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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2013AP1731 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY H. JONES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MANITOWOC COUNTY, HONORABLE JUDGE JEROME L. FOX PRESIDING, & FROM AN ORDER, DENYING THE DEFENDANT-APPELLANT'S POST-CONVICTION MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Issue #1: Was Jones's trial counsel ineffective, denying him his constitutional right guaranteed by the Sixth Amendment?

Issue #2: Was Jones's constitutional right to present a defense, guaranteed by the due process clause, violated by the trial court's exclusion of two pieces of evidence: 1) Jones's expert opinion regarding his propensity to commit a sexual assault and 2) by the trial court's exclusion of evidence that each complaining witness had made similar prior allegations of sexual assault against other persons, which a jury could reasonably have found to have been untruthful?

Issue #3: Is Jones entitled to a new trial, in the interest of justice?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Jones believes that each of the issues raised in this appeal can be fully briefed, and are supported based upon the record below at the trial court and existing law. Therefore, neither oral argument, nor publication, are requested.

STATEMENT OF THE CASE

Ricky H. Jones ("Jones") was charged with two crimes, both charges were First Degree Sexual Assault of a Child Under 13 Years of Age, a Class B Felony. R. 12; App. 101-102. The first count alleged that Jones had sexual contact with Caitlyn B. on or about July 1, 2006. The second

count alleged that Jones had sexual contact with Mykaela W. on or about August 15, 2006.

On February 15, 2008, Jones filed a Motion for In Camera Inspection, to obtain patient files of Caitlyn B., allegedly relating to past allegations of sexual assault against another party. R. 16. The trial court issued an order, granting the defense motion for in camera inspection of Caitlyn B.'s records. R. 17. Ultimately, a disc, containing an audio/visually recorded interview of Caitlyn B. was offered by defense for admission at Jones' trial; the trial court ultimately ruled the recording inadmissible. R. 39; App. 140.

Similarly, on May 13, 2008, Jones filed a Motion for In Camera Inspection of Mykaela W.'s patient files relating to a prior allegation that Mykaela W. had made of sexual assault, against a third-party (other than Jones). R. 24. The trial court issued a similar order, granting Jones permission to review records which included an audio/visually recorded interview of Mykaela W. but ultimately ruled the recording inadmissible at trial. R. 26, R. 39.

Both recordings were offered as being proof of prior false allegations made by each complaining witness and proof of each complaining witness's motive to falsify the charges issued against Jones. R. 33-34. Initially, the trial court ruled the recordings inadmissible, on June 23, 2008, finding that the trial court did not find the recordings to demonstrate a prior untruthful statement. R. 43. Jones then filed an interlocutory appeal as to each recording, which was granted and heard by the Court of Appeals. R. 40. The Court of Appeals reversed and remanded the trial court's decision, with instruction to decide the motion under a different legal standard; the Court of Appeals found that the trial court had improperly decided whether the trial court believed the

statements to be untruthful, where the trial court should have ruled on whether a jury could have reasonably found the statements to be untruthful. R. 56; Ap. 41-49. The matter then proceeded to a Petition for Supreme Court Review, where the petition was held in abeyance, while the Supreme Court heard a similarly situated argument. R. 57-60. After the case was remanded back to the trial court, the trial court found that a jury could not reasonably have found the complaining witness's prior statements to be untruthful and excluded the evidence. R. 98; App. 150-151.

Jones had a jury trial on May 24th and May 25th, 2011. R. 99-100. At the trial, testimony was heard from Mykaela W., Valarie S. (Mykaela's mother), Mykaela's step-father Michael S. (Mykaela's step-father), Detective Erik Kowalski, Caitlyn B., Shannon U. (Caitlyn's mother), Sara Schumacher (forensic interviewer), Jennifer Witczak (Human Services), Michelle Trochil (Jones' ex-girlfriend), Matthew Armstrong (Nurse Practitioner), and Dr. Eugene Braaksma.

First, Valarie S. testified regarding Mykaela's initial reporting of her allegations against Jones. R. 99:89-104. Valarie S. testified that Mykaela first told her and her boyfriend, Ralph Shipman, that she thought Jones had sex with her because "he licked her pee-pee." R. 99:91.

Next, Detective Erik Kowalski testified regarding his forensic interview of Mykaela W. R. 99:104-143. Detective Kowalski testified about his initial contact with Mykaela and her family, where he conducted a brief interview of Valarie S. and Ralph Shipman. R. 99:123-126. Detective Kowalski's description of what Valarie S. heard from Mykaela was consistent with Valarie's testimony at trial.

Next, Mykaela W. testified. R. 99:143-176. Mykaela told the jury that Jones made her have sex with Jones in his

bedroom. R. 99:152-153. Specifically, Mykaela said that Jones touched the inside and outside part of her that she uses to go pee with his hands. R. 99:153-157.

The jury also heard testimony from Sara Schumacher, from the Child Advocacy Center. R. 99:177-189. Ms. Schumacher testified regarding her background, her qualifications to conduct forensic interviews, and her interview of Caitlyn B.

The trial court next allowed Jones to call his expert witness, Eugene Braaksma, out of order. R. 99:217-241. First, Dr. Braaksma testified regarding his education, experience, and qualifications as an expert witness. R. 99:217-219. Next, Dr. Braaksma testified regarding the Stepwise Interview procedures used by the State investigators and potential problems and limitations of such interviewing techniques. R. 99:223-240. Finally, Jones attempted to elicit Dr. Braaskma's opinion regarding Jones' propensity to commit a sexual offense (or lack thereof). R. 99:241. However, the State objected to the line of questioning and arguments were heard outside the presence of the jury. R. 99:241-246. Defense counsel then made an offer of proof with Dr. Braaksma. R. 99:246-251. The trial court cited various grounds for excluding the expert's opinion. R. 100:10-13. First, the trial court cited lack of notice and discovery violation, as primary grounds to exclude the evidence. Second, the trial court found the evidence to be inadmissible character or propensity evidence.

