ballistics laboratory. Since 1990 I have been a self-employed crime scene analyst. Among other things, I perform crime scene reconstructions, shooting incident reconstruction, blood spatter analysis, forensic photography and digital imaging and forensic computer animations. I have extensive training in the neuroscience of action and perception and the human visual system (Harvard University Center for Brain Science, Duke University School of Medicine). I have testified as an expert witness in state and federal courts in Alaska, California, Colorado, Florida, Kansas, Maryland, Missouri, New Jersey, New York, Texas, Washington, and West Virginia. I am a past president, fellow and distinguished member

of the Association for Crime Scene Reconstruction. I have consulted on shooting incidents, firearms and ballistics to the U.S. Army, federal agencies, major corporations, law enforcement agencies and several popular TV shows, including CSI, Law & Order, and NBC, CBS, ABC, PBS/NOVA, and appeared numerous times on CNN, Fox News, MSNBC and other news shows. Further detail is found in my attached curriculum vitae.

2. I was asked by Attorney Jerome Buting to review aspects of the Todd Kendhammer homicide case. I reviewed the trial testimony and related exhibits for witnesses Trooper Michael Marquardt, Analyst Nick Stahlke, Dr. Kathleen McCubbin, Dr. Steven Cook, Mark Meshulam and Barry Bates. I also reviewed the official Wisconsin Motor Vehicle Accident Report for the case and numerous law enforcement investigation narrative reports. These reports including descriptions of various "pipe drop" experiments conducted by the Wisconsin State Patrol and La Crosse County Sheriff's Department on the highway where the defendant stated his vehicle was struck by a pipe which impacted and penetrated the passenger side of the windshield and struck the defendant's wife, Barbara Kendhammer. I also reviewed numerous video tape recordings of these "pipe drop" experiments. I believe these recordings to be important to a possible series of events that support the defendant's rendition of the event as an accident.

3. The written report by Trooper Marquardt and his trial testimony assumed a pipe could not fall off an oncoming truck, fly through the air and penetrate the defendant's windshield in the manner described by the defendant. Marquardt testified that he measured the hole in the windshield as 4.02 feet above the ground. (Jury trial

transcript, Day 5, December 8, 2017, at p. 9). He testified that he estimated the height from which a pipe could have fallen from a passing flatbed truck to be 6 feet above the ground, or a fall of approximately 2 feet to the penetration height in the Kendhammer windshield. (*Id.* at 10). The effect of gravity causes an object to fall at 32 feet per second. (*Id.* at 11). Therefore, Marquardt calculated the pipe would have fallen off a passing truck to the height of the hole in the Kendhammer vehicle in just 1/3 of a second. (*Id.*). The prosecutor argued in his closing argument that 1/3 of a second was not enough time for the defendant to have seen an oncoming pipe and reacted by throwing his hands up to attempt to block it as it came up to the windshield, as the defendant had claimed, because it "defies physics" and is "not possible." (Jury trial transcript, Day 9, December 14, 2017, at p. 17, 89).

4. Trooper Marquardt's report and testimony assumed that the pipe did not strike the ground and bounce up before striking the defendant's car. He gave no opinion about whether this latter scenario could have caused a falling and bouncing pipe to pierce the Kendhammer windshield. It appears that Trooper Marquardt's assumption was based on an interview with the defendant in a squad car being driven to the hospital moments after his badly injured wife was taken from the scene by paramedics. In that recorded interview, the defendant responds to Sergeant Mark Yehle's suggestion that "you said it [the pipe] came off the truck, never hit the ground, and ...", by stating: "No, it just come right straight off the truck." (Trial Exhibit #144, Marquardt report, p. 2). At trial, Marquardt conceded that he "didn't analyze other ways" the pipe could have been "kicked aloft." (Jury trial transcript, Day 5, December 8, 2017, at p. 19).

5. However, the official Wisconsin Motor Vehicle Accident Report, filed by La Crosse County Sheriff's Deputy Robert Kachel provides an alternative manner for the pipe to have become aloft before it penetrated the Kendhammer windshield. The report states that "The driver of Unit One [Kendhammer vehicle] stated there was a flatbed truck traveling southbound on County Road M. The southbound truck lost a 53-inch metal pipe from his load. *The pipe bounced off the roadway* and impaled the front windshield passenger side of Unit 1." (Wisconsin Official Motor Vehicle Accident Report, page 3 of 4) (emphasis added).

6. The reports I have reviewed indicate that on October 28, 2016, the La Crosse Sheriff's Department, the Division of Criminal Investigation (DCI) and the Wisconsin State Patrol conducted a series of experiments where they attempted to observe and measure the behavior of a similar pipe falling off a flatbed truck from various heights and speeds at the same highway location the defendant claimed the accident occurred. A total of nine tests were conducted and each was videotaped from several angles. On information and belief, these "pipe drop" experiments were not presented at or discussed during the trial, but it is my understanding that they were contained in discovery materials.

7. The reports and videos I reviewed show that the experiments were performed by using a flatbed truck with an adjustable ramp to release a similar metal pipe from various heights, positions, and speeds. The truck traveled southbound on County Highway M (CTH M) at the approximate location where the defendant said his northbound vehicle was struck and the pipe was released down the ramp while cameras at

various locations recorded its flight through the air and the behavior of the pipe as it struck the ground.

8. The videos show that the pipe rolled off the truck and struck the ground in different orientations each time and behaved differently each time after impacting the ground. On some of the drops the pipe hit the ground in a relatively flat orientation and bounced up very little. On others the pipe hit the ground with one of the ends striking the ground first which caused the pipe to bounce up and torque and spin in various orientations. On one of the experiments the pipe bounced up and tumbled end over end in the northbound roadway. On at least one of the nine drop experiments the pipe bounced and torqued in a manner that almost aligned with penetration of the passenger side of the windshield of an oncoming car, as generally described by the defendant in this case. With so few tests experiments run by the government, it cannot be ruled out that a pipe falling from an oncoming truck might have penetrated the passenger side of the windshield as the defendant stated.

9. The experiments demonstrate to me that a pipe falling off of an oncoming truck on that highway could bounce in unpredictable ways, especially if one of the pipe ends impacted the roadway first. The pipe could have torqued or even tumbled end over end in a manner that might have supported the defendant's claim that a pipe falling off a truck impaled his windshield in the manner he described. Once the pipe impacted the roadway and bounced into the air it may have remained airborne for a significant length of time sufficient to allow a driver to see the object and react to it.

Alexander Jason

Subscribed and Sworn to before me
this 22nd day of January, 2021.

Notary Public, State of California

KAREN B. DURAN
Notary Public - California
Contra Costa County
Commission # 2188266
My Comm. Expires Mar 25, 2021

My Commission expires: March 25, 2021

Alexander Jason

Certified Senior Crime Scene Analyst
Certified Force Science Analyst

PO Box 375 Pinole, CA 94564 • 510-724-1003 / ajason@alexanderjason.com

CURRICULUM VITAE

Board Certified Senior Crime Scene Analyst: Certified by the *International Association for Identification* (IAI); the oldest professional forensic science organization.

Certified Force Science Analyst: Force Science Institute; Human Dynamics in Shooting Incidents

Board Certified in Forensic Photography and Digital Imaging by the Intl Association for Identification

Qualified Expert Witness in:

- **Crime Scene Reconstruction**
- **Shooting Incident Reconstruction**
- **Wound Ballistics**
- **Force Science Analysis**
- **Bloodspatter Interpretation**
- **Forensic Photography & Digital Imaging**
- **Forensic Computer Animation**

Federal and State Courts (Alaska, California, Colorado, Florida, Kansas, Maryland, Missouri, New Jersey, New York, Texas, Washington, and West Virginia.)

PROFESSIONAL DESCRIPTION & EXPERIENCE

The focus of my professional work is crime scene analysis, shooting incident reconstruction and wound ballistics research. My primary interest is in the reconstruction and analysis of shooting incidents, the human and mechanical dynamics of shooting and the science of wound ballistics which relates to the use of firearms against humans and specifically to the interaction of projectiles and the human body.

PROFESSIONAL MEMBERSHIPS

Fellow of the American Academy of Forensic Sciences
Member: International Association of Bloodstain Pattern Analysts
Member: International Association for Identification
Technical Advisor: Association of Firearm and Toolmark Examiners
Co-Founder: International Wound Ballistics Association

CURRENT POSITIONS

Former Member of the National Institute of Justice's Standing Review Panel. Appointed by the NIJ Director as a consultant to review & evaluate forensic science & crime scene investigation technology research and project proposals.

Forensic Analyst / Photographer for homicide and other coroner cases involving organ transplant for the California Transplant Donor Network.

Peer Reviewer for: American Academy of Forensic Science *Journal of Forensic Sciences*; *Investigative Sciences Journal.*

Consultant on Shooting Incidents, Firearms and Ballistics to the United States Army, federal agencies, major corporations, law enforcement agencies as well as to the "Mythbusters," "CSI," & "Law & Order" TV shows, NBC, CBS, ABC, PBS/NOVA and several major film studios. I have also consulted on bullet design and performance parameters for ammunition manufacturers. I have appeared numerous times on CNN, Fox News, NBC, MSNBC and other news shows while interviewed on current shooting incidents.

PRIOR PROFESSIONAL POSITIONS

Past President, Fellow, & Distinguished Member: Association for Crime Scene Reconstruction

Shooting Reconstruction Instructor: Selected by the U.S. State Department to teach a 3 day course on Shooting Reconstruction to members of the PGR (Attorney General of Mexico's Investigative and Crime Scene personnel -- equivalent to our FBI) at the PGR Academy in Mexico City, Mexico (October, 2000).

U.S. Congress' Office of Technology Assessment Advisory Panel (1990-1992): Appointment to study and evaluate the effects of police officers being shot and to develop ballistic impact and penetration standards for police body armor.

Managing Editor of the *Wound Ballistics Review*: *The Journal of the International Wound Ballistics Association*; 1990-1995. (Most IWBA Full Members are physicians; many others are engineers, scientists, and law enforcement members engaged in the study of wound ballistics.)

Writer, Producer, & Director of six instructional video programs on firearms, wound ballistics, the use of deadly force by civilians, and forensic firearms evidence:

Deadly Weapons: Firearms & Firepower (1 hour and 45 minutes);
Deadly Effects: Wound Ballistics (1 hour and twenty minutes);
Deadly Force: Firearms, Self Defense, & The Law (1 hour and 40 minutes);
Forensic Firearms Evidence: Elements of Shooting Incident Investigation (3 hours)
Gunshot Wounds: Examination, Interpretation, Documentation (Producer)
Blunt Force, Sharp Force, Pattern Injury: Examination, Interpretation, (Producer)

All the above video programs are utilized for training by law enforcement agencies (including the FBI), crime labs, universities, medical schools, and many other institutions throughout the world.

Editor of the *Forensic Firearms Evidence: Elements of Shooting Incident Investigation* handbook and the co-author of a forensic firearms evidence written examination both of which are used by law enforcement agencies and crime laboratories in the U.S. and many other countries.

Awards:

Association of Firearm & Toolmark Examiners "**Most Outstanding Paper**" (*Firearm Recoil Dynamics*) 2008
American Film Institute's 1990 AVC Award for "Best Instructional Video" for *Deadly Force: Firearms, Self Defense, & The Law.*

WORK HISTORY

San Francisco Police Department 1970-74;
Principle duty was as an investigator working in the Intelligence Unit performing special investigations, threat assessment, vulnerability evaluations, and protective operations. Received Letter of Commendation for assisting in homicide investigation

Second Chance Body Armor, Inc., Executive Vice President, 1975-1976;
Supervised research, development, and testing of body armor for law enforcement.

Research West, Inc. 1976 -1978;
Senior Analyst performing research, analysis, and supervising investigations.

Letterman Army Institute of Research
Informally studied and performed research for three years at the U.S. Army's Wound Ballistics Laboratory w/ Dr. Martin L. Fackler, MD -- which was an internationally recognized wound ballistics research facility (1987-90.)

Center for Ballistic Analysis, Director, 1987-1992: Research and consulting in wound ballistics, body armor performance, and bullet performance dynamics.

Shooting Incident Reconstruction / Crime Scene Analyst: Self-employed 1990 - present;

EDUCATION & PROFESSIONAL DEVELOPMENT

Harvard University: *Fundamentals of Neuroscience, Part 1,2,3.* 15 weeks: Course completed, (Dr. David Cox, Ph.D thru HarvardX/edX).

Duke University School of Medicine: *Foundational Neuroscience for Action and Perception* Same course taught to medical students but without clinical aspects. 16 weeks: Course completed. (Dr. Leonard White, Ph.D thru Coursera).

Duke University School of Medicine: *The Brain and Space: Neuroscience of Visual & Auditory Systems.* (Dr. Jennifer M. Groh, Ph.D thru Coursera). 5 weeks: Course completed "*With Distinction*".

Duke University Institute for Brain Sciences: *Visual Perception & The Brain. 5 weeks. Course completed. (Dr. Dale Purves, MD thru Coursera)*

Polytechnic University of Hong Kong Faculty of Health Sciences: *Human Anatomy. 6 weeks. Course completed.* (Dr. John Yuen, Ph.D thru edX).

San Francisco State University, B.A., Journalism, 1973. (Honor graduate: *Cum Laude*)

Pepperdine University Graduate School of Management, 1975 (Non-Degree)
Completed Master's program in Operations Research and Management. (Operations Research involves constructing mathematical and statistical models to analyze complex mechanical and human operations.)

