SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff - Respondent,

v. Case No. 2012AP000046-CR

JIMOTHY A. JENKINS,

Defendant – Appellant - Petitioner.

REPLY BRIEF OF THE DEFENDANT – APPELLANT -- PETITIONER, JIMOTHY A. JENKINS

AN APPEAL FROM A JUDGMENT AND ORDERS OF THE CIRCUIT COURT FOR MIILWAUKEE COUNTY, THE HONORABLE CARL ASHLEY AND REBECCA DALLET, PRESIDING.

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ARGUMENTS

I. JENKINS WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL WHEN HIS TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE.

A. Jenkins' Trial Counsel's Performance Was Deficient Regarding Jones.

The State acknowledges trial counsel "could not specifically recall why he did not call [Jones] as a witness…" (State's brief:8 (hereinafter "SB:#")). However, it then offers potential strategies why counsel failed to call Jones: Because counsel had trouble with several witnesses, and "Jones was undoubtedly one of them…" (SB:9); Because of inconsistent descriptions (SB:10); Because of Jones' involvement in a drug transaction (SB:10-11); And because the alibi testimony was better offered through McFadden. (SB:12). However, "…it is not the role of a reviewing court to engage in a post hoc rationalization for an attorney's actions by constructing defenses that counsel does not offer…" Goodman v. Bertrand, 467 F.3d 1022,1029(7th Cir.2006) (quoted sources omitted). "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." Harris v. Reed,894 F.2d 871,878(7th Cir.1990).

The State uses State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648,630 N.W.2d 752 to justify the creation of strategies. In Kimbrough, counsel claimed he forgot to ask for a lesser included jury instruction. Id.,¶24. This was rejected by the court, since counsel never mentioned the instruction in opening, and counsel did not ask for the instruction despite drafting two other jury instructions. Id.,¶30. Jenkins' case is factually different because counsel never gave an explanation for failing to call Jones. (R.77:18:10-14;P-Ap.p.146). Further, other evidence shows counsel simply forgot about Jones: Counsel was uncertain if he met or talked to Jones (R.77:16;P-Ap.p.144) and could not recall if she was uncooperative. (R.77:25;P-Ap.p.143). The

witness list demonstrates counsel intended to call Jones. (R.77:25-26;P-Ap.p.153-154). This court should not accept the State's construction of *post hoc* strategies not offered by counsel.

The State argues that Jenkins "failed to explain what any further investigation would uncover." (SB:11,n.2). Jenkins did address the four things a complete investigation would have revealed. See Jenkins's brief:23-24.

B. Counsel's Deficient Performance Was Prejudicial To Jenkins' Defense Regarding Jones.

The State incorrectly adds to the Strickland standard, asking for a focus on the reliability of the proceedings. (SB:6). This standard has been found to be contrary to Strickland. Goodman, 467 F.3d at 1028; Washington v. Smith, 219 F.3d 620,632 (2000). The correct standard is: "a reasonable probability that, but for counsel's professional errors, the results of the proceeding would have been different."Strickand v. Washington, 466 U.S. 668,694 (1984).

The State "fails to see how the circuit court did not apply the [Strickland] standard." (SB:14). However, it does not address the three cases Jenkins cited as support for the argument that the court should not have decided if a jury would believe a missing witness. First, Jenkins set forth both the majority and concurring opinions of State v. McCallum, 208 Wis.2d 463,561 N.W.2d 707(1997) which discussed "reasonable probability of a different result." Both opinions give a threshold requirement for the new evidence, but once met, leave the credibility determination to the jury. The majority opinion stated: "the circuit court must determine whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." McCallum,¶19. The majority pointed out that there should not be a comparison of which statement is more credible. Id. ("a finding that a recantation is less credible than the accusation does not necessarily mean that a reasonable jury could not have a reasonable doubt."). The concurring opinion gave more guidance, writing:

> The first step is for the circuit court to determine whether the recantation is credible, that is, worthy of belief. The circuit court does not determine whether the recantation is true or false. Such a holding would render meaningless the right to have a jury determine the ultimate issue of guilt based on all the evidence. The circuit court merely determines whether the recanting witness is worthy of belief, whether he or she is with the realm of believably, whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a new trial.