The next morning, the jury heard from Caitlyn B. R. 100:14-53. Caitlyn testified that she was presently 11 years of age, born November 26, 1999. R. 100:18. Caitlyn identified Jones as the person who assaulted her and testified that he specifically touched her vagina, breasts, and buttocks

with his fingers and tongue on various dates and times. R. 100:26-28.

During the middle of Caitlyn's testimony, while the jury was excused for a break, the trial court modified its legal basis for excluding Dr. Braaksma's expert opinion that Jones did not have a propensity to commit a sexual assault. R. 100:42-44. The trial court amended its prior finding that the testimony was excludable as propensity evidence and acknowledged the potential admissibility under State v. Richard A.P., 223 Wis. 2d 777. However, the trial court reiterated the concerns that proper notice was not provided to the State:

> THE COURT: Let's go back on record for just a moment. Be seated. Before we started with the jury here today, counsel for the defense made - - or re-made a motion seeking to admit some testimony. It's testimony, now that I'm thinking about it, commonly called ***Richard A.P.*** evidence, and it comes from a case at 223 Wis. 2d 777.
>
> And counsel is correct. In some instances at the discretion of the court for good and proper reasons, that testimony can be admissible.
>
> I noted that I thought that 9-0-4-0-4 (1) stood in its way. Probably a - - a better citation would have been to the - - to the earlier relevancy statutes. But here's the point I want to make.

> I said that it was never disclosed to Mr. Jones that this repot or this testimony was going to be received.
>
> As I understood 9-0-7-0-2, as it's been re-done, with the so-called ***Daubert*** standard, had I been aware that this was going to be offered, I would have had to conduct a separate hearing prior to the trial to determine whether or not the ***Daubert*** standard was met.
>
> So that's - - that's another reason we're not going to hear that testimony. Because, under the - - under the discovery provision of the statute, it wasn't disclosed to Mr. Jones. Had it been done to mis - - uh, disclosed to Mr. Jones, and had we discussed it, I'm sure, because of the nature of the testimony, it would have been subject to fairly close scrutiny under revised 9-0-7-0-2. That's all I wanted to say.

R. 100:42-44.

The jury briefly heard from Jennifer Witczak, from Manitowoc Human Services, regarding a brief interview she conducted of Caitlyn B. R. 100:53-62. The jury heard briefly from Caitlyn's mother, Shannon U., regarding how Caitlyn had been present at Jones' residence various days. R. 100:62-72. The jury heard from Michelle Trochil (formerly Michelle Braun), regarding her residence she previously shared with Jones. R. 100:72.

Next, the jury heard from Matthew Armstrong, a Nurse Practitioner, who had conducted an examination of Caitlyn B. R. 100:97. During the examination, Armstrong noted "mild irritation" of Caitlyn's vaginal region. However,

he testified that it could be attributed to many things in addition to sexual contact, which may include poor hygiene, sensitivity to chemicals such as detergents, etc. No other evidence was noted to provide corroboration that a sexual assault occurred.

The jury also heard from Michael S. briefly. R. 100:103. Jones re-called Detective Kowalski and called a few other witnesses, before testifying himself. During Detective Kowalski's testimony for the defense, trial counsel elicited the following testimony about a different officer, Detective Swetlik's involvement in investigating alongside Detective Kowalski:

> Q And what was his role in all this?
>
> A I believe he was investigating a different case.
>
> Q Okay. So did you guys actually compare notes on a different case?
>
> A I believe he expressed some concern about another case, yes.
>
> Q And so what was this other case that he was investigating?
>
> A Sexual assault.
>
> Q Okay. And – and what case did that – who did that involve?
>
> A I believe the defendant.
>
> Q Okay. So what you're telling us is that both of you would have been

> investigating a different case concerning Mr. Jones; right?
>
> A Correct.

R. 100:120-121.

The jury returned guilty verdicts on both counts, a presentence investigation ("PSI") was ordered, Jones' bond was revoked, and sentencing was scheduled. R. 76-77; App. 103-104. A PSI was filed on September 15, 2011 and Jones was sentenced on September 29, 2011. R. 78-79. The trial court issued a Judgment of Conviction, convicting Jones and sentencing him to 23 years in prison on each charge (8 years initial confinement and 15 years of extended supervision), consecutive to each other. R. 90; App. 105.

Jones filed a Notice of Intent to Pursue Post-Conviction Relief and subsequently filed a Post-Conviction Motion, alleging Ineffective Assistance of Counsel. R. 105; App. 106-110. A motion hearing was held April 11, 2013, where trial counsel testified. R. 111. The parties then submitted briefs on the matter and the trial court subsequently denied Jones' Post-Conviction Motion, by written order. R. 113, R. 114, R. 118; App. 111-124.

ARGUMENT

I. Jones was denied the effective assistance of counsel.

The Supreme Court of the United States decided the land-mark case, regarding a defendant's due process right to effective assistance of counsel in Strickland v Washington:

> That a person who happens to be a lawyer is present at trial alongside the accused, however,

> is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to be ensure that the trial is fair.
>
> For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). …
>
> … (paragraphs omitