**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 14, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP501-CR** **Cir. Ct. No. 2005CF4688**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**AARON MATTHEW HEINE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., and M. JOSEPH DONALD, Judges.[1] *Judgment reversed, orders affirmed in part and reversed in part, and cause remanded with directions.*

[1] The Hon. Charles F. Kahn, Jr., presided over the trial and the first postconviction motion. The Hon. M. Joseph Donald presided over the second postconviction motion.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Aaron Matthew Heine, a deputy sheriff assigned to the infirmary section of the Milwaukee County Jail, was convicted of second-degree sexual assault by use of force and second-degree sexual assault by a correctional staff person, in violation of WIS. STAT. §§ 940.225(2)(a) and (h) (2005-06).[2] He appeals from the judgment of conviction and from orders denying his motions for postconviction relief. On appeal, Heine challenges the sufficiency of the evidence, which would result in acquittal if his challenge was successful.[3] In the alternative, he seeks a new trial on grounds that the State failed to disclose ***Brady***[4] evidence prior to trial, including a written statement prepared by Heine as ordered by a superior officer on the night of the alleged assault, and transcripts of internal affairs investigation interviews with Heine and the alleged victim, L.W.[5]

¶2 We reject Heine's first argument because there is sufficient evidence to support his convictions. However, we conclude he is entitled to a new trial because he was unconstitutionally denied access to transcripts of internal affairs interviews of both himself and L.W., and to a report he wrote the night of the

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] *See* ***State v. Henning***, 2004 WI 89, ¶22, 273 Wis. 2d 352, 681 N.W.2d 871 ("[D]ouble jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence.").

[4] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

[5] Rather than continuing to refer to the alleged victim and the alleged assault, we will subsequently refer to the victim and the assault. However, we acknowledge that because we are reversing the conviction, these are once again allegations, rather than proven facts.

assault. Therefore, we reverse the judgment, reverse the orders in part and affirm the orders in part, and remand for a new trial.

## BACKGROUND

¶3 On July 26, 2005, Heine was working as a sheriff's deputy in the infirmary of the Milwaukee County Jail. L.W. was an inmate in the infirmary. At the end of his shift, Heine reported to his supervisor, Lieutenant Richard Gellendin, that L.W. had threatened to accuse Heine of rape if he did not pay her bail. Heine denied any sexual contact with L.W. Gellendin ordered Heine to write a report, which he did. Heine was also interviewed by internal affairs on July 27 and August 18, 2005.[6]

¶4 On the night of the assault, L.W. was interviewed by Detective Susan Wittliff of the Milwaukee County Sheriff's Department after Heine reported L.W.'s threat to his supervisor. Wittliff later testified that L.W. told Wittliff that she was sitting on the toilet in her cell when Heine approached her, touched her vaginal area, and then touched her buttocks and vaginal area with his exposed penis as she was bending over to pick up her panties and put them on. Wittliff said L.W. told her that she quickly turned and sat down on her bed, and then performed fellatio on Heine at his insistence. Wittliff said L.W. told her that after Heine ejaculated in her mouth, L.W. spit the ejaculate into her right hand and shortly thereafter transferred the ejaculate to a medicine cup, which she covered with a sanitary napkin pad wrapper and fastened with rubber bands. L.W. gave the cup to Wittliff. DNA testing ultimately revealed that semen in the medicine

[6] The seven- and ten-page transcripts of these interviews, as well as Heine's own four-page typed report, were among the documents not provided to Heine.

cup, as well as on swabs taken of L.W.'s face, hand and perineal[7] area, contained Heine's DNA and sperm, although no semen was found on the oral swabs or oral smear. The day after the assault, L.W. was interviewed by Captain Keith Zauner; the interview was recorded and later transcribed.[8]

¶5 After an investigation by the Milwaukee County Sheriff's Department, the State charged Heine with second-degree sexual assault of an inmate by a correctional officer. The next day, August 25, 2005, Heine's trial counsel filed a discovery demand[9] for, among other things:

> All written or recorded statements made by the defendant concerning the alleged crime that are within the state's possession, custody, or control, including the defendant's testimony in any John Doe proceeding … or before any grand jury….
>
> ….
>
> ... Any and all relevant written or recorded statements of a witness [whom the state intends to call at trial]….

Subsequent counsel filed a supplemental discovery demand on June 20, 2006, renewing "all discovery and inspection demands previously submitted by the former attorneys" and additionally requesting access to the evidence that had been subjected to scientific testing. Despite these discovery requests, Heine's own

[7] These are presumably swabs taken of the perineum, which is "the area between the anus and the posterior part of the external genitalia esp. in the female." *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1680 (unabr. 1993).

[8] The thirteen-page transcript of this interview is one of the documents that was not provided to Heine.

[9] The demand was pursuant to "Wis. Stats. § 971.23; the Fifth, Sixth and Fourteenth Amendments of the United States Constitution; and Article I §§ 1, 7 and 8 of the Wisconsin Constitution."

written report, prepared at the direction of his supervisor, and transcripts of the three internal affairs interviews were never produced.

¶6 After L.W. testified at the preliminary hearing, Heine was bound over for trial and a second charge was added: second-degree sexual assault with use of force. Due to concerns that L.W. would not appear for trial, the trial court granted the State's motion to videotape a deposition of L.W., pursuant to WIS. STAT. §§ 885.42 and 967.04.

¶7 Ultimately, Heine waived his right to a jury trial and the case was tried to the court. The State's case was based largely on L.W.'s videotaped testimony and the physical evidence that Heine's sperm was present in the cup and on L.W.'s face, hand and perineal area.

¶8 Heine's defense was that he had not had any sexual contact with L.W., and that L.W. had retrieved his sperm by collecting Heine's urine from an unflushed staff toilet. Heine presented evidence that he had a previously undiagnosed condition, retrograde ejaculation, that causes approximately half of his ejaculate to be introduced into his bladder. When he urinates, that sperm is then expelled with the urine. The defense theory was that when Heine used the restroom at the start of his shift, there was sperm in Heine's urine because he engaged in sexual intercourse at home with his fiancée shortly before starting work. Heine said he did not flush the toilet. Heine presented evidence that L.W. could have had access to the staff toilet Heine used, although he did not have any witnesses who saw L.W. in the bathroom. In further support, Heine presented evidence that the medicine cup contained a high concentration of urine that would not ordinarily be found in ejaculate, suggesting some part of the material in the cup came from a toilet.

¶9 The trial court found Heine guilty of both offenses. In a written decision, the court specifically found that the presence of Heine's sperm and DNA in the medicine cup and on L.W.'s face, perineal area and right hand corroborated her testimony. The court accepted the testimony that Heine suffers from retrograde ejaculation, but rejected Heine's theory that L.W. had obtained his sperm by taking urine from the staff toilet. The court found that although one test had indicated "the presence of urea and creatinine (a presumptive but not conclusive result for the presence of urine) in the substance remaining in the medicine cup," this did not "establish that the sample came from the toilet." Rather, the court suggested, the sample of urine could have come from other sources including Heine's penis, L.W.'s hand (after using the toilet in her cell) or a sanitary napkin pad wrapper that L.W. placed over the medicine cup.

¶10 With respect to the count of second-degree sexual assault with use of force, the trial court found that while L.W. was performing fellatio on Heine, he "grabbed her by the back of her head and forced his penis further into her mouth." The court explicitly held that this action "constitute[d] the use of force to accomplish the assault" that is required as an element of second-degree sexual assault.[10]

¶11 The trial court sentenced Heine to five-and-a-half years of initial confinement and eight-and-a-half years of extended supervision for the crime of second-degree sexual assault by a correctional officer. For the second-degree

[10] The crime of second-degree sexual assault with use of force or violence contains three elements: (1) the defendant had sexual contact or intercourse with the victim; (2) the victim did not consent to the sexual contact or intercourse; and (3) the defendant had sexual contact or intercourse with the victim by use or threat of force or violence. *See* WIS JI—CRIMINAL 1208.

sexual assault by use of force, the trial court imposed a concurrent sentence with the same periods of initial confinement and extended supervision.

¶12 Heine filed a motion for postconviction relief on numerous grounds,[11] including that the trial court had "applied a legally deficient legal standard in evaluating the sufficiency of the evidence" and that the defense had presented forensic evidence that supported a "reasonable hypothesis of innocence" that the State was required to "disprove beyond a reasonable doubt." (Emphasis omitted.) The trial court denied the motion, concluding there was sufficient evidence to support the conviction and that the State was not required to disprove every material fact supporting Heine's theory of defense because Heine's defense was not a statutory defense to liability. Heine appealed.

¶13 Subsequently, trial counsel obtained transcripts of the three internal affairs interviews and a copy of Heine's report pursuant to his defense of Heine in a civil lawsuit.[12] Heine voluntarily dismissed his appeal[13] and filed a postconviction motion for a new trial based on newly discovered evidence, namely the four documents not produced prior to trial.[14] The trial court denied the motion,

[11] Those grounds that are not raised on appeal will not be addressed.

[12] Heine's trial counsel's affidavit in support of the motion for a new trial states that the documents "were found in the files of the Milwaukee County Personnel Review Board and obtained via an Open Records Request filed with the Personnel Board by [L.W.'s attorney] … in connection with a civil suit … against Milwaukee County and Mr. Heine on behalf of [L.W.]."

[13] This court extended time for filing the direct appeal pursuant to WIS. STAT. § 809.30.

[14] The basis for the new trial request, as stated in the motion, is

(continued)

concluding that "the evidence [would] have been cumulative for the most part" and that "there is simply not a reasonable probability that the outcome of the trial would have been different." This appeal follows.

## DISCUSSION

¶14 Heine raises two primary issues on appeal. The first concerns the sufficiency of the evidence and the second concerns his request for a new trial based on the unconstitutional withholding of the internal affairs transcripts and report. We examine each issue in turn.

### I. Sufficiency of the evidence.

¶15 Although Heine does not characterize his arguments as a challenge to the sufficiency of the evidence, we agree with the State that that is the essence of his argument on appeal.[15] We conclude that the evidence, taken in a light most favorable to the verdict, was sufficient to convict Heine.

¶16 Our supreme court has recognized that a "conviction should not be reversed unless the evidence, viewed most favorably to the State and to the

> newly discovered material evidence consisting of statements of … [L.W.], as well as the defendant's own statements, withheld by the Milwaukee County Sheriff's Department … which documents were intentionally withheld from the defendant's counsel by the prosecution and/or the Milwaukee County Sheriff's Department despite multiple formal pre-trial discovery requests to the prosecution and two "Open Records" requests to the Milwaukee County Sheriff's Department, by the defense counsel.

[15] Heine asserts the trial court violated his due process rights by not requiring the State to "factually prove beyond a reasonable doubt every element necessary" and "disprove every material fact supporting [Heine's] theory of defense." (Uppercasing omitted.) He also argues that the trial court failed to follow WIS JI—CRIMINAL 140, as discussed *infra*.

conviction, is so insufficient as a matter of law that no reasonable trier of fact could have found guilt beyond a reasonable doubt." ***State v. Doss***, 2008 WI 93, ¶21, 312 Wis. 2d 570, 754 N.W.2d 150. Where, as here, the trial court "acts as the finder of fact, it is the ultimate arbiter of witness credibility and the weight to be given to each witness' testimony." *See* ***Gilbert v. Geiger***, 2008 WI App 29, ¶21, 307 Wis. 2d 463, 747 N.W.2d 188.

¶17 Here, the trial court heard testimony from L.W. that Heine had sexually assaulted her. The State also introduced evidence that Heine's sperm and DNA were present in the medicine cup and on L.W. The trial court was free to accept the witnesses' testimony, and this testimony supports the convictions on both counts. For these reasons, we cannot say that the evidence was "so insufficient as a matter of law that no reasonable trier of fact could have found guilt beyond a reasonable doubt." *See* ***Doss***, 312 Wis. 2d 570, ¶21.

¶18 Heine argues the trial court should have acquitted him because he presented a reasonably hypothesis of innocence. We disagree. The trial court was free to reject the evidence suggesting L.W. could have obtained Heine's urine and sperm from the staff toilet. *See* ***Gilbert***, 307 Wis. 2d 463, ¶21. Moreover, the court was free to accept the testimony of Sharon Polakowski, a forensic scientist in the DNA analysis unit at the Wisconsin State Crime Laboratory who testified on behalf of the State. When asked whether the material from the medicine cup could have been "semen diluted in urine and subsequently diluted in a toilet bowl," Polakowski replied that it was "not likely, based on [her] screening and confirmatory test results." She explained that she did not believe that the "strong positive" test result for semen would have been possible if the semen had been diluted in urine and toilet water.

¶19 Finally, Heine argues that the trial court failed to follow WIS JI—CRIMINAL 140, the jury instruction concerning burden of proof and presumption of innocence. Part of the jury instruction, listed under the heading "Reasonable Hypothesis," states: "If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty." (Footnote omitted.) Heine argues that because he presented a defense theory that he claims explains the physical evidence, he should have been acquitted. We disagree. As the footnote to this part of the jury instruction explains, the Wisconsin Supreme Court clarified the meaning of the phrase "reasonable hypothesis" in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), stating:

> The rule that the evidence must exclude every reasonable hypothesis of innocence does not mean that if any of the evidence brought forth at trial suggests innocence, the jury cannot find the defendant guilty. The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence. Accordingly, the rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence which the jury believes and relies upon to support its verdict.

***Id.*** at 503. Consistent with ***Poellinger***, the trial court was free to reject the evidence supporting Heine's theory of defense. *See* ***id.*** For the foregoing reasons, we reject Heine's challenge to the sufficiency of the evidence and, therefore, decline to reverse his conviction on that basis.

## II. New trial based on *Brady* violation.

¶20 Heine seeks a new trial on grounds that he was unconstitutionally denied due process because the State did not disclose transcripts of the internal

affairs interviews and Heine's own report. He contends that he is entitled to a new trial based on this newly discovered evidence.

**A. Legal standards.**

¶21 The United States Supreme Court recognized in ***Brady v. Maryland***, 373 U.S. 83 (1963), that the Due Process Clause of the Fourteenth Amendment guarantees defendants a constitutional right to evidence favorable to the accused and has held that right is violated "when favorable evidence is suppressed by the State either willfully or inadvertently, and when prejudice has ensued." ***State v. Harris***, 2008 WI 15, ¶61, 307 Wis. 2d 555, 745 N.W.2d 397. Thus, to establish a ***Brady*** violation, a defendant must show: (1) the State suppressed the evidence in question; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the determination of the defendant's guilt or punishment. ***State v. Rockette***, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269 (citing ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999)). There can be a due process violation "'irrespective of the good faith or bad faith of the prosecution.'" ***Id.*** (quoting ***Brady***, 373 U.S. at 87). "The prosecution's duty to disclose evidence favorable to the accused includes the duty to disclose impeachment evidence as well as exculpatory evidence." ***Id.*** (citing ***Strickler***, 527 U.S. at 280).

¶22 In ***State v. Harris***, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737, our supreme court recognized the United States Supreme Court's holding in ***United States v. Bagley***, 473 U.S. 667 (1985), that a

> ***Brady*** violation may occur under three circumstances: 1) if the prosecutor fails to disclose that the defendant was convicted on the basis of perjured testimony; 2) if the defendant makes no ***Brady*** request and the prosecutor fails to disclose evidence that is favorable to the defendant; or 3) if the defense makes a specific ***Brady*** request and the prosecutor fails to disclose the requested material.

***Harris***, 272 Wis. 2d 80, ¶13 (citing ***Bagley***, 473 U.S. at 678-81). ***Harris*** noted that ***Bagley*** also

> adopted a uniform standard for materiality governing all three categories of ***Brady*** violations: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

***Harris***, 272 Wis. 2d 80, ¶14 (quoting ***Bagley***, 473 U.S. at 682). ***Harris*** recognized that under this test—the same test used for analyzing claims of ineffective assistance of counsel under ***Strickland v. Washington***, 466 U.S. 668 (1984)—a reviewing court:

> "may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."

***Harris***, 272 Wis. 2d 80, ¶14 (quoting ***Bagley***, 473 U.S. at 683).

¶23 In ***Kyles v. Whitley***, 514 U.S. 419 (1995), the United States Supreme Court again discussed materiality, stating:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

***Id.*** at 434 (quoting ***Bagley***, 473 U.S. at 678). Citing this language, we have recognized that "the non-disclosed evidence need not necessarily be of such force to result in an acquittal." *See* ***State v. White***, 2004 WI App 78, ¶25, 271 Wis. 2d 742, 680 N.W.2d 362.

¶24 Applying these standards, we consider whether Heine has shown "that the State suppressed the evidence in question, that the evidence was favorable to the defendant and that the evidence was 'material' to the determination of the defendant's guilt or punishment." ***Rockette***, 294 Wis. 2d 611, ¶39 (citation omitted). "On appeal, this court independently applies this constitutional standard to the undisputed facts of the case." ***Id.***

**B. Application.**

¶25 To begin, we consider whether the State suppressed the evidence in question. At the trial court, in response to Heine's postconviction motion for a new trial, the State agreed that "the evidence in question (at least the physical report and transcriptions) was discovered after conviction."[16] The State conceded that although the documents at issue were not in the possession of the District Attorney's Office, "the report and transcriptions, which were apparently in the custody of the [Milwaukee County] Sheriff's Department, are presumed to be in

[16] Although good faith or bad faith of the prosecution does not affect whether a ***Brady*** violation has occurred, *see* ***State v. Rockette***, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269, we note for the record that it appears undisputed that the District Attorney's Office was unaware that the transcripts and report existed. Rather, there are suggestions that the prosecutor erroneously believed that the documents had been destroyed.

the custody of the State for purposes of discovery."[17] The trial court implicitly accepted this concession and adopted the State's brief as its ruling on the motion. Thus, Heine has established the first ***Brady*** requirement: that the State suppressed the evidence in question. *See* ***Rockette***, 294 Wis. 2d 611, ¶39.

¶26 Next, we consider whether the evidence was favorable to Heine. *See* ***id.*** The record in this case demonstrates that the outcome of the case rested substantially on determinations of credibility as between L.W. and Heine. The internal affairs transcripts include statements that potentially affect the credibility of both individuals. From the defense perspective, L.W.'s statement provides important impeachment evidence because she provided information in her internal affairs interview that she did not mention at the preliminary hearing or in her deposition testimony. Also from the defense perspective, Heine's initial report, and his subsequent interviews with internal affairs, tend to corroborate his trial testimony. Because these documents were not produced, Heine was deprived of the important ability to use them at trial.

[17] On appeal, the State, now represented by the Attorney General's Office, asserts for the first time that "the documents were apparently turned over to the defense prior to trial" and then states that "[i]t will be up to counsel for Heine to explain in his reply brief what" reports were provided to Heine. These assertions are not supported by the record and are contrary to the State's trial-level response brief concerning Heine's postconviction motion. We decline to consider this argument. *See* ***State v. English-Lancaster***, 2002 WI App 74, ¶22, 252 Wis. 2d 388, 642 N.W.2d 627 (doctrine of judicial estoppel bars court from considering party's argument where party advocated a certain position in the trial court and a contrary position on appeal); *see also* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) ("[I]ssues not raised or considered in the trial court will not be considered for the first time on appeal."), *superseded on other grounds by statute*, WIS. STAT. § 895.52, *as recognized in* ***Wilson v. Waukesha County***, 157 Wis. 2d 790, 797, 460 N.W.2d 830 (Ct. App. 1990); ***Van Deurzen v. Yamaha Motor Corp. USA***, 2004 WI App 194, ¶6, 276 Wis. 2d 815, 688 N.W.2d 777 ("We do not normally consider evidence presented for the first time on appeal.").

¶27 Where the theory of defense is that the complaining witness was fabricating her claim, and the withheld evidence of that witness's prior statements contains significant information inconsistent with her testimony, the defendant is deprived of important impeachment evidence. For example, in the internal affairs interview, L.W. said that on the same day as the assault, Heine looked through the cell door when L.W. was naked before she took a shower and told her to lower a t-shirt she had in her hand so he could see her breasts. L.W. said that Heine later came into her room after she showered and was still naked, and that he "fling[ed]" her nipples with his finger. L.W. did not mention these incidents in her preliminary hearing or deposition testimony, despite her extensive testimony on direct and cross-examination. In her deposition, she testified that she asked Heine for a towel, but did not mention any inappropriate incidents, despite being asked if "there c[a]me a time when [Heine] touched [her] inappropriately" and being asked in various ways to describe her contacts with Heine on July 26, 2005. These contacts are of such a nature that a reasonable factfinder would expect a witness claiming a sexual assault occurred the same day to remember them, and her failure to mention them is a basis on which to challenge her credibility.