Id.,¶48. Finding that a witness is "incredible" is sufficient to hold that no reasonable probability exists for a different result. Id.,¶49. However, once that initial threshold is met, "[t]he circuit court does not determine which of the two statements is more credible; the circuit court is not to act as a thirteenth juror." Id.,¶52&¶59.

The other two cases not addressed by the State are Ramonez v. Berghuis, 490 F.2d 482 (6th Cir.2007) and Vasquez v. Bradshaw, 522 F.Supp. 900 (N.D.Ohio 2007). Ramonez held that the State court improperly made "a finding that a jury would not believe a witness's testimony." Ramonez, 490. This court was not concerned with witness inconsistencies: "While there would have been plenty of grist for the cross-examination mill as to Ramonez's three witnesses, the question whether those witnesses were believable for purposes of evaluating Ramonez's guilt is properly a jury question." Id. Vasquez criticized the lower court because it found that the jury would not have believed any of the missing witnesses: "The critical point, however, is not whether the Court believes or disbelieves the testimony that the post-conviction hearing witness provided; it is simply a question of what testimony those witnesses would have provided at trial had [trial counsel]'s performance been effective, and whether their testimony, had the jury heard it, might reasonably have changed the outcome of the trial." Vasquez., at 927.

What the court determined in Jenkins' case was that the jury would not have believed Jones, because "the jury would have had difficulty with some of [Jones'] statements..." (R.80:10;P-Ap.p.124). This is usurping the jury's role of determining guilt or innocence, an incorrect application the Strickland standard.

The State concedes Jones' testimony "would have arguably supported both parts of this defense…" (SB:13). However, it then makes credibility assessments arguing: "her testimony would not have persuaded the jury;" Jones' testimony would not have been as effective as the cross of Kimber; and "the jury would not have given much weight to her description of the shooter." (SB:13&16). Again, the question is not would the jury believe Jones, but whether when presented with both Kimber and Jones' testimony, is there a reasonable probability, sufficient to undermine the confidence in the verdict, that a new trial would have a different outcome.

The State complains that Jenkins hardly acknowledges the problems with Jones' testimony. (SB:15). Jenkins acknowledges Jones' inconsistencies, but believes too much emphasis is placed on statements that are not shockingly different. The police report from the night of the shooting is unclear as to what Jones witnessed. First it reports: "JONES stated that she did not see who the occupants of the car were nor the face of the Black Male suspect who was shooting because he had a hood on and it was dark." (R.45:19;P-Ap.p.199). Yet two sentences later it reports: "JONES stated that she had met the victims for the first time that night and that she does not know the victims nor the individuals who shot at the victims." (Id.). Thus if Jones did not know the individuals who shot the victims, a fair inferences is that she saw the shooter well enough to know that she does not know the shooter. A week later, Jones gave the shooter's description "as being a black male, 20-21 yoa, 5'8", medium build, medium complexion, clean shaven-baby face." (R.45:21;P.Ap-p.201). This is not vastly inconsistent with her previous statements. Jones also confirmed: "..she had never seen the boy with the rifle before" but "believes that she could identify him." (R.45:22;P-Ap.p202). And in a photo array identification attempt, which included Jenkins,

Jones failed to identify a shooter. (R.45:24;P.Ap.p.204). Again, Jones stated that she "looked the shooter directly in the face…" (Id.). Then almost four years later, she gave a similar description: "black male, maybe 20-21, medium build, medium complexion, clean shaved baby face, smooth skin, no acne, about 5'8." (R.45:25;P.Ap.p.205). At the Machner hearing, when confronted about the lack of the phrase "no acne" in previous descriptions, Jones responded: "he had a clean shaved face. I mean, he didn't have no hair on his face, and he – like he shaved his skin or anything, so he just had a baby face." (R.77:67;P.Ap.p.195). Jenkins contends that "smooth skin, no acne" is not vastly different from the original description of "clean shaven baby face." Thus Jones' inconsistencies are not so great as to make her incredible as a witness.

The State asks if Jenkins believes the inconsistencies in Jones' statements are even relevant to his claim. (SB:15-16,n.3). Jenkins believes that in a Strickland assessment, an uncalled witness's inconsistencies could be relevant, but only to a point, and certainly not in this case. An uncalled eyewitness who is **incredible,**[1] because of vast or extreme inconsistencies, would not undermine the confidence in a verdict. However, an eyewitness's minor inconsistencies, when she provides evidence directly contrary to the State's only identifying witness, should not defeat the prejudice prong of Strickland, since the jury is the ultimate decider of whom to believe.