TRAINING

Basic Peace Officer Training: San Francisco Police Academy, 1971
Firearms, Criminal Law, Crime Scene Investigation, etc.
Pathology of Gunshot Wounds & Blunt and Sharp Force Injuries Seminars
Dr. Patrick Besant-Matthews, MD, Forensic Pathologist. 1992, 1993, 1994, 1996, 1997. 1999.
Crime Scene Investigation Training Seminar,
International Assoc for Identification Sep, 1993, 2002
Crime Scene Reconstruction Training
Assoc of Crime Scene Reconstruciton, Oct 1994
Shooting Incident Reconstruction Seminar,
AFTE Conference, San Diego, CA, 1995
Advanced Field Evidence Technician Seminar
California State University, Long Beach, 1996
Firearms Trajectory Interpretation (Instructor)
Calif Dept of Justice, January, 1996
Shooting Reconstruction: Ballistic Trajectory Analysis
California Department of Justice, California Criminalistics Institute, February, 1996.
Institute on the Physical Significance of Bloodstain Evidence
Laboratory of Forensic Science, May, 1996.
National Seminar on Forensic Medicine,

Institute of Forensic Medicine, Panama Dept of Justice, Panama City, July, 1996
Shooting Reconstruction Workshop
California Assoc of Criminalists, May 1997
Shooting Incident Reconstruction Workshop
Assoc of Crime Scene Reconstruction, Oct, 2001
Mathematics of Shooting Scene Reconstruction
AFTE Training Seminar, May, 2003
Evidence Photography Training
Evidence Photographers Intl, Nov 2003
Shooting Scene Reconstruction Workshop (FBI-Philadephia PD)
AFTE Training Seminar, May, 2003
Investigation of Long Range Shooting Cases,
AFTE Conference, San Francisco, 2007
Forensic Shooting Scene Reconstruction Course
Forensic Science Consultants; Luke & Mike Haag, Paulden, AZ, September, 2008
Force Science Certification Training:
San Jose P.D., June, 2009
Gunshot Wounds: Theory & Practice Seminar
Dr. Vincent J. DiMaio, MD, author of "*Gunshot Wounds*," Feb, 2010
Shooting Reconstruction: Elements of Trajectory Analysis,
RTI, 2013
Forensic Image Comparison Workshop
IAI – FBI, August 2015
Advanced Bloodspatter Analysis
Forensic Pieces Sep, 2017 - Pasadena Police Dept,
Fundamentals of Fluid Dynamics Workshop
IABPA, Sep 2017 - Cal State University, Dept of Mechanical Engineering

FIREARMS EXPERIENCE

Formally National Rated Competitive Shooter; U.S. Army "Expert" rating in Rifle and Pistol. SFPD Academy Combat Pistol and Shotgun Training. Served for 14 years as Rangemaster at one of the major law enforcement shooting competitions. Duties included design of shooting courses and events, evaluating marksmanship skills and proficiency with handguns, rifles, and/or shotguns

CERTIFICATIONS, MEMBERSHIPS, & LICENSES

California Department of Justice Certified Firearms Instructor
California Private Investigator's License
NRA Certified Range Safety Officer

Membership

MENSA (restricted to those with an IQ in the 98th percentile.)

Patent

Inventor of advanced crime scene evidence collection tool currently being tested by law enforcement agencies. (Patent Issued.)

PRESENTATIONS

Phoenix Law Enforcement Association
Wound Ballistics
Phoenix, AZ; February, 1989

The National Judicial College
Demonstrative Evidence: Forensic Computer Animation
Reno, NV; December, 1992

Assoc of Firearm & Toolmark Examiners Training Seminar
Forensic Animation: Shooting Incident Reconstruction
Miami, FL; April, 1992

San Francisco Barrister's Club
Demonstrative Evidence: Forensic Animation
San Francisco, CA; August, 1992

Detroit Police Department / American Society for Industrial Security
Shooting Incident Reconstructions & Computer Animation
Detroit, MI; March, 1993

California Association of Criminalists
Forensic Animation for Criminal and Civil Trials
Berkeley, CA; March, 1993

Assoc of Firearm & Toolmark Examiners Training Seminar
Forensic Computer Animation
Raleigh, NC; May, 1993

Tulare County Trial Lawyers Association
Forensic Animation: Shooting Incident Reconstruction
Visalia, CA: September, 1993

International Association for Identification
Shooting Incident Reconstruction with Computer Animation
Caspar, WY: September, 1993

American Academy of Forensic Sciences
Forensic Animation & Shooting Incident Reconstruction
San Antonio, TX; February, 1994

California Public Defender's Association
Computer Animation in the Courtroom
Long Beach, CA: February, 1994

International Wound Ballistics Association
Shooting Incident Reconstruction & Computer Animation
Sacramento, CA; March, 1994

International Wound Ballistics Association
A Method for Determining Graze Wound Direction
Sacramento, CA; March, 1994

California District Attorney's Association
Forensic Animation and Graphics: Bringing Your Case to Life
San Rafael, CA; April, 1994

Northwest Association of Forensic Scientists
Forensic Animation & Shooting Incident Reconstruction
Concord, CA; April, 1994

National College of District Attorneys
Showing the Shooting: Developments in Forensic Ballistics
South Lake Tahoe, CA; April, 1994

Assoc of Firearm & Toolmark Examiners Training Seminar
Computer Animation and Shooting Reconstruction
Indianapolis, IN; June, 1994

High Technology Crime Investigators Association
Using Computers for Shooting Reconstruction
Monterey, CA; June, 1994

Assoc for Crime Scene Reconstruction Training Conference
Computer Animation for Crime Scene Reconstruction
Oklahoma City, OK; September, 1994

American Academy of Forensic Sciences
General Section
The Virtual Crime Scene
Seattle, WA; February, 1995

American Academy of Forensic Sciences
Criminalistics Section
Forensic Computer Animation: Illustration of Shooting Incidents
Seattle, WA; February, 1995

Hastings Law School
Advanced Evidence Seminar
Computer Animation as Demonstrative Evidence
San Francisco, CA; March, 1995

American Inn of Court
Crime Scene Reconstruction & Computer Animation
San Francisco, CA; May, 1995

Assoc of Firearm & Toolmark Examiners Training Seminar
Computer Animation and Shooting Reconstruction
San Diego, CA; June, 1995

American Inn of Court
Forensic Computer Animation: Uses & Abuses
Lake Charles, LA; September, 1995

International Bloodstain Pattern Analysts & Association of Crime Scene Reconstruction Joint Training Conference
Shooting Incident Reconstruction
Oklahoma City, OK; October, 1995

American Inn of Court
Forensic Computer Animation
University of San Francisco Law School
San Francisco, CA; October, 1995

American Academy of Forensic Sciences
Computer Animation: It's Use in Crime Scene Reconstruction

Nashville, TN; February, 1996

National Seminar on Forensic Medicine Panama Dept of Justice / Intl Criminal Investigative Training & Assistance Program
(U.S. Dept. of Justice)
Shooting Incident Reconstruction / Wound Ballistics
Institute of Forensic Medicine,
Panama Dept of Justice, Panama City; July 1996

Defense Investigator's Association
Shooting Incident Reconstruction
Oakland, CA; October, 1996

Scientific Assembly of Forensic Nurses
Crime Scene Reconstruction
Kansas City, MO; November, 1996

Association for Crime Scene Reconstruction /
Int'l Association of Bloodstain Pattern Analysts
Shooting Incident Reconstruction
Albuquerque, NM; November, 1996

American Academy of Forensic Sciences
Criminalistics Section
Blood on the Bullet: The Detection of Blood on Fired Bullets
New York, NY; February, 1997

American Academy of Forensic Sciences
Crime Scene Reconstruction: Applying Computer Technology
New York, NY; February, 1997

Association for Crime Scene Reconstruction / Int'l Assoc of Bloodstain Pattern Analysts Joint Training Conference
Reconstruction of Shooting Incidents
Seattle, WA; November, 1997

Association for Crime Scene Reconstruction / Int'l Assoc of Bloodstain Pattern Analysts Joint Training Conference
Workshop: Shooting Incident Reconstruction
Seattle, WA; November, 1997

American Association of Law Schools Section on Evidence
Crime Scene Reconstruction & Computer Animation
San Francisco, CA; January, 1998

American Academy of Forensic Sciences
Criminalistics Section
Blood on the Bullet: The Detection of Blood on Fired Bullets, Part II
San Francisco, 1998

University of California, Hastings College of The Law
Advanced Evidence Seminar / Prof. Roger Park
San Francisco, CA; April, 1998

Utah Assoc of Crime Scene Analysts Principal Instructor
Shooting Incident Reconstruction Training Class
(2 days) Ogden, UT; June, 1998

Association for Crime Scene Reconstruction Workshop:

Shooting Incident Reconstruction on Vehicles
Oklahoma City, OK; November, 1998

Association for Crime Scene Reconstruction
"He Didn't Fall for Her" -- A Shooting Reconstruction
Oklahoma City, OK; November, 1998, CA, 1998

American Academy of Forensic Sciences General Section
Shooting Incident Reconstruction
Orlando, FL, 1999

University of California, Hastings College of The Law
Forensic Computer Animation: Admission and Use
San Francisco, CA; April, 1999

Richmond Police Department Evidence Technicians
Shooting Incident Reconstruction Techniques
Richmond, CA; May, 1999

Association for Crime Scene Reconstruction
Shooting Reconstruction: 16 Bullets, One Dresser, One Decedent
Kansas City, MO, Sept; 1999

Association for Crime Scene Reconstruction
Shooting Reconstruction Workshop (Instructor)
Kansas City, MO, Sept; 1999

American Academy of Forensic Sciences
The Gallardo Case: A Shooting Reconstruction
Reno, NV; February, 2000

University of California Hastings School of Law
Advanced Evidence Seminar / Prof. Roger Parks
San Francisco, CA; April, 2000

National Defense Investigators Association
Crime Scene Reconstruction
Las Vegas, NV; Oct, 2000

Procuraduria General de la Republica
(Office of the Attorney General of Mexico)
Forensic Ballistics Course (3 Days)
Mexico City, Mexico, Oct 2000

American Academy of Forensic Sciences
The Effect of Hair Upon the Deposition of Gunshot Residue
Seattle, WA, Feb 2001

University of California Hastings School of Law
Guest Speaker Advanced Evidence Seminar / Prof. Roger Park
San Francisco, CA; April, 2001

California Judges Association
Guest Speaker*: Digital Evidence Seminar*, Palm Springs, CA, May, 2001

Association of Firearm & Toolmark Examiners
Shooting Reconstruction: Putting It Together
Newport Beach, CA, July, 2001

Association of Firearm & Toolmark Examiners
The Effect of Hair Upon the Deposition of Gunshot Residue
Newport Beach, CA, July, 2001

Association for Crime Scene Reconstruction
The Effect of Hair Upon the Deposition of Gunshot Residue
Las Vegas, NV, October, 2001

Santa Clara University Law School
Guest Speaker
Advanced Evidence Seminar / Prof. Kandis Scott,
Santa Clara, CA, February, 2002

University of California Hastings School of Law
Guest Speaker *Advanced Evidence Seminar* / Prof. Roger Park
San Francisco, CA; April, 2002

International Association for Identification
Homicide or Suicide: The Cameron Reconstruction
Las Vegas, NV; March, 2002

Association for Crime Scene Reconstruction
The Penetration of Automotive Windshields by .223 Ammunition
Denver, CO, October, 2002

Santa Clara University Law School
Guest Speaker
Advanced Evidence Seminar / Prof. Kandis Scott
Santa Clara, CA, March, 2003

Association of Firearm & Toolmark Examiners
The Penetration of Automotive Windshields by .223 Ammunition
Philadelphia, PA, May, 2003

Association of Firearm & Toolmark Examiners
Through The Door: A Shooting Reconstruction
Philadelphia, PA, May, 2003

Association of Firearm & Toolmark Examiners
The Cameron Case: Shooting Reconstruction
Vancouver, BC Canada; May, 2004

Forensic Science Educator's Conference
St. Louis University School Of Medicine
Crime Scene Reconstruction: What It Is & Isn't
St. Louis, MO, July, 2004

Forensic Digital Photography
University Medical Center
Sexual Assault Response Team
Principal Instructor – 2 Day Seminar
San Diego, CA, September 2004

Forensic Digital Photography & Documentation of Evidence
Principal Instructor – 2 Day Seminar
South San Francisco, CA; March, 2005

University of California Hastings School of Law

Guest Speaker *Advanced Evidence Seminar* / Prof. Roger Park
San Francisco, CA; April, 2005

San Francisco MENSA Regional Meeting
"Brilliance by the Bay"
Invited Speaker: "
CSI: Bullets, Bodies, & B.S."
San Francisco, CA; November, 2005

American Academy of Forensic Sciences
Shooting Reconstruction: The Value of Evidence & Analysis in a Double Homicide
Seattle, WA, Feb 2006

University of California Hastings School of Law
Guest Speaker *Advanced Evidence Seminar* / Prof. Roger Park
San Francisco, CA; April, 2006

University Health Center
Forensic Digital Photography Seminar
Instructor: (2 Days)
San Diego, CA; April, 2006

California Association of Criminalists
Workshop Presenter: *Forensic Digital Photography*
Concord, CA; May, 2006

California Association of Criminalists
Shooting Reconstruction: The Value of Evidence & Analysis
Concord, CA; May, 2006

Office of the San Francisco Medical Examiner
Invited Speaker
Shooting Incident Analysis & Reconstruction
San Francisco, CA; February, 2007

San Francisco District Attorney's Office
Invited Speaker
Shooting Incident Analysis & Reconstruction
San Francisco, CA; March, 2007

California Association of Criminalists
Muzzle Flash: Why Many See It and a Few Do Not (Co-Author)
Garden Grove, CA; March, 2007

University of California Hastings School of Law
Guest Speaker Advanced Evidence Seminar / Prof. Roger Park
San Francisco, CA; April, 2007

Association of Firearm & Toolmark Examiners
The Effect of Gripping Upon Firearm Recoil
San Francisco, CA, May, 2007

Association of Firearm & Toolmark Examiners
Drive By Shooting: To Dream the Impossible Crime
San Francisco, CA, May, 2007

St Louis University School of Medicine
Dept of Forensic Science
Masters Death Investigation Training Conference

Crime Scene Reconstruction: The Elements Of Investigation, Analysis & Determinations
St. Louis, MO; July 2007

Professional Education Seminars, Inc
Crime Scene Investigation & Advanced Technology
Harrisburg, PA: Nov, 2007

Professional Education Seminars, Inc
Crime Scene Investigation & Advanced Technology
Altoona, PA, Nov, 2007

Professional Education Seminars, Inc
Crime Scene Investigation & Advanced Technology
Pittsburg, PA, Nov, 2007

Professional Education Seminars, Inc
Crime Scene Investigation & Advanced Technology
Portland, ME, Dec, 2007

Professional Education Seminars, Inc
Crime Scene Investigation & Advanced Technology
Concord, NH, Dec, 2007

Professional Education Seminars, Inc
Crime Scene Investigation & Advanced Technology
Burlington, VT Dec, 2007

Evidence Photographers International Council
Forensic Photography
Orlando, FL; Jan 2008

American Academy of Forensic Sciences
Shooting Reconstruction: The Boyd Case
Washington, DC, Feb 2008

Association of Firearm & Toolmark Examiners
City Shooting: The Sean Bell Case: A Complex Shooting Reconstruction
Honolulu, HI, May, 2008

Association of Firearm & Toolmark Examiners
Firearm Recoil Dynamics: The Inside Story
"Most Outstanding Paper" 2008 Award
Honolulu, HI, May, 2008

California International Association for Identification
"A Complex Shooting Reconstruction"
San Jose, CA, May 2009

American Academy of Forensic Sciences
Shooting Dynamics: Elements of Time & Movement in Shooting Incidents
Seattle, WA, Feb 2010

American Academy of Forensic Sciences
The Rosario Case (NYPD): A Complex Shooting Incident Reconstruction
Seattle, WA, Feb 2010

LeadAmerica Law & Justice Conference
Crime Scene Reconstruction
Stanford University, Palo Alto, CA

July, 2010

Utah Medical Examiner Shooting Death Investigation Conference
Special Invited Guest
Investigation of Shooting Incidents
Salt Lake City, UT, Oct, 2010

University of California Hastings School of Law
Guest Speaker Advanced Evidence Seminar / Prof. Roger Park
San Francisco, CA; Nov, 2010

St. Mary's College High School
Invited Speaker
Shooting Incident Reconstruction
Albany, CA, Nov 2010

Critical Incidents: A New Look at Officer Involved Shootings Seminar
Forensic Analysis of Officer Involved Shootings
Featured Speaker
Oakland, CA, Mar 2011

Association of Firearm & Toolmark Examiners
Shooting Dynamics: Elements of Time and Movement in Shooting Incidents
Chicago, IL, May 2011

California Association of Criminalists
Critical Issues in Shooting Incident Analysis
Sacramento, CA, July 2011

American Academy of Forensic Sciences
Critical Issues in Shooting Incident Analysis
Atlanta, GA, Feb 2012

Rains Lucia Stern, PC
Invited Speaker
Deadly Force in the Digital Age
Concord, CA, May 2013

Association of Firearm & Toolmark Examiners
Shooting Reconstruction: Combining Audio, Video, & Movement
Albuquerque, NM, June, 2013

Association of Firearm & Toolmark Examiners
Determining Bullet Direction from Clothing Fibers
Albuquerque, NM, June, 2013

California Association of Criminalists
Shot in the Yard: Complex Ballistics Analysis
California Criminalistics Institute, Sacramento, CA, Dec, 2013

California Criminalistics Institute Firearms Academy
Instructor
Advanced Techniques in Shooting Incident Reconstruction
CCI, Sacramento, CA; March, 2014

Los Angeles County Coroner West Coast Training Seminar
Invited Speaker
Shooting Incident Analysis: Methods and Results

Los, Angeles, CA May, 2014

Association of Firearm & Toolmark Examiners
A Shot in the Yard: A Complex Shooting Reconstruction
Seattle, WA, May, 2014

California Association of Criminalists
A Momentous & Moving Case
Ventura, CA, May 2015

California Association of Criminalists
Was The Knife in The Hand? – A Shooting Incident Reconstruction
San Francisco, CA, May 2017

International Association of Bloodstain Analysts
A Gun Too Far: A Shooting Reconstruction of a Homicide
Redondo Beach, CA, Sep 2017

Association of Firearm & Toolmark Examiners
Murder of the Schoolmarm: An Historical Shooting Reconstruction
Charleston, WV, June 2018

Association of Firearm & Toolmark Examiners
A Gun Too Far: A Shooting Reconstruction of a Homicide
Charleston, WV, June 2018

International Wound Ballistics Workshop (Invited speaker)
Wound Ballistics in Action
Hitzkirch, Switzerland. October 2018

Contra Costa Police Chief's Association Workshop (Invited Speaker)
In Depth Review: Homicide and OIS Cases
Bodega Bay, CA, November 2018

Publications

Methodology of Identification of the Non-Standard Discharge from Firearms
Advances in Criminalistics Journal 2017
Prague, Czech Republic

Bullet Entry Holes in Fabric: Fibers, Facts, and Fallacies
Journal of the Assoc of Firearm & Toomark Examiners
Volume 46, Number 2, Summer 2014

Where Are The Bullets?
The Explanation for the Lack of Recognizable Bullets or
Significant Bullet Fragments at Certain Shooting Scenes (co-author)
Journal of the Association of Firearm & Toomark Examiners
Volume 44, Number 3, Summer 2012

Drywall: Terminal Ballistic Properties of Forensic Interest (co-author)
Journal of the Assoc of Firearm & Toomark Examiners
Volume 42, Number 3, Summer 2010

Shooting Dynamics: Elements of Time & Movement in Shooting Incidents
Investigative Sciences Journal
Volume 2, Number 1, January 2010

Muzzle Flash: One Witness Sees It, the Other Does Not (co-author)
California Association of Criminalists News Journal
Third Quarter, 2007

The Effect of Hair Upon the Deposition of Gunshot Residue
Forensic Science Communication – Federal Bureau of Investigation
April, 2004

The Art and Science of Crime Scene Reconstruction
Forensic Nurse Journal – May/June, 2004

Courtroom Computer Animation and Simulation
The Champion: National Association of Criminal Defense Lawyers
Vol XX No. 1, Jan/Feb 1996

The "Rhino" Bullet
Wound Ballistics Review: Journal of the International Wound Ballistics Association
Vol 2. No. 1, 1995

Ammunition Performance: Testing Data & Acceptance Criteria
Wound Ballistics Review: Journal of the International Wound Ballistics Association
Vol 1, No. 4, 1993

The Body Armor Standards Controversy
Wound Ballistics Review: Journal of the International Wound Ballistics Association
Vol 1, No 3., 1992

The Roots of Bad Data: The Relative Incapacitation Revisited
Wound Ballistics Review: Journal of the International Wound Ballistics Association
Vol1, No. 2, 1992

The Twilight Zone of Wound Ballistics
Wound Ballistics Review: Journal of the International Wound Ballistics Association
Vol 1, No. 1, 1991

Body Armor Standards: A Review and Analysis
Wound Ballistics Review: Journal of the International Wound Ballistics Association
Vol 1, No. 1, 1991

Wounding Effects of the AK-47 Rifle
American Journal of Forensic Medicine and Pathology
(Co-author) 11(3), 185-189, 1990

Forensic Animation
The Docket, Jan 1993

Computer Animation Training Tapes
CADalyst, June 1993

Evidence Set in Motion: The Mitchell Homicide
Police Journal, June 1992

A New Era in Combat Handguns
Police Marksman, May 1989

The Omni-Shock Bullet
Journal of the Association of Firearm & Toolmark Examiners (Co-author)
January, 1989

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

Case No. 2016 CF 909

TODD KENDHAMMER,

Defendant.

AFFIDAVIT OF JEROME F. BUTING

STATE OF WISCONSIN)
)SS
COUNTY OF WAUKESHA)

I, Jerome F. Buting , swear and depose as follows:

1. I am an attorney licensed to practice in the state of Wisconsin and I currently represent Mr. Todd Kendhammer in his Motion for Post-Conviction Relief.

2. As part of my representation of Mr. Kendhammer, I obtained the trial attorney file from prior counsel Hurley Burish, S.C., and reviewed the items obtained in pretrial discovery, including law enforcement reports and audio and video recordings. Included in the file were videos of "pipe drop" experiments conducted by the La Crosse County Sheriff's Dept, DCI and the Wisconsin State Patrol on County M on October 28 ,2016, in which a pipe similar to the one involved in the defendant's case was rolled off a truck from various heights at various speeds. These videos were not used at trial. I attach a copy of them to this affidavit as Exhibit 1. A copy will be mailed to the clerk of circuit court while a photocopy of the flash drive is e-filed with the rest of the documentary exhibits supporting the Defendant's Motion for Post-Conviction Relief. The law enforcement written reports describing the pipe drop experiments are attached as Exhibit 2.

3. The discovery in the trial attorney's file was not Bate-stamped in any sequential manner, either by the DA or the defense attorneys. For ease of reference I had my assistant scan and Bate-stamp all the documentary discovery we obtained from trial counsel and they are designated as "BWS__" at the bottom of each page. The following exhibits in support of this post-conviction motion were obtained from pretrial discovery in the trial attorney's file:

a. I attach as Exhibit 2 a copy of the law enforcement written reports of pipe drop experiments, conducted October 28, 2016 (BWS 601,619, 653, 659-661).

b. I attach as Exhibit 3 a copy of the official Wisconsin Motor Vehicle

Accident Report, prepared by Deputy Robert Kachel, dated 9/16/16 (BWS 32-35).

c. I attach as Exhibit 4 a copy of an excerpt of West Salem P.O. Lance Loeffelhoz's report dated 9/16/2016 (BWS 13).

d. I attach as Exhibit 5 a copy of an excerpt of the Initial Report from the La Crosse County Sheriff Department, prepared by Adam Wickland, dated 9/16/16 (BWS 8).

e. I attach as Exhibit 6 a copy of an excerpt of the La Crosse County Sheriff Department interview of First Responder Brandon Hauser, dated 9/27/16 (BWS 93).

f. I attach as Exhibit 7 a copy of an excerpt of the La Crosse County Deputy Medical Examiner Sandra Carlson report, dated 9/21/16 (BWS 408).

g. I attach as Exhibit 8 a copy of the La Crosse County Sheriff Department follow up report, prepared by Inv. Fritz Leinfelder, dated 9/23/16 (BWS 74-75).

h. I attach as Exhibit 9 a copy of the La Crosse County Sheriff Department follow up report, Deputy Robert Kachel dated 9/16/16 (BWS 14-15).

i. I attach as Exhibit 10 a copy of the Tri-State Ambulance report, dated 9/16/16 (BWS 130-139).

j. I attach as Exhibit 11 a copy of interview by private investigator Raymond DiPrima of James Hemker, dated 6-29-17.

k. I attach as Exhibit 12 a copy of interview by trial counsel's paralegal, Shavon Caygill of Steven Petranek, dated September 30, 2016.

4. My review of the trial attorney's file revealed that a Motion to Change Venue or Jury Venire and 20 page supporting Brief was drafted with a date of November 17, 2017. The motion was never signed or filed with the court. Attached as Exhibit 13 is an excerpt of the draft Brief, p. 19. Also in a Change of Venue Materials file are a draft affidavit of paralegal Shavon Caygill and approximately 290 pages of media and internet articles relating to the case prior to trial.

Dated at Brookfield, Wisconsin this 15th day of February, 2021.

Jerome F. Buting

Subscribed and Sworn to before me
this 15th day of February, 2021.

Notary Public
My Commission ~~Expires~~: is permanent.

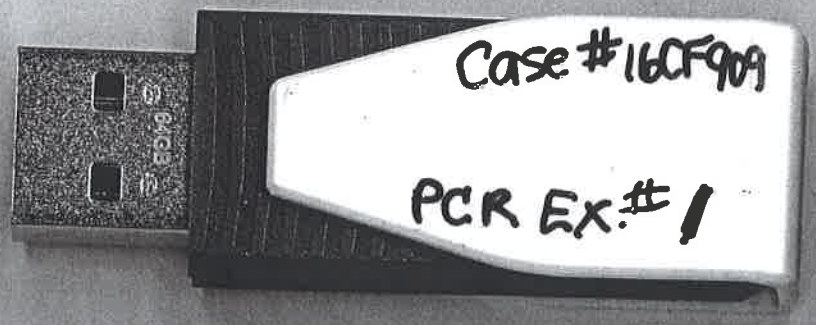


EXHIBIT
1

On Thursday, October 27, 2016, S/A Bradley M. Ruff met with S/A Joseph Welsch and members of the La Crosse County Sheriff's Department Detective Bureau at the La Crosse County Sheriff's Department garage. S/A Welsch was working with the La Crosse County Sheriff's Department on an investigation into the death of Barbara C. Kendhammer, F/W, DOB: 03/14/1970. According to Barbara Kendhammer's husband, Todd A. Kendhammer, M/W, DOB: 03/16/1970, a pipe had fallen off a truck and stuck Barbara Kendhammer and killed her. S/A Welsch had requested that cameras and recording equipment be installed on a La Crosse County truck which would be used to document what happened if a pipe fell off a vehicle. Three cameras were subsequently installed on the vehicle to document the pipe from different angles which were connected to a DVR recorder inside the cab of the truck.