¶28 We acknowledge that L.W.'s statement to internal affairs also contains information that is consistent with her deposition testimony. However, where the central issue at trial is the credibility of the defendant or the complaining witness, denying a defendant access to relevant impeachment information harms the defense. Based on our review of the transcripts of the internal affairs interviews and Heine's report, we conclude that they contained information that was favorable to the defense.

¶29 Finally, we must consider whether the evidence was material, recognizing that the "'evidence is material only if there is a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" ***Harris***, 272 Wis. 2d 80, ¶14 (quoting ***Bagley***, 473 U.S. at 682). We conclude that the evidence was material.

¶30 As we have explained, the credibility determinations in this case were crucial. Indeed, with respect to the conviction for second-degree sexual assault with use of force, the only basis for finding use of force was L.W.'s testimony, because the trial court's finding that Heine used force was based on L.W.'s testimony that Heine "grabbed her by the back of her head and forced his penis further into her mouth." There was no physical evidence to support this element. Thus, the trial court's credibility determinations were crucial.

¶31 We also reject the State's argument that Heine's report and the internal affairs statements were not material because they were merely cumulative of Heine's and L.W.'s testimony, much like the United States Supreme Court rejected a similar argument in ***Skipper v. South Carolina***, 476 U.S. 1 (1986). In ***Skipper***, the defendant (Skipper) was seeking to introduce certain evidence to the jury, which was considering whether to impose the death penalty. ***Id.*** at 2. Skipper and his wife were permitted to testify that Skipper had "conducted himself well" during the time he had been in prison. ***Id.*** at 3. However, the trial court denied Skipper's attempt to introduce testimony from two jailers and a regular visitor to the jail concerning Skipper's time in prison, even though the state was allowed to assert that Skipper would pose disciplinary problems if sentenced to prison (as opposed to being sentenced to death) and "would likely rape other prisoners." ***Id.*** On appeal, the Court rejected the state's argument that the proffered testimony was merely cumulative of the testimony of petitioner and his former wife. ***Id.*** at 7-8. The Court held that "characterizing the excluded

evidence as cumulative and its exclusion as harmless is implausible on the facts before" the Court, and that it could not "confidently conclude that credible evidence [about defendant's conduct] would have had no effect upon the jury's deliberations." ***Id.*** at 8. Similarly, based on the facts of this case, we cannot conclude that the transcripts and report would have had no effect upon the factfinder's deliberations. In particular, Heine's report and interviews could have been used to corroborate Heine's testimony, and L.W.'s interview could have been used to impeach her testimony.

¶32 "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." ***State v. Plude***, 2008 WI 58, ¶47, 310 Wis. 2d 28, 750 N.W.2d 42. Further, our supreme court has recognized that where "the State's discovery violation undermine[s] the essence of discovery," the defendant "must have the opportunity to choose a strategy and prepare for trial in light of all the evidence that should have been provided." ***State v. DeLao***, 2002 WI 49, ¶65, 252 Wis. 2d 289, 643 N.W.2d 480. This may require a new trial. *See* ***id.*** "'The penalty for the breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant.'" ***Id.***, ¶60 (citations omitted).

¶33 Here, the failure to timely produce these documents prior to trial deprived Heine of important material impeachment evidence and of corroborating evidence, both of which he was entitled to receive in order to prepare for trial. We conclude that under the facts concerning this ***Brady*** violation, a new trial is warranted.

## CONCLUSION

¶34 For the foregoing reasons, we reverse the judgment, reverse the orders in part and affirm the orders in part, and remand for a new trial.

*By the Court.*—Judgment reversed, orders affirmed in part and reversed in part, and cause remanded with directions.

Not recommended for publication in the official reports.