The State argues that the weaknesses of its case must be balanced against the inconsistencies in Jones' statements. (SB:17). However Strickland hold that a case only weakly supported by the evidence is much more likely to be effected by errors than a strong case. Strickland, 466 U.S. at 696. Thus assessment of the State's case alone must be conducted.

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[1] The State follows this standard when assessing the failure to call Moore. It explains that "[t]he implausibility of [Moore's] statement would have led the jury to ignore it." (SB:22). However, it does not use terms such as "implausibility," "impossibility," or "incredible" when describing Jones' statements. Thus it implicitly argues that Jones testimony would not be believed because of inconsistencies, but Moore would not be believed because he is incredible.

Thus for the Strickland standard, the question remains whether Jones' testimony creates a reasonable probability that the jury would have reached a different result. "'Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible.'" U.S. v. Leibach, 347 F.3d 219,246 (7thCir.2003) (quoted sources omitted). There certainly would have been ripe grounds to cross-examine Jones, but one cannot say the chance of a different result with Jones' testimony was less than negligible.

Without Jones, the jury had only Kimber's testimony to assess the identification of the shooter. The State was able to use this in closing, emphasizing that Kimber "was there, that he was shot, and he identified who did the shooting." (R.74:55) and "if you believe Toy Kimber; then certainly what you have here, beyond any doubt is the fact Jimothy Jenkins is guilty of each and every one of these crimes." (R.74:56). Can it be said with confidence, after assessing Kimber and Jones' testimony, that there is not a reasonable probability that the outcome would have been different with Jones' testimony? With Jones, there is a reasonable probability that the jury would have reached a different verdict and thus Jenkins must be awarded a new trial.

C. Jenkins Was Denied His Constitutional Rights To Counsel By His Trial Counsel's Deficient and Prejudicial Performance Regarding Moore.

The State argues that Jenkins' trial counsel was reasonable in not calling Moore as a witness, despite counsel's concession that Moore would be credible and a good witness, because counsel does not have to raise every non-frivolous defense. (SB:19). However, excluding credible witnesses is unreasonable when it would have led to complete exoneration. Thus counsel's performance fell below the expected standard of representation.

In regards to prejudice, the State agrees for the purposes of this appeal that Moore and Blunt's statements are admissible. (SB:21). This is directly contrary to the Court of

Appeals decision, which agreed with the court's decision that the statements were inadmissible hearsay. (P.Ap.p.109).

The State argues that Moore's attorney would not have allowed Moore to testify. (SB:20). However, Moore was sentenced on April 8, 2009, and Jenkins' trial started on April 27, 2009, thus Moore would not have had an attorney any longer. (R.77:11). Further, trial counsel spoke to Moore, and could have subpoenaed Moore. (R.77:49). Further, Moore gave a statement to Jenkins' post-conviction investigator, so he was willing to testify. (R.45:27-28;P-Ap.p.207-208).

The State argues the Moore's testimony is implausible. (SB:22). However, the State is again asking the court to usurp the jury's role. Again, there is certainly ample information for cross examination of Moore. However, given what Moore had to say, there is a reasonable probability that the outcome would have been different with Moore's testimony. As such, Jenkins must be awarded a new trial.

II. THIS MATTER SHOULD BE REVERSED IN THE INTEREST OF JUSTICE.

The State argues this case is governed by State v. Burns, 2011 WI 22,332 Wis.2d 730,798 N.W.2d 166, which it argues stands for the proposition that discretionary reversal cannot be based upon on counsel's mistake, but only upon an erroneous evidentiary ruling. (SB:25-26). Burns stated: "the 'erroneous' denial of relevant evidence refers to a legal evidentiary error by the trial court." Burns,¶45. However, given the context in which the statement was written, given the cases Burns relied upon, and given other courts' decisions, this court's discretionary reversal power, because the controversy has not been fully tried, is not limited to erroneous evidentiary rulings.

The relevant statement in Burns was made while discussing the defendant's complaint that he should have been allowed to cross-examine a doctor. Burns,¶44. Thus Burns itself did not involve missing evidence because of counsel's actions. Thus Burns on its own facts does not stand for the proposition that discretionary reversal is not allowed because of counsel's error.