On Friday, October 28, 2016, S/A Ruff and S/A Welsch met with the La Crosse County Detectives, and members of the WI State Patrol and the La Crosse County District Attorney's Office near Burgum Coulee Road and County Highway M, West Salem, WI. State Patrol added additional cameras to the La Crosse County truck. S/A Ruff also setup a camcorder on a tripod on the shoulder of County Highway M near Burgum Coulee Road. S/A Ruff demonstrated the operation of the recording equipment to a La Crosse County Detective who would activate the recording of the three cameras installed on the vehicle during the drops of the pipe. S/A Ruff operated the camcorder and recorded the truck as it made drive by passes on County Highway M near the location that Todd Kendhammer had previously identified as the location he had met the truck when the pipe fell off.

At the conclusion of the reenactments, S/A Ruff removed the cameras and recording equipment from the truck. S/A Ruff also downloaded the video from the DVR and camcorder to S/A Ruff's computer. S/A Ruff copied the video files to a WI DOJ DCI DVD disk which was assigned evidence tag 16-6090-5.1 and was placed into Eau Claire Evidence.

TECHNICAL RECONSTRUCTION REPORT SUPPLEMENT

CASE NUMBER: 2016-316-SWR

REPORTING RECONSTRUCTIONIST: Tpr. Ryan J. Zukowski

CRASH TYPE: Class I

On the morning of October 28, 2016, I participated in forensic testing on CTH M near Bergum Coulee Road in West Salem, Lacrosse County, Wisconsin. Participating agencies included the Lacrosse County Sheriff's Department, Division of Criminal Investigation (DCI), and the Wisconsin State Patrol. Detectives from the Lacrosse County Sheriff's Department provided a county maintenance flatbed truck for testing. They also created an adjustable ramp to release a metal pipe from various heights and positions for evaluation. Technical services personnel from the Division of Criminal Investigation placed three cameras in and around the exterior of the truck to record the tests. I set up a Video VBox accelerometer in the truck that records vehicle speed as well as longitudinal/lateral G-forces. The Video VBox also incorporated two cameras with one positioned forward-facing as a picture-in-picture frame and a side-mounted camera recording whole-frame to the rear on the driver's side of the truck.

The drop zone was identified on CTH M to the south of Burgum Coulee Road from the southbound travelling truck. A metal pipe, painted orange to assist in identification, was released from the ramp in a total of nine testing scenarios.

I sat in the rear of a pickup truck operated by Special Agent J. Welsch. I was equipped with a Casio EXF1 Pro High Speed Camera. I set the camera to record at 300 frames-per-second. Special Agent Welsch travelled ahead of the test truck in the same direction and speed I could record the test drops with the high speed camera.

A total of nine tests were completed. I preserved the digital video files from the Video VBox and the Casio high-speed camera. The video files were provided to Trooper Michael Marquardt to share with LaCrosse County investigators. I was provided raw laser scan files from an October 27, 2016 assignment at the Wisconsin State Crime Laboratory by Inspector Richard Krisher. I registered the scans in Faro Scene software and created a Webshare Project for viewing. The project was placed on a thumb drive and mailed to Special Agent Joe Welsch on November 3, 2016.

This is the end of this supplement report written on today's date November 14, 2016.

Respectfully submitted,

Trooper Ryan J. Zukowski
Accredited Crash Reconstruction Specialist, ACTAR #1427
Wisconsin State Patrol – Technical Reconstruction Unit

REPORT SUPPLEMENT

CASE NUMBER: 2016-317-SWR

REPORTING RECONSTRUCTIONIST: Michael Marquardt

INCIDENT TYPE: Death Investigation

November 9th, 2016

Notification/Actions Taken:

On the morning of October 28th, 2016 I traveled to West Salem, Wisconsin to observe and assist the Lacrosse County Sheriff's Department as they conducted research testing related to a fatality vehicle investigation that they were investigating. A male subject had reported that while traveling north on CTH M a piece of pipe had fallen from the back of an opposite direction truck. This pipe had pierced the windshield of the vehicle that he was operating and had struck his wife. As a result of this incident, his wife died several days later while in the hospital.

Investigators with the Lacrosse County Sheriff's Department had requested assistance from the Wisconsin State Patrol's Technical Reconstruction Unit in reviewing the incident. On this morning, the Lacrosse County Sheriff's Department was conducting field testing, having located a truck and having designed a release system that allowed them to drop a piece of pipe, similar in nature to that from the incident, at various heights and various speeds at or near the location of the incident as indicated by the male vehicle operator.

While at the testing scene, I observed Trooper Ryan Zukowski of the Technical Reconstruction Unit, assisting with video production and video files taken through the use of the Video Vbox system, brought to the testing by members of the Wisconsin State Patrol. I also observed Sergeant Thomas Erdmann of the Technical Reconstruction Unit taking scene measurements through the use of total station measuring instrument. Finally, I and Trooper Derrek Hanson of the Technical Reconstruction Unit observed the testing and marked the various strike locations on the pavement surface for Sergeant Erdmann to measure.

These measurements were later provided to me by Sergeant Erdmann and I completed a basic scale diagram of the testing location and the roadways near it. It should be noted that each individual test was layered and color coded in the Crashzone CAD program for later review if needed. This would require the use of the Crashzone CAD program and these layers would not be included in a printed version either in .JPEG or .PDF unless they had been turned on.

End of Report

Respectfully Submitted:

Discovery 112

LA CROSSE COUNTY SHERIFF DEPARTMENT
Follow-up Report

16-19180 10/28/2016 10:00

RE: FORENSIC TESTING OF PIPE

NARRATIVE:
SUMMARY:

On 10/28/2016 at approximately 10:00 a.m. the La Crosse County Sheriff's Department along with personnel from the Division of Criminal Investigation and Wisconsin State Patrol conducted a forensic testing on County Road M, just south of Bergum Coulee Rd. in the Town of Hamilton. The purpose of this testing was to determine the flight pattern and the different paths a pipe would take at different speeds and heights with a pipe matching the one that was involved in the Todd and Barbara Kendhammer incident on 09/16/2016.

The drop zone where the scenario took place was on County Road M, just south of Bergum Coulee Rd., in the area where Todd Kendhammer stated that the accident initially took place. The La Crosse County Sheriff's Department utilized a County-owned maintenance flatbed truck and an adjustable ramp system was constructed in the bed of the truck in order to change the ramp to various heights and positions in elevation. Cameras were mounted on the interior and exterior of this truck by the Technical Reconstruction Unit (TRU) of the State Patrol and from the Division of Criminal Investigation to record the pipe being released at the various heights and speeds.

The information received from the cameras will be forwarded to the Sheriff's Department from these respective agencies after the recordings have been downloaded. Also recorded by Michael Marquardt of the TRU was a two-scale flight pattern of each test and of the area of County Road M and Bergum Coulee Rd. This was completed utilizing a diagraming instrument commonly known as Total Station. A report will be submitted to the Sheriff's Department by Marquardt when completed.

Below is a list of each test and the heights of the ramp. Also included are the speeds of the vehicle that were recorded by me on this date.

Test #1:
Vehicle Speed: 50 mph
Ground to ramp: 59"
Bed of truck to upper edge of ramp: 64"
Bed of truck to lower edge of ramp: 14 1/2"

Test #2:
Vehicle Speed: 40 mph
Ground to ramp: 59"

Bed of truck to upper edge of ramp: 64"
Bed of truck to lower edge of ramp: 14 1/2"

Test #3:
Vehicle Speed: 50 mph
Ground to ramp: 59"
Bed of truck to upper edge of ramp: 64"
Bed of truck to lower edge of ramp: 14 1/2"
Bump created at edge of ramp to cause pipe to hit prior to leaving vehicle

Test #4:
Vehicle Speed: 40 mph
Ground to ramp: 80"
Bed of truck to upper edge of ramp: 71"
Bed of truck to lower edge of ramp: 35 3/8"

Test #5:
Vehicle Speed: 50 mph
Ground to ramp: 80"
Bed of truck to upper edge of ramp: 71"
Bed of truck to lower edge of ramp: 35 3/8"

Test #6:
Vehicle Speed: 50 mph
Ground to ramp: 80"
Bed of truck to upper edge of ramp: 71"
Bed of truck to lower edge of ramp: 35 3/8"
Bump created at edge of ramp to cause pipe to hit prior to leaving vehicle

Test #7:
Vehicle Speed: 40 mph
Ground to ramp: 104"
Bed of truck to upper edge of ramp: 93 1/2"
Bed of truck to lower edge of ramp: 60"

Test #8:
Vehicle Speed: 50 mph
Ground to ramp: 104"
Bed of truck to upper edge of ramp: 93 1/2"
Bed of truck to lower edge of ramp: 60"

Test #9:
Vehicle Speed: 50 mph
Ground to ramp: 104"
Bed of truck to upper edge of ramp: 93 1/2"
Bed of truck to lower edge of ramp: 60"

A "bump" was created at edge of ramp to cause pipe to hit prior to leaving vehicle on Test numbers 3,6 and 9.

All tests were recorded utilizing the attached cameras on the flatbed truck used.

All of the video evidence received will be placed into Evidence at the La Crosse County Sheriff's Department.

Please see the attached reports from Technical Reconstruction Unit (TRU) of the State Patrol and from the Division of Criminal Investigation for more information.

No further information.

Capt. John Zimmerman #1042

kp

Wisconsin Motor Vehicle Accident Report

MV4000e 01/2005

F2N0S61

PK2012

POLICE # 00-16-19180

ACCIDENT #

GENERAL INFORMATION

☑ Reportable Accident	☐ On Emergency	☐ Amended	DOT Document Number: F2N0S61	Document Override Number:
Agency Accident Number:		Police Number: 00-16-19180		
4 - Accident Date: 09/16/2016	5 - Time of Accident (Military Time): 0806	6 - Total Units: 01	7 - Total Injured: 01	8 - Total Killed:
2 - County: LA CROSSE - 32	3 - Municipality: HAMILTON - 07, TOWN			11 - Accident Location: NON-INTERSECTION
14 - On Hwy No.: M	14 - On Street Name:	14 - Bus/Frnt/Rmp:	15 - Est. Distance: 301 FT	15 - Hwy. Dir: SOUTH
16 - Fr/At Hwy No.:	16 - From/At Street Name: BERGUM COULEE RD		16 - Business/Frontage/Ramp:	
17 - Structure Type:	17 - Structure Number:	12 - Latitude: 43.935505	13 - Longitude: -91.121997	
80 - First Harmful Event: OTHER NON-COLLISION		93 - Manner of Collision: NO COLLISION WITH MOTOR VEHICLE IN TRANSPORT		
112 - Access Control: NO CONTROL	113 - Road Curvature: STRAIGHT	113 - Road Terrain: LEVEL/FLAT	Surface Type: BLACKTOP, BITUMINOUS, OR ASPHALT - 2	
115 - Traffic Way: NOT-PHYSICALLY-DIVIDED-(2-WAY TRAFFIC)				
117 - Relation To Roadway: ON-ROADWAY				
114 - Light Condition: DAYLIGHT	116 - Road Surface Condition: DRY	118 - Weather: CLOUDY		
9 ☐ Hit and Run	9 ☐ Government Property	9 ☐ Fire	9 ☑ Photos Taken	9 ☐ Trailer or Towed
9 ☐ Truck, Bus, or Hazardous Materials	9 ☐ Load Spillage	9 ☐ Construction Zone	9 ☐ Names Exchanged	
101 ☑ Supplemental Reports	102 ☐ Witness Statements	103 ☑ Measurements Taken	79 - E M S Number:	

Operator/Pedestrian

Unit Status:	81 - Most Harmful Event: Collision With: OTHER OBJECT-- NOT FIXED		23 - Dir Of Travel: NORTH	24 - Speed Limit: 55
36 - Operating as Classified: D CLASS	37 - Endorsements:	35 ☐ Operating Commercial Motor Vehicle		
29 - Driver's License Number: K5358017009609	30 - State: WI	31 - Expiration Year: 2017	34 - On Duty Accident:	
25 - Operator/Pedestrian Last Name: KENDHAMMER	25 - First Name: TODD	25 - Middle Initial: A	25 - Suffix:	
32 - Date Of Birth: 03/16/1970	33 - Sex: MALE			

OPERATOR/PEDESTRIAN 01

26 - Address Street & Number: N6617 SCOTCH COULEE RD E				26 - PO Box:
27 - City: WEST SALEM	27 - State: WI	27 - Zip Code: 54669	28 - Telephone Number:	
39 - Seat Position: FRONT-SEAT-LEFT-SIDE-(MC/BIKE DRIVER, TRAIN CONDUCTOR)		40 - Safety Equipment: RESTRAINT-USE-UNKNOWN		
38 - Injury Severity: N - NO APPARENT INJURY	41 - Airbag: NON-DEPLOYED	42 - Ejected: NOT-EJECTED	44 ☐ Medical Transport	
43 - Trapped/Extricated: NOT-TRAPPED	92 - Pedestrian Location:	92 - Pedestrian Action:		
119 - What Driver Was Doing: GOING-STRAIGHT	120 - Traffic Control: NO-CONTROL		62 - No. of Citations Issued: 0	
64 - 1st Statute No.	64 - 2nd Statute No.	64 - 3rd Statute No.	64 - 4th Statute No.	64 - 5th Statute No.
122 - Driver Factors: NOT-APPLICABLE				
88 - Driver or Pedestrian Cond: APPEARED NORMAL	89 - Substance Presence: NEITHER-ALCOHOL-NOR-DRUGS-PRESENT			
90 - Alcohol Test: TEST NOT GIVEN	90 - Alcohol Content:	91 - Drug Test: TEST NOT GIVEN		

EXHIBIT 3

Wisconsin Motor Vehicle Accident Report MV4000e 01/2005 **F2N0S61**

PK2012

91 - Drugs Reported	
124 - Highway Factors	NOT-APPLICABLE

Vehicle

VEHICLE 01

21 - Unit Type: AUTOMOBILE			Vehicle Type: PASSENGER-CAR		22 - Total Occupants: 2
56 - License Plate Number: 323HUS	57 - Plate Type: AUT	58 - State: WI	59 - Exp Year: 2017	55 - Vehicle Identification Number: 4T1BE46K29U877651	
50 - Year: 2009	51 - Make: TOYT	52 - Model: CAMRY	53 - Body Style: 4D - 4DR	54 - Color: GRY	100 - Skidmarks to Impact (Ft)
94 - Vehicle Damage: OTHER					
95 - Extent Of Damage: MINOR	96 ☐ Vehicle Towed Due To Damage		97 - Vehicle Removed By: WEST SALEM AUTO		
123 - Vehicle Factors: NOT-APPLICABLE					

Vehicle Owner

VEH OWNER 01

45 ☑ Vehicle Owner Same As Operator				
46 - Vehicle Owner Last Name: KENDHAMMER	46 - First Name: TODD	46 - Middle Initial: A	46 - Suffix:	Date Of Birth: 03/16/1970
46 - Company Name				
47- Address Street & Number: N6617 SCOTCH COULEE RD E		47 - PO Box		
48 - City: WEST SALEM	48 - State: WI	48 - Zip Code: 54669	49 - Telephone Number	

Insurance

INS 01

63 - Liability Insurance Company: UNKNOWN		60 ☑ Policy Holder Same As Owner
61 - Policy Holder Last Name	61 - Policy Holder First Name	
61 - Policy Holder Company		

School Bus

BUS 01

Bus Travelling to/from: ○ To ○ From	School Name	Body Make	Seating Capacity
School District Contracted With			

Occupant

OCCUPANT 01

☐ Address Same As Operator				
65 - Unit No: 01	66 - Occupant Last Name: KENDHAMMER	66 - First Name: BARBARA	66 - Middle Initial: C	66 - Suffix:
68 - Address Street & Number: N6617 SCOTCH COULEE RD E		68 - PO Box		
68 - City: WEST SALEM		68 - State: WI	68 - Zip Code: 54669	
67 - Date of Birth: 03/04/1970		69 - Sex: F		
71 - Seat Position: FRONT-SEAT-RIGHT-SIDE-(TRAIN ENGINEER)		72 - Safety Equipment: RESTRAINT-USE-UNKNOWN		

70 - Injury Severity	73 - Airbag	75 - Ejected	77
A - INCAPACITATING INJURY	**NON-DEPLOYED**	**NOT-EJECTED**	☑ **Medical Transport**
76 - Trapped/Extricated **NOT-TRAPPED**	78 - Agency Space		

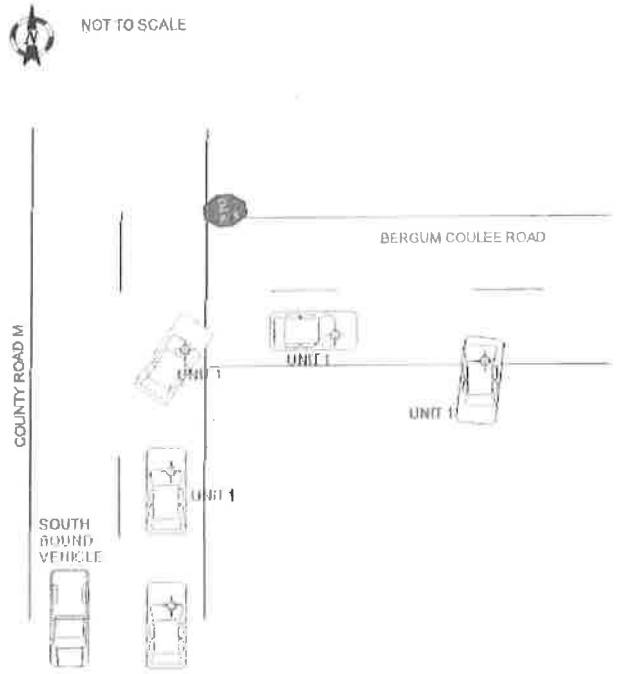
Trailer

TRL 01	106 - Power Unit Number	License Plate Number	Plate Type	State	Expiration Year
	Trailer Make		Unit Type		Vehicle Identification Number

Diagram and Narrative

DIAGRAM AND NARRATIVE

105 - Photos By
KACHEL



UNIT 1 WAS TRAVELING NORTHBOUND ON COUNTY RD M. THE DRIVER OF UNIT ONE STATED THERE WAS A FLATBED TRUCK TRAVELING SOUTHBOUND ON COUNTY ROAD M. THE SOUTHBOUND TRUCK LOST A 53 INCH METAL PIPE FROM HIS LOAD. THE PIPE BOUNCED OFF THE ROADWAY AND IMPALED THE FRONT WINDSHIELD PASSENGER SIDE OF UNIT 1. THE END OF THE PIPE STRUCK THE PASSENGER OF UNIT 1 IN THE HEAD AND KNOCKED HER UNCONSCIOUS. THE DRIVER OF UNIT 1 PULLED ONTO BERGUM COULEE ROAD WHILE TRYING TO RENDER AID TO THE PASSENGER. THE DRIVER OF UNIT 1 PULLED OFF TO THE SOUTH SIDE OF BERGUM COULEE ROAD. THE DRIVER OF UNIT 1 PLACED THE CAR IN REVERSE INSTEAD OF PARK AND THE CAR BACKED UP INTO THE TALL GRASS. ONLY THE FRONT TWO TIRES WERE STILL ON THE ROADWAY. THE PASSENGER OF UNIT 1 WAS TRANSPORTED TO GUNDERSON LUTHERAN HOSPITAL BY TRI-STATE AMBULANCE. THE DRIVER OF UNIT 1 DID NOT SEEK MEDICAL ATTENTION AT THE SCENE. WE WERE UNABLE TO LOCATE THE SOUTH BOUND VEHICLE ON COUNTY ROAD M. RK 1281

Officer Information

OFFICER INFORMATION

125 - Officer Last Name	125 - First Name	125 - Middle Initial	131 - Officer ID
KACHEL	**ROBERT**		**1281**

129 - Law Enforcement Agency No.	130 - Law Enforcement Agency Name
137	**LA CROSSE COUNTY SHERIFFS DEPT**

126 - Law Enforcement Agency Address Street & Number
333 VINE ST RM 1500

127 - City	127 - State	127 - Zip Code	128 - Telephone Number
LA CROSSE	**WI**	**54601**	**(608) 785-9888 EXT.**

132 - Date Notified	133 - Time Notified (Military Time)	134 - Time Arrived (Military Time)	135 - Date Of Report
09/16/2016	**0806**	**0819**	**09/16/2016**
	00-16-19180	19 - Special Study	

18 - Agency Space

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #	REPORT DATE:	CASE NUMBER:
WEST SALEM POLICE DEPARTMENT	WI0320300	9/16/2016 8:06:37 AM	16-16-03273

INITIAL

REFERENCE COUNTY CASE #16-19180

ON 09/16/16 AT 08.06 AM, I, LANCE B. LOEFFELHOLZ, IN FULL WEST SALEM UNIFORM WAS CONTACTED BY DISPATCH TO ASSIST THE LA CROSSE COUNTY SHERIFF'S DEPT WITH AN UNKNOWN ACCIDENT AT COUNTY M AND BERGUM COULEE ROAD. WHILE ENROUTE TO THIS ACCIDENT, THEY ADVISED US OF POSSIBLY A PIECE OF PIPE OR SOMETHING THAT WENT THROUGH THE WINDSHIELD AND EXPLODED AND HIT SOMEONE. THEY THEN ADVISED US AGAIN THAT THE PERSON ON SCENE WAS PERFORMING CPR.

UPON MY ARRIVAL ON SCENE, I OBSERVED A GRAY VEHICLE PARTLY IN THE DITCH AND PARTLY ON THE ROAD. IT WAS AT AN ANGLE DOWN INTO THE DITCH. I OBSERVED THAT THE WINDSHIELD WAS BUSTED UP AND UPON COMING AROUND THE CAR I OBSERVED ONE FEMALE/WHITE LYING ON THE ROADWAY AND PARTLY ON THE GRASS, A MALE/WHITE, AND ONE OF OUR FIRST RESPONDERS. THE FIRST RESPONDER WAS PERFORMING CHEST COMPRESSIONS ON THIS FEMALE/WHITE AND HE ASKED ME TO TAKE THE MALE/WHITE AWAY FROM THE SCENE. ONCE I GOT THE MALE/WHITE AWAY FROM THE SCENE AND BACK BY THE FIRST RESPONDER VEHICLE, HE WAS IDENTIFIED AS TODD A. KENDHAMMER, M/W, DOB 03/16/1970. HE WAS VISUALLY SHAKEN UP. HE HAD BLOOD ALL OVER HIS SHIRT, ALL OVER HIS HANDS, ARMS, AND SOME ON HIS SHORTS. HE STATED THAT HE WAS DOING CPR AND THAT HE HAD TAKEN THE PIPE OUT OF THE WINDSHIELD AND THREW IT TO THE BACK OF THE CAR. AT THIS POINT I WAS JUST TRYING TO SETTLE HIM DOWN AND AGAIN ASKED HIM WHAT HAPPENED. HE STATED THAT HE AND HIS WIFE WERE HEADING NORTHBOUND ON COUNTY M TO GO OUT AND PICK UP A CAR THAT HE WAS GOING TO PUT A WINDSHIELD IN WHEN THEY WERE COMING AROUND THE BEND JUST BEFORE BERGUM COULEE ROAD IN THIS STRETCH WHEN HE HEARD A LOUD BANG AND OBSERVED A PIPE COMING THROUGH THE WINDSHIELD WHICH HE SAYS HE TRIED TO DEFLECT OR STOP BUT HE SAID HE HIT THE WINDSHIELD AND THEN THE PIPE HIT HIS WIFE IN THE HEAD. HE SAID THE VEHICLE THAT THE PIPE CAME OFF WAS AN OLDER TYPE FLAT BED TYPE TRUCK BUT HE DIDN'T HAVE AT THIS POINT ANY OTHER DESCRIPTION. HE DID WANT TO CONSTANTLY GO BACK BY HIS WIFE AND BE WITH HER BUT HE WAS ADVISED THAT HE COULD NOT AT THIS TIME. HE SEEMED TO HAVE CUTS ON BOTH HIS KNUCKLE AREAS, BACKS OF HIS HANDS, AND THIS MIGHT BE FROM WHEN HE HIT THE WINDSHIELD TRYING TO DEFLECT THE PIPE. HE STATED AT THIS POINT THEN HE OBSERVED HIS WIFE FLAILING AROUND IN THE PASSENGER SIDE SEAT AND THIS IS WHEN HE PULLED ON TO BERGUM COULEE ROAD TO HELP HER. DURING THIS TIME, TODD STATED THAT HE PUT THE CAR IN THE DITCH BACKWARDS BUT HE WAS UNSURE IF HE DID IT ACCIDENTALLY. HE THOUGHT THAT MAYBE THE CAR WAS IN DRIVE AND WENT TO HELP HER OR IF HE WAS TRYING TO BACK UP AND TURN AROUND. AT THIS POINT IN TIME WITH THE CAR IN THE DITCH, HE WENT AROUND TO THE PASSENGER SIDE AND PULLED HIS WIFE OUT, WHO WAS LATER IDENTIFIED AS BARBARA C. KENDHAMMER, F/W, DOB 03/04/1970. HE PULLED HER OUT AND PULLED HER UP TO THE ROAD AND CALLED 911 AND THIS IS WHERE HE STARTED CPR. TODD ALSO STATED THAT HE PULLED THE PIPE OUT AND THREW IT TO THE REAR OF THE VEHICLE PASSENGER SIDE ALSO. ONCE ONE OF THE COUNTY OFFICERS CAME ON SCENE AND STAYED WITH TODD, I DID GO UP AND I DID OBSERVE THAT THIS PIPE WAS LYING IN THE GRASS BACK BY THE TRUNK AREA PASSENGER SIDE. OTHER LA CROSSE COUNTY SHERIFF'S DEPT. PERSONNEL, AND THE FIRE DEPARTMENT ARRIVED ON SCENE ALONG WITH TRI-STATE AND THEY TOOK OVER THE ACCIDENT SCENE

IN LOOKING AT THE WINDSHIELD, THERE WAS ON THE PASSENGER SIDE A HOLE WITH BLOOD AROUND IT AND IF YOU ARE LOOKING AT THE WINDSHIELD I'D SAY TO THE RIGHT OF IT, CENTER TOWARDS THE DRIVER SIDE. THERE WAS A PUNCHED OUT AREA THAT LOOKED SMASHED WHICH POSSIBLY COULD CORRELATE WITH WHAT TODD SAID WHEN HE TRIED TO DEFLECT OR STOP THE PIPE AND HE HIT THE WINDSHIELD. AT THIS POINT IN TIME AGAIN, COUNTY DEPUTIES TOOK OVER AND I WAS ADVISED THAT I WAS NO LONGER NEEDED ON SCENE.

END OF REPORT.

LANCE B. LOEFFELHOLZ, PATROLMAN III
WEST SALEM POLICE DEPARTMENT
09/16/16 AT 11:05 AM

LOEFFELHOLZ, LANCE B	6040	
OFFICER	ID	DATE

EXHIBIT 4

APPROVED BY:

INITIAL REPORT:

NARRATIVE:
SUMMARY:

On 09/16/2016 at 08:09 I was dispatched to an Accident with Personal Injury on Bergum Coulee Rd. at County Road M. Sgt. Valencia and Deputy Kachel were also dispatched to this location and as we were some distance away, West Salem was requested for Mutual Aid. Subsequent to our arrival, the passenger, Barbara Kendhammer, was transported to Gundersen Lutheran Hospital by Tri-State Ambulance due to the injuries she sustained in the crash. Todd was taken to Gundersen by Sgt. Yehle.

OBSERVATION OF SCENE:

Upon my arrival Deputy Kachel, Sgt. Valencia, and Officer Loeffelholz were already on scene. West Salem Fire and First Responders and Tri-State Ambulance were also at the location. As I approached I could see a dark colored passenger car in the south side ditch of Bergum Coulee Rd. with a broken windshield. I observed that Officer Loeffelholz was speaking to a male, identified as Todd Kendhammer, who was standing by a First Responder vehicle.

CONTACT WITH TODD:

I made contact with Todd and observed that he was very visibly shaken by the crash that had occurred. He was speaking very quickly and was unsteady on his feet and looked as though he was surprised by what had occurred. He also had a large amount of blood on his white t-shirt and a number of small cuts or lacerations to his knuckles. I did not notice an odor of an intoxicant nor did I believe that he could have been under the influence of any illegal drug at that time and there were no other signs of impairment.

I began interviewing Todd about what had occurred. He told me that he was traveling north on County Road M when a flatbed truck traveling south on County Road M had lost a length of pipe which then entered the car and struck his wife, Barbara, in the passenger seat. He was not able to describe the truck other than to say it was a flatbed. He also explained that they were heading to Holmen to pick up a vehicle as he was going to put a new windshield in it.

Todd said that he tried to stop his vehicle but put it in reverse instead and that is how he ended up on Bergum Coulee Rd.

Todd saw Barbara "flailing" around after she had been struck by the pipe and he removed it.

Deputy Stratman and I took Todd back to our squad car where he was searched and nothing illegal was found. He was cooperative throughout and seemed very concerned about the well-being of his wife. We asked him about family members and Todd told us that he had a son, Jordan, who was at home and a daughter, Jessica, who was at work in La Crosse. We assured

LA CROSSE COUNTY SHERIFF DEPARTMENT
Follow-up Report

16-19180 09/27/2016 13:30

RE: INTERVIEW OF BRANDON HAUSER (FIRST RESPONDER)

INVOLVEMENTS:
FI: BRANDON R HAUSER, M/W, DOB 01/11/1993, 2156 FREEWAY DR, BLOOMER, WI, 54724, 608-397-9163

NARRATIVE:
SUMMARY:

On 09/27/2016 Brandon R. Hauser, a West Salem First Responder who arrived first on scene in regard to this incident, was interviewed at the La Crosse County Sheriff's Department. He described the position of Barbara Kendhammer when he arrived on scene as well as his observations of Todd Kendhammer. The following is a summary of the interview.

INTERVIEW OF BRANDON HAUSER:

Brandon Hauser told me that he was the first one on the scene on Bergum Coulee Rd. and that he observed the car off of the road. He advised that upon arrival he was summoned by Todd Kendhammer. Hauser said that he knows Todd as he had rented a home from him for approximately one (1) year at 446 Tilson St. N. in West Salem.

Hauser said that Barbara was out of the vehicle and he diagramed the position of her body relative to the car. He advised that initially her head was approximately at the midpoint of the front passenger door but later corrected himself to say it was closer to the rear passenger door.

Hauser advised that Todd was yelling at him to get down there and that he was frantic to the point that he had asked Officer Loeffelholz to take him away after he had arrived. When he had initially made contact with Todd he was positioned at the feet of Barbara and he was on his knees, facing toward the road. I asked Hauser where he was when he cut his siren out in an attempt to indicate whether Todd would have heard him coming. He said that he shut the siren of while on Bergum Coulee Rd.

I asked Hauser what he did next. He said that his observations of Barbara's injuries included bleeding from the forehead, her ears, nose, and could not say whether she was bleeding from the mouth. I asked him if it appeared to him that some of the blood may have been wiped off and he said he could not say for sure. I asked him this because Todd advised that he had wiped Barbara's face or head with his shirt.

Hauser was asked what Barbara was wearing and he said that she had a black hoodie on and he noticed no blood or glass on that. She was wearing a black short sleeve West Salem Panthers

September 21, 2016

Statement of Sandra L. Carlson

LaCrosse County Deputy Medical Examiner

DOB: 03-26-1962

W4136 Old County Road B

West Salem, Wi. 54669

This is a statement of a conversation I had with Todd Kendhammer of N6617 Scotch Coulee Road East in the town of Hamilton, Wi. 54669. On Tuesday 09-20-2016. I transported Barbara Kendhammer to the Dane County Autopsy Facility for an autopsy regarding a MVA that occurred on 09-17-2016 on Bergum Coulee Road in the town of Hamilton, WI. 54669. While at the autopsy, it was discussed between Dr. McCubbin, the forensic pathologist and myself that several injuries were questionable. Dr. McCubbin stated that it would be nice to find out how these questionable injuries occurred. On Tuesday 09-20-2016 evening while at my home at W4136 Old CTY Road B in West Salem, WI. I received a phone call at 1934 hours from my daughter who happen to be at the decedents residence putting together several picture boards for the funeral of Barbara Kendhammer. My daughter is good friends with the decedents daughter Jessica Servais. My daughter had forgotten some packages at my home and asked that I bring them to her at the decedents residence. I told her I would but didn't feel real comfortable with it. So on my way there I called and spoke with Bob Cooper LaCrosse County Chief Deputy Medical Examiner at 1939 hrs on Tuesday 09-20-2016 and explained to him what I should do if the decedents husband asked me any questions, for instance if she looked ok for an open casket at the funeral. Bob stated that he should already know what she looks like, as he spent time with her in the hospital. And that I should tell Todd that she doesn't look any different than she did at the hospital. I arrived at the residence of the decedent at approximately 1955 hrs or so on Tuesday 09-20-2016. I knocked on the door and the decedents son answered. I asked him if I could speak with Devin (my daughter). He lead me to the basement of the home where people were gathered making poster/picture boards. I handed Devin her items and then looked at the pictures that were being put together. The decedents daughter Jessica was present and I said hello. After taking several minutes looking at photos, I got teary eyed and told my daughter that I was going to get going. She walked me upstairs that led to the kitchen where Todd Kendhammer was. I approached him and gave him a hug and I cried with him. He then stated about how he was going to start working nights so he didn't have to sleep in bed, because it was too hard for him, knowing that Barb wasn't there. He stated he slept on the couch the night before. He talked about how they were going on a trip the weekend she passed, and how she loved to bake and buy things to make her home beautiful. Todd stated that Barb loved to bake also, as she made the best pot pies and regular pies and always had talent for that. He talked about how beautiful the casket was, and it would be a long road to recovery for him. He was very weepy and shaky while speaking. He also talked about how thankful he was that they were able to donate her organs. He handed me a donation plastic wrist band and thanked me for taking care of her today. He mentioned he remembers a flat box truck coming in their direction , but didn't actually pay any attention to it as he and Barb were talking at the time. I told him I was so sorry for his loss and told him I should probably head out. He offered to walk me to my car

LA CROSSE COUNTY SHERIFF DEPARTMENT
Follow-up Report

16-19180 09/23/2016 15:15

INVOLVEMENTS:
FI: PATRICK W SKAAR, M/W, DOB 11/26/1965, N6057 BERGUM COULEE RD, WEST SALEM, WI, 54669, HOME #608-784-4854, CELL #414-303-9494

FI: RANDY J ERLER, M/W, DOB 05/14/1958, W465 SUNRISE DR, STODDARD, WI, 54658, 608-792-2099

NARRATIVE:
SUMMARY:

On Friday, 09/23/2016, Sgt. Inv. Mark Yehle, Deputy Brian Buckmaster, and I went to Bergum Coulee near the incident site. We were attempting to collect evidence when a male party, identified as Patrick Skaar, stopped to talk with us.

Patrick told me that he was having some construction done on his house and that the two (2) construction workers, Randy and Gary, would have been arriving at his residence close to the time that they heard the sirens approaching the area. He said that Nevy Construction was the contractor that they had hired and Randy was a subcontractor.

I contacted Tom Nedvidek of Nevy Construction and he gave me the phone number for Randy Erler who was working out on Bergum Coulee. At approximately 3:00 p.m. I made contact with Randy.

Randy stated that he had been working at the Skaar residence. When he turned onto Bergum Coulee he noted a vehicle he said looked like it was attempting to do a Y-turn and went off of the road. The back tires were down in the ditch. He drove slowly by this vehicle and did not notice anyone near it. He said that the passenger door was open but again, saw no one. He then continued on to the job site. He arrived at the job site at approximately 8:02 or 8:04 a.m. He said he looked at the clock in his vehicle when he pulled into the driveway and that is how he remembered that.

I asked Randy if he had observed anything unusual about the vehicle and he said he did not. I asked if he had noted any damage to the front of the vehicle and he also said no. I asked if he noted any damage to the windshield and he stated, "No." I then asked if he had ever seen a windshield and how they shatter to which he said yes, he did. He did not observe any of this shatter. I asked if he would have noted or seen if there was an object sticking out of the windshield and he said, "Yes," and that he had not seen anything sticking out of the windshield.

I told Randy that I would like to show him some photographs of the vehicle and he said he had time to do so. I drove to the job site where Randy was working on Marco Rd. in Onalaska. I

showed him a side picture of the vehicle with the rear tires in the ditch and he said that was the position the vehicle was in when he went by. He also noted that he remembered the driver's side window was partially rolled down. I showed him a picture of the windshield showing the condition of it with it being shattered. Randy told me that he did not see the shatter and that he did not remember it looking like that. He said if he had seen the windshield shattered like that he definitely would have stopped.

Randy again told me that the party he was working with, Gary Fossum, informed him when he called that he was just turning onto Bergum Coulee. Randy confirmed that the call he made to Gary was at 7:46 a.m. He also told me that the windows on his truck were rolled down when he was slowly driving by the vehicle off of the road. He estimated his speed at approximately 5 mph when he drove by this vehicle and he heard and saw no one.

Randy made contact with his partner, Gary Fossum, by phone and gave the phone to me. I made arrangements to meet Gary at his residence on the north side of La Crosse at approximately 3:45 p.m. on today's date.

No further information.

Inv. Fritz Leinfelder #1091

kp

LA CROSSE COUNTY SHERIFF DEPARTMENT
Follow-up Report

16-19180 09/16/2016 08:09

PROPERTY:
EVID #3: BLK 6" SAMSUNG CELL PHONE W/ BLK OTTER BOX CASE (LOCKER #13)
EVID #4: WET SWEATER, BLK, HAD BEEN CUT FROM BARBARA (LOCKER #22)
EVID #5: SHIRT, GRY W/ ORANGE STRIPE, CUT FROM BARBARA (LOCKER #22)
EVID #6: NIKE TENNIS SHOE, GRY W/ TEAL AND WHI SOLE, SIZE 7 (LOCKER #13)
EVID #7: 53" METAL PIPE, GRY, W/ DIRT ON ONE (1) END (LOCKER #18)

COPIES TO:
MEDICAL EXAMINER – Emailed on 9/19/16

NARRATIVE:
SUMMARY:

On 09/16/2016 at 8:09 a.m. I was dispatched to Bergum Coulee Rd. and County Road M for an Accident with Injuries. The front seat passenger, Barbara C. Kendhammer, was transported to Gundersen Lutheran Hospital by Tri-State Ambulance.

INITIAL CALL:

Dispatch had received a 911 call from Todd Kendhammer who said that his wife was injured when a pipe or something came through the windshield and hit her. While en route Dispatch advised that blood was coming out of Barbara's nose and mouth and CPR was being started.

ARRIVAL ON SCENE:

West Salem First Responders along with Officer Loeffelholz of the West Salem Police Department were already on scene when I arrived. I rendered CPS with a First Responder until Tri-State arrived on scene and took over. While approaching the vehicle I observed Officer Loeffelholz speaking with a man who was later identified as Todd Kendhammer. He was wearing a white t-shirt with blood stains on the front.

LOCATION OF EVIDENCE:

Evidence Item #3 was located a few feet from the passenger side back tire. The phone belongs to Todd and is the phone he used to call 911.

Evidence Items #4 and #5 were balled up together on the side of the road, near where Barbara's body had been. Medical personnel cut off the clothing from her so medical aid could be rendered.

Evidence Item #6 was a shoe near items #4 and #5. It was in the tall grass, just next to the roadway.

Evidence Item #7 was a metal pipe approximately 53 inches in length. It was located behind the vehicle, just off of the passenger side.

All items were logged in and turned over to Evidence at the Law Enforcement Center.

ADDITIONAL INFORMATION:

Photographs and measurements were taken of the scene.

No further information.

Robert Kachel/Deputy Patrol #1281

kp

Tri-State Ambulance

FACSIMILE TRANSMITTAL SHEET

TO: Captain John Zimmerman	FROM THE OFFICE OF: Tyler Stapleton, Billing Operations Supervisor
COMPANY:	DATE: 09/21/2016
FAX NUMBER: 608-785-5527	TOTAL NO. OF PAGES INCLUDING COVER: 10
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: Records Request	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Attached is a medical record as requested.

235 CAUSEWAY BLVD, LA CROSSE, WI 54603
608-519-3348
608-519-3351 FAX

Discovery 51

BWS00130

EXHIBIT tabber 10

Sheriff's Office
County of La Crosse, Wisconsin
Courthouse & Law Enforcement Center • 333 Vine St • Rm 1500
La Crosse, Wisconsin 54601-3298
Administrative Calls: (608) 785-9529 • Fax: (608) 785-5640
Non-Emergency Dispatch: (608) 785-5942
Web Site: www.co.la-crosse.wi.us

STEVEN J. HELGESON
SHERIFF

JEFFREY A. WOLF
CHIEF DEPUTY

09/21/2016

TO: TRI-STATE AMBULANCE SERVICE

REF: TRAFFIC ACCIDENT (LCSO CASE # 16-19180

LOCATION: CTH M & BERGUM COULEE ROAD (TOWNSHIP of HAMILTON)

DATE: 09/16/2016 @ 8:09 am

Please forward to the La Crosse County Sheriff's Department a copy of the paramedic report from the above mentioned case information.

This is in reference to an ongoing investigation into the fatal traffic accident.

Sincerely:

Captain John Zimmerman
La Crosse County Sheriff's Department

La Crosse County Sheriff Department

333 Vine Street St., La Crosse, WI 54601-3296 - Courthouse & Law Enforcement Center
(Phone) 608-785-9629

FAX COVER SHEET

DATE: 9/21/2016 11:22:42 AM

TO: Fax User

FAX#: 5193351

FROM: John Zimmerman
FAX: 608-785-5640

2 **Page(s) total (including cover sheet)**

COMMENTS:

Note: If you do not receive all pages, please phone (608) 785-9629

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 15825
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

CREW INFO

Vehicle: 8640

Call Sign:
Resp No:
Primary Role: Ground Transport
Crew #1 ID: Barloon, James
Crew #1 Role:
Crew #1 Level: 2009 Paramedic
Crew #2 ID: Braun, Chuck
Crew #2 Role:
Crew #2 Level: 2009 Paramedic
Crew #3 Role:
Crew #3 Level:

Disp Locn: Station 5
Disp Zone:

Disp GPS Locn:
Other EMS Agency:

Est First At Scene:

First At Scene time:
Doc'd By: Barloon, James

Assisted By: Fire
First Responder
Police

RESPONSE INFO

Med/Trauma: Trauma

Call Type: ALS1
Resp Priority: P1 - Emer - Lights/Sirens

Nature Of Call: Cardiac or Respiratory Arrest/Death
EMD Performed:
EMD Card No:
Dispatch. Delay:
Resp. Delay:

Call Taken by:

Resp. with: Fire
First Responder
Law
Locn Type: Street and highway
Location: BERGUM COULEE RD & COUNTY ROAD M
West Salem, La Crosse, WI 54669
Scene Zone No: La Crosse
Scene GPS Locn:

Pt. Found: On Floor/Ground
No of Patients: 0

Sending Fac Med Rec No:

Mass Casualty Inc: No
Possible Injury: Yes

DISPOSITION

Type of Service: 911 Response (Scene)

Outcome: Treated, Transported by EMS
Dest. Reason: Patient's Choice
Trans. Priority: P1 - Emer - Lights/Sirens

Odometer Start: 0.0
At Scene Mileage: 8.7
At Dest. Mileage: 24.7
Odometer End:

Patients Txed from Amb: Stretcher
Cond at Dest.: Improved

Dest Type:
Protocols Used:

Level of care : ALS
Barriers to Care:

Pt. Transported: Supine - Stairchair
Scene Delay :

Trans. Delay:

Dest Delay:

Destination: Gundersen Lutheran Medical Center
Dept: Trauma and Emergency Care
1900 SOUTH AVE
LA CROSSE, La Crosse, WI 54601
Dest Zone No: <None>
Dest GPS Locn:

Dest Fac Med Rec No:
Recv Doctor:

TIMES

Injury:

PSAP:
Recvd: 08:08 09-16-16
Dispatch: 08:09 09-16-16
En route: 08:09 09-16-16

At scene: 08:21 09-16-16

At patient: 08:22 09-16-16
Trans of Care:
Transport: 08:39 09-16-16

At dest.: 09:00 09-16-16

In service: 09:30 09-16-16

Cancel:

At base:

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 15825
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

PATIENT INFORMATION

Name : Barbra C Kendhammer
Phone :
Home Country :

SSN : 000-00-0000
Sex : Female
Race : White
DOB : 03/04/1970 (46 yrs)
Weight : 140 lbs (63.50 kgs)
Home Addr. : N6617 SCOTCH COULEE RD WEST SALEM, WI 54669

Ethnicity :
Broselow/ Luten Color :
Emergency Info Form :
DL Info :
Advanced Directives :
Mailing Addr. : N6617 SCOTCH COULEE RD WEST SALEM, WI 54669

Doctor:

NEXT OF KIN

Name :
SSN :
Sex :
Phone :
DOB :
Home Addr. :
Relationship :

INSURANCE

Condition code:
Modifier :

no insurance information entered

PATIENT COMPLAINTS

Chief Complaint
Trauma - MVA (Primary)

Anatomic Location
General/Global

Organ System
Global/General

Primary Symptom
Respiratory arrest

Last Oral Intake

Medical Hx Obtained From

HISTORY

Past Medical History
Unable to Complete

Allergies
Unable to Complete

Medications
Unable to Complete

ASSESSMENT

ETOH/Drug use: None Reported
Pregnancy:

09/16/2016 09:23:00 By: Barbosa, James

Body Area	Assessments and Comments	Body Area	Assessments and Comments
Airway	Patent	Breathing	Absent : Chest Expansion - Symmetrical
Circulation	Pulses - Carotid - Absent (0)	Blood/Fluid Loss	100 - 500 ML
Head	Bleeding Uncontrolled	Left Ear	Bleeding Controlled ; NOT Presented as CSF Present
Right Ear	Bleeding Controlled : NOT Presented as CSF Present	Nose	Bleeding Controlled
Both Eyes	Reactive	Chest/Lungs	Breath Sounds-Equal
External/Skin	Pale	Mental Status	Unresponsive

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 16825
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

IMPRESSIONS

Primary Impression: Traumatic Injury

CARDIAC ARREST

Arrest Etiology

Resuscitation Attempted

Arrest Witnessed by

First Monitored Rhythm

Spontaneous Circulation

Discontinued Reason

Rhythm at Destination

Therapeutic Hypothermia Initiated

Time of Cardiac Arrest

CPR Provided Prior to EMS Care

AED Used Prior to EMS Care

END OF CARDIAC ARREST EVEN

AED Used By

CPR Provided By

TRAUMA

MVA Details : Row Location : Position : Height of Fall:

Trauma

MVA - Injury Indicators - Auto intrusion > 12" in occupant compartment

MVA - Position of Patient in Vehicle - Front Seat-Right(Passenger Side)

MVA - Injury Indicators - Windshield Spider/Star

Cause of Injury

MVC-Passenger Vehicle

Mechanism of Injury

Blunt

Penetrating

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 15625
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

VITAL SIGNS

Time	PTA	BP	Pulse	Monitor Rate	Respiratory	SPO2	EtCO2	Glucose	GCS
09/16/2016	8:24	0	0, Absent, Absent		Mechanically Assisted (BVM, CPAP, etc), Absent			498	E1 + V1 + M1 = 3

Skin Temp=Cool Skin Color=Pale Skin Moisture=Normal Lung Sounds Left= Lung Sounds Right=
Pupil size: Left=5-mm, Right=5-mm Pupil Reacts: Left=Not Known, Right=Not Known Pupil Dilation: Left=Normal, Right=Normal
Level of Consciousness: Unresponsive; Arm Movement: Left=None, Right=None; Leg Movement: Left=None, Right=None;
Cardiac Rhythm=PEA

Taken by: Barloon, James

TRAUMA SCORES

no trauma scores entered
Comments:

PRIOR AID

Prior Aid	Performed by	Outcome
Yes	First Responder	
	First Responder	

TREATMENT SUMMARY

Time	PTA	Treatment	Who performed	Authorized by	Comments
	Yes	Airway (BVM) - PTA	First Responder	Protocol (Standing Order)	

Complication: Complication Narrative:

*Number of Attempts=1 *Prior Aid By=Law Enforcement *Procedure Result=Yes
*Response=Unchanged

Time	PTA	Treatment	Who performed	Authorized by	Comments
	Yes	Oxygen	First Responder	Protocol (Standing Order)	

Complication: Complication Narrative:

*Prior Aid By=Law Enforcement *Response=Unchanged Device=BVM
Indication=Respiratory Arrest LPM=15 LPM Result=Unchanged

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:23	No	Cardiac Monitor	Barloon, James	Protocol (Standing Order)	

Complication: Complication Narrative:

Indication=Monitoring

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:25	No	Blood Sugar	First Responder	Protocol (Standing Order)	

Complication: Complication Narrative:

Result=498

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 15825
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

TREATMENT SUMMARY CONTINUED

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:29	No	Airway-Oral	Barloon, James	Protocol (Standing Order)	

Complication: *Attempts=1; Indication=Cardiac Arrest
Complication Narrative: *Response=Unchanged; Type=7 OPA
*Result=Successful

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:30	No	IO	Braun, Chuck		

Complication: Rate=WO; Size=Adult; Type=EZ IO
Complication Narrative: Result=Successful; Solution=0.9% NSS; Volume Infused=ml
Site=L Tibial Tuberosity; Tubing=Macro Drip

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:32	No	Suction	First Responder	Protocol (Standing Order)	

Complication: *Prior Aid By=Patient; Site=Oral
Complication Narrative: *Result=Yes; Suction - Result=Airway Cleared
Indication=Fluid in Airway; Type=14 FR

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:33	No	Intubation Unsuccessful	Barloon, James	Protocol (Standing Order)	

Complication: Apneic Oxygenation=No; ETT Size=7.0; Response=Unchanged; Spinal Protection=No
Complication Narrative: Blade Type=Mac 3; Mode=Video; Result=Unsuccessful; Suction Performed=Yes
Bouge Used=Yes; Preoxygenation Method=Bag Valve Mask; Sniffing Position=Yes; Vocal Cords Visualized=Yes

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:34	No	End Tidal CO2	Barloon, James	Protocol (Standing Order)	

Complication: Indication=Monitoring
Complication Narrative: Result=Unchanged

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:35	No	King Airway LTS-D	Barloon, James	Protocol (Standing Order)	

Complication: *Attempts=1; *Size=Size 4
Complication Narrative: *Response=Unchanged
*Result=Yes

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 15825
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

TREATMENT SUMMARY CONTINUED

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:36	No	Epinephrine 1:10,000	Braun, Chuck	Protocol (Standing Order)	

Complication:
Complication Narrative:
Dose=1.0
Route=Intravenous (IV)

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:39	No	IV	Braun, Chuck		

Complication:
Complication Narrative:
*Result=Successful
Rate=WO
Site=Right A.C.
Size=16 G
Solution=0.9% NSS
Tubing=Macro Drip

Time	PTA	Treatment	Who performed	Authorized by	Comments
08:53	No	12-Lead ECG	Barloon, James	Protocol (Standing Order)	

Complication:
Complication Narrative:
Cardiac Rhythm=Sinus Tachycardia
Indication=Other
Lead Placement=Standard
Transmitted to=GHS

NARRATIVE

Called for an MVC

Reported that an object such as a pipe came through the windshield of the vehicle. PT is front seat passenger, unknown by EMS if she was wearing seat belt or of other protective devices. Unknown by EMS upon arrival to the scene how PT got out of the vehicle and where I find her upon arrival to the scene.

Upon arrival I find PT laying on the shoulder of the road, CPR being performed by FR and LE. MRx applied and attempt to intubate. PT has blood and fluids coming PT airway, suctioning of airway and ETT. End tidal reading are zero initially and unable to confirm tube placement by auscultation. ETT pulled and King airway placed. My partner established an IO during this time and PT in PEA, one Epi given. End Tidal reading above 20, CPR paused and palpable pulse felt in the carotid. King airway secured and C-collar placed. PT log rolled and LBB placed under, no signs of other injury on PT back. PT lifted to the cot and log lifted to remove the LBB.

In ambulance continue to ventilate PT, MRx and vitals monitored. Second IV established. Secondary exam performed, PT has blood coming from her nose and ears, halo test negative. King airway and mouth suctioned as needed during transport. Bilateral bruising noted on PT clavicle, chest rise is equal, ABD soft and nondistended, pelvis stable, lower extremities no signs of injury. IV running WO and PT B/P rising. 12-lead performed and transmitted.

PT taken to trauma room 18, report and care to receiving staff.
306 clear. James Barloon

MISCELLANEOUS

Trauma Registry ID:
PD Case Number:
Pat ID Band/Tag #:
Fire Inc Report #:
no miscellaneous entered

HIPAA

no signatures entered

Patient Care Report

GUNDERSEN
TRI-STATE AMBULANCE
235 CAUSEWAY BLVD
LA CROSSE, La Crosse, WI, 54603-3119

Run Number: 15825
Incident Number:
Date of Service: 09/16/2016
Patient Name: Barbra Kendhammer

SIGNATURES

Time	Type	Who signed	Why patient did not sign
09/16/2016 09:13	Signature - Facility, Patient is Unable to Sign	Nurse (RN) - RN, Angela	<Not applicable>

I hereby certify that Barbra C Kendhammer was received by our facility. **THIS SIGNATURE IS NOT AN ACCEPTANCE OF FINANCIAL RESPONSIBILITY FOR THE PATIENT**

x

09/16/2016 09:14	Signature - Crew, Patient is Unable to Sign	Crew Member #2 - Braun, Chuck	<Not applicable>

By signing here, I, Barloon, James, Braun, Chuck, certify that the patient was physically or mentally incapable of signing at the time of transport, and that none of the individuals listed in 42 C.F.R. 434.30(b)(1) - (4) was available or willing to sign the claim on behalf of the beneficiary.
This Signature is not an acceptance of financial responsibility for the patient.

CREW INFORMATION

Start Date/Time: 09/16/2016 07:56

Crew #	Name	Crew #	Name
2241	Barloon, James	6618	Braun, Chuck
Level:	2009 Paramedic	Level:	2009 Paramedic

x

CHANGE TRACKING

Caption	Date/Time	Change	Who Changed

PHYSICIANS CERTIFICATION STATEMENT FOR AMBULANCE TRANSPORTATION

no PCS entered

DIPRIMA INVESTIGATIONS

MEMO

TO: **STEPHEN HURLEY**
FROM: RAYMOND DIPRIMA, Private Investigator
DATE: **06.29.2017 / 06.30.17**
RE: **STATE OF WISCONSIN v TODD KENDHAMMER**

ON O6.29.2017, AT 1:20 PM, I WENT TO THE FARM OF JAMES HEMKER, AT N5857 COUNTY M, WEST SALEM, WISC., 608.317.7136, AND OBSERVED A DARK BROWN, 2000 FORD, DUALLY PICKUP, WITHOUT A TAILGATE, BEARING WISCONSIN PLATE 211033F, PARKED IN THE FIELD ROAD. THIS FORD IS THE SAME TRUCK SEEN IN A DASH CAM VIDEO, AT 8:23 AM ON 09/16/16. I INTERVIEWED HEMKER AND OTHERS IN THE AREA, AS TO WHAT THEY SAW ON 09/16/16, AT 8 AM. I RECORDED THE CONVERSATIONS WITH A DIGITAL RECORDER, AND HAVE DOWNLOADED THEM AND ATTACHED TO THIS SUMMARY MEMO:

JAMES HEMKER:

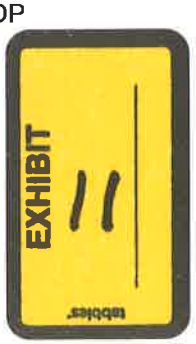
1. I FARM 212 ACRES HERE AND HAVE OWNED THIS FARM SINCE 1990. I LIVE AT W 4594 ROMSKOG ROAD, JUST A SHORT DISTANCE FROM THE FARM, AND ON THAT MORNING, I WAS HAVING COFFEE WITH MY WIFE, AND HEARD THE SIRENS, AND CAME DOWN TO CHECK IT OUT THINKING ONE OF MY COWS WAS LOOSE.(HEMKER'S RESIDENCE IS .8 MILES TO THE FARM)

2. I PULLED INTO MY NEIGHBOR, GILBERT FREDRICK'S DRIVEWAY ABOUT 8:30 AM. GILBERT WAS OUT THERE, AND I WANTED TO KNOW WHAT WAS GOING ON. WE WERE LOOKING TOWARDS THE ACTIVITY. I SAW A BLUISH GRAY CAR WITH A RED LIGHT COME FLYING DOWN M, AND IT PULLED INTO WHERE THE CAR WAS IN THE DITCH. I THOUGHT HE WAS GOING TO RUN OVER SOMEONE.

3. THEN THE SAME CAR PULLED UP RIGHT BEHIND ME, BUT DIDN'T TALK TO ME AND LEFT. A COUPLE DAYS LATER, THE INSPECTOR CALLED ME. IT COULD'VE BEEN ZIMMERMAN.HE SAID HE HAD SEEN MY PICKUP, AND WANTED TO KNOW IF I KNEW ANYTHING ABOUT THE ACCIDENT. I TOLD HIM I WASN'T DOWN HERE WHEN THE ACCIDENT HAPPENED. MY TAILGATE ON MY FORD PICKUP WAS OFF ON 09.16.16, AND IT IS STILL OFF. THE POLICE NEVER ASKED ME IF I CARRIED PIPE IN THE TRUCK. (I HAVE DOWNLOADED AN ATTACHED TO THIS MEMO A PICTURE OF THE HEMKER TRUCK AND THE MISSING TAILGATE TAKEN ON 06.29.17. THE PHOTO SHOWS A 5TH WHEEL ATTACHMENT AND SEVERAL TWO BY FOURS, IN THE BED OF THE TRUCK)

4. I RENT THE FARM HOUSE TO EMMA AND TREVOR JOHNSON. LATER EMMA TOLD ME THE POLICE HAD COME OUT TWO OR THREE TIMES TO TALK TO HER. I WAS UPSET BECAUSE EMMA TOLD ME THE POLICE WERE ACCUSING US OF HAVING PILES OF PIPES LAYING OUT BY THE BACK ROAD(FIELD ROAD), AND THE FRONT ROAD(THE ENTRANCE ROAD TO THE HOUSE).I'VE OWNED THIS FARM SINCE 1990, AND THOUGHT THE INVESTIGATOR WAS LYING ABOUT THE PILES OF PIPES , AS I'VE NEVER SEEN PIPE ON THE ROAD DURING MY OWNERSHIP. THAT COP SAID HE HAD PATROLLED THE ROAD AND HAD SEEN PILES OF PIPES IN THE PAST. THE POLICEMAN THAT SPOKE TO EMMA DID NOT IDENTIFY HIMSELF OR LEAVE A CARD. THE ONE THAT WAS TALKING TO EMMA HAD A MOLE ON THE SIDE OF HIS NOSE. SHE DIDN'T THINK HE WAS PROFESSIONAL. I TOLD HER TO CALL ME IF HE CAME BACK.

5. THE POLICE DID STOP BY, AND TALKED TO ME, BUT I DIDN'T GIVE A FORMAL STATEMENT. I TOLD THEM ABOUT THE PIPES, CEMENTED INTO THE BRIDGE, BUT THEY DIDN'T ASK TO SEE THE PIPES.



HEMKER WALKED ME OVER TO THE CONCRETE BRIDGE, THAT SPANS A CREEK A SHORT DISTANCE FROM CO. M, WHERE YOU ENTER HIS PROPERTY. THERE ARE 8 PIPES CEMENTED INTO THE CONCRETE BRIDGE.THE PIPE IS SIMILAR TO THE PIPE THAT HIT THE KENDHAMMER WINDSHIELD ON 09/16/16.THERE ARE NO MISSING PIPES IN THE BRIDGE. I TOOK PHOTOS , WHICH I DOWNLOADED AND E-MAILED TO YOUR OFFICE.

I SHOWED HEMKER A PHOTO OF THE KENDHAMMER PIPE.HE SAID THAT AFTER THE ACCIDENT HE AND HIS WIFE, SAW A 24" PIECE OF GALVANIZED PIPE ON THE ROAD UP BY THE QUARRY, THAT WAS SIMILAR. HE DID NOT STOP AND PICK IT UP.

CONTINUING HEMKER SAID:

6. SINCE 1990, I HAVE SEEN QUITE A FEW TRUCKS HAULING JUNK AND SCRAP TO RUNGES IN HOLMEN. I HAVE FOUND TIN ON THE ROAD BUT NOT PIPE. WHEN THE PRICE IS UP, YOU SEE MORE TRUCKS.

7. I KNOW THERE IS AN OVERHEAD DOOR COMPANY IN HOLMEN THAT HAS TRUCKS WITH GALVANIZED PIPE .I HAVE SEEN THEM ON M.

8. THERE ARE ALSO WELL DRILLING TRUCKS FROM HOLMEN, THAT RUN ON M. THE PIPE YOU SHOWED ME LOOKS LIKE SOMETHING FROM A WELL. LOOKS LIKE IT WAS RUSTY AND PLUGGED.I DON'T THINK THAT KIND OF PIPE IS USED FOR FARM IRRIGATION.

9.THERE HAVE BEEN 10-12 ACCIDENTS IN FRONT OF MY FARM SINCE 1990. THIS IS THE SECOND DEATH.

10. I WAS HERE WHEN THE POLICE DID THE RE-ENACTMENT AND WERE BOUNCING THE PIPE ON THE ROAD.

ATTACHMENTS:

1. PHOTOS TAKEN AT THE HEMKER FARM ON 06/29/17, TO INCLUDE THE FORD TRUCK WITH THE MISSING TAILGATE, AND CEMENTED BRIDGE PIPES .

2. DOWNLOADS OF 06.29.17, AND 06.30.17 INTERVIEWS WITH JIM HEMKER.

PO Box 131762, Roseville, Mn. 55113
612.335.3737/Fax 651.228.1241
iprimainvestigations@gmail.com

Todd Kendammer
HURLEY, BURISH & STANTON
33 E. MAIN STREET, SUITE 400
MADISON, WI 53703
SHAVON CAYGILL

September 30, 2016
Steven Petranek
N6504 Bergum Coulee Road
West Salem, WI
608.797.6602 cell
608.786.3316 home

On the above date I interviewed Steven Petranek regarding an interview he had with police on September 27, 2016, concerning Todd Kendhammer's accident.

Petranek lives in what he calls the "Valley." His house is located on Bergum Coulee Road which intersects with Highway M. Kendhammer's car was found in the ditch at the intersection of Highway M and Bergum Coulee Road. Petranek lives two ½ miles back from Highway M. His home is the last house on the dead end.

The police showed up at his home on Tuesday evening. There were three squad cars parked on the dead end street. Officer Siegel and another officer came up to his door. The officers informed him they were checking with neighbors in the Valley about the accident that occurred on Highway M and Bergum Coulee. He could see other police officers at his neighbor's houses.

They asked him if he had heard about the accident at the end of Bergum Coulee Road, and if he was around that day. Petranek informed them he was aware of the accident but had left at approximately 7:35 - 7:40 a.m. that morning to travel to his daughter's house in Onalaska. Petranek explained to me that he is helping remodel his daughter's house and remembers he wanted to leave by 7:30 but was running a little late. The officers showed him a picture of a car in the ditch and asked him if he saw that car the morning of September, .

Petranek told them he did not see that car that morning. Petranek also stated when he returned from his daughter's house around 2:00 or 2:30 p.m. that afternoon the accident was already cleared. The cops alluded to him, they were asking questions because they do not believe Kendhammer called the accident in right away and believe that morning he had been driving up and down Bergum Coulee Road. They told him they were trying to put a time line together of that morning.

Petranek's other daughter, Casey Petranek- Rothering lives right up the street from him, and was also interviewed. She left her house the morning of the accident about five minutes after him. His daughter has to be to work at 8:00 a.m. so she is aware of the approximate time she left. She was also shown a picture of a car in the ditch which she informed the police she did not see that morning. Petranek stated he did not notice the windshield in the picture he was shown, but his daughter stated the car in the picture she viewed had obvious damage to the windshield and described it as looking shattered with an impact spot.

Petranek's son in law's, sister, works at a bank located on Hwy. M and Hwy. 16, as a teller. At approximately 8:30 a.m. the morning of the accident, the police were at the bank asking for any security footage that captured Highway M. Petranek's son-in-law is helping with the remodeling of his daughter's home. He received a phone call from his sister that morning asking if he was okay because the police had shown up at the bank and described an accident, on Bergum Coulee Road and Highway M.

On Friday, September 23, there were five squad cars parked at the scene. Officers were walking around the scene, and flying a drone. Petranek said it looked as if they had circled items on the road and marked the circles with initials, "DS." This morning there were three squad cars at the scene and police officers were walking around.

Petranek stated he lives in a very rural area and there are always trucks driving by with scrap iron on them. He stated even though the price of iron has gone down, there are still plenty of people scraping metal out in his area. He does not know anyone specific that drives a blue flat bed truck that scraps metal, or that he sees driving by on a regular basis.

Petranek knows Todd Kendhammer well and knew his wife. He did not inform the police of this and was not asked. He described them as inseparable and very much in love. He thinks it is horrible what the police are insinuating and it is wasting taxpayers time and money.

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2016 CF 909

TODD A. KENDHAMMER,

Defendant.

BRIEF IN SUPPORT OF TODD KENDHAMMER'S MOTION FOR CHANGE OF VENUE OR JURY VENIRE

I.

INTRODUCTION

Todd Kendhammer is charged with first degree intentional homicide in relation to the death of his wife, Barbara. Indisputably, this is as serious a criminal charge as there can be. Regardless of the seriousness of the charge, Wisconsin law presumes Todd Kendhammer to be innocent until such time as the State proves his guilt, beyond a reasonable doubt as to each and every element. As one might anticipate, the publicity the case has generated in La Crosse County is tremendous. But, as has been demonstrated by the responses contained in jury questionnaires

certainty whether we have an impartial La Crosse County jury free from outside influences until the case is completed. Even assuming a jury is selected, trial and jury deliberation activities may reveal unanticipated problems. If the risk of having to scuttle the trial during voir dire is intolerable, this final risk involving potential jury problems during trial and a necessary retrial is utterly unacceptable.

III.

CONCLUSION

A change of venue or jury venire at this juncture is constitutionally mandated since, based on the responses to the jury questionnaire, there can be no assurance of an impartial La Crosse County jury which is free from outside influences. This case involves the unprecedented confluence of a massive amount of pretrial publicity; publicity involving highly inflammatory, prejudicial, extraneous or inadmissible information; and the obvious reaction of the potential jurors as evidenced by their responses to the jury questionnaire. For these reasons, together with the practical need for finality and certainty as to scheduling and trial preparation, a change of venue or jury venire should be ordered.

Dated this 17th day of November, 2017.

Respectfully submitted,

TODD KENDHAMMER, *Defendant*

/s/ Stephen P. Hurley

Stephen P. Hurley
Wisconsin Bar No. 1015654
Jonas B. Bednarek
Wisconsin Bar No. 1032034
HURLEY, BURISH & STANTON, S.C.
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F:\-clients\Kendhammer Todd\Pleadings\Drafts\Brief in support of Motion for Change of Venue.wpd