Further, one of the supporting authorities cited by Burns was State v. Cuyler, 110 Wis.2d 133,327 N.W.2d 662 (1983).[2] Cuyler cited two cases that did not involve an erroneous evidentiary ruling: One involved counsel error (State v. Logan, 43 Wis.2d 128,168 N.W.2d 171(1969)), the other involved newly discovered evidence (Garcia v. State, 73 Wis.2d 651,245 N.W.2d 654(1976)). See Cuyler, at 142,327 N.W.2 667.

The State admits that other courts have held that an erroneous evidentiary ruling is not required for discretionary reversal. (SB:27). In State v. Jeffrey A.W., 2010 WI App 29,¶12,323 Wis.2d 541,780 N.W.2d 231 the Court of Appeals found discretionary reversal was required because of faulty herpes testing, despite finding that counsel was not deficient in attempting to verify the accuracy of the tests. In fact, the Court of Appeals rejected the State argument that if the court does not find ineffective assistance, it is powerless to exercise discretionary reversal. Id.,¶20.

Additionally, other courts have utilized its power to reverse on matters not involving erroneous court rulings. State v. Williams, 2006 WI App 212,¶17,296 Wis.2d 834,723 N.W.2d 719 stated: "an argument that can be framed under ineffective assistance of counsel may also support a motion for a new trial because the real controversy was not fully tried." Williams relied heavily on State v. Hicks, 202 Wis.2d 150,549 N.W.2d 435 (1996), citing: "The supreme court concluded that the real controversy was not fully tried when defense counsel failed to have pubic hair found at the sexual assault crime scene subjected to DNA analysis…" Williams, ¶16. Thus both cases involved reversal based upon counsel error.

Case law has held that discretionary reversal is allowed if the real controversy has not been fully tried because the jury did not hear evidence, "'even if this occurred because the evidence or testimony did not exist at the time of

[2] The other authority did not state that counsel error was inappropriate for discretionary reversal. State v. Joyner, 2002 WI App 250,¶24,258 Wis.2d 249,653 N.W.2d 690. ("the real controversy was fully tried—we have already concluded that Trudy Joyner's statements were correctly excluded.").

trial.'" State v. Davis, 2001 WI App 147,¶16,337 Wis.2d 688, 808 N.W.2d 130 (quoting State v. Maloney, 2006 WI 15,¶14 n.4, 288 Wis.2d 551,709 N.W.2d 436). Thus if evidence did not exist at trial, obviously an erroneous evidentiary ruling is not required for discretionary reversal.

Further, there is nothing in the statute that restricts discretionary reversal to erroneous evidentiary rulings. Rather, the statute only requires that the reversal be consistent to accomplish the ends of justice. §751.06 Wis.Stats. (2011-2012).

The State argues Burns and State v. Mayo, 2007 WI 78,301 Wis.2d 642,734 N.W.2d 115 implies that an erroneous evidentiary ruling is required. (SB:27). Burns, as previously discussed, does not require this. And while Mayo held that "the Strickland test is the proper test to apply in the context of ineffective assistance of counsel" it did not specifically limit discretionary reversal powers to evidentiary errors. Mayo,¶28.

The State argues that allowing reversal when the jury did not hear evidence because of counsel's actions, it is allowing a lesser standard than Strickland requires. That may be true, but the State ignores that two distinct legal theories are being applied. Strickland involves an investigation into violations of a defendant's the Sixth Amendment right. Discretionary reversal involves this court's investigation to ensure that the ends of justice are accomplished. Under the State's logic this court could not grant discretionary reversal when other claims for Constitutional violations have been denied.

The State then argues that even if an erroneous evidentiary ruling is not required, the merits of Jenkins' claim do not justify discretionary reversal. But the State's own argument demonstrates that the full controversy has not been tried: "Whatever the flaws in Kimber's identification of the shooter, Jones's testimony had far more." (SB:31). Thus the State is comparing two conflicting stories – the very thing that the jury system was designed to accomplish. Because the jury did not get to compare the two accounts, the real controversy has not been tried.

CONCLUSION

Jenkins must be awarded a new trial.

Dated this 19th day of February, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)&(c) for a brief and appendix produced with proportional serif font. Brief length is 10 pages and 2,994 words.

Signed:_____
Joseph E. Redding

CERTIFICATION OF COMPLAINCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated February 19, 2014.

_____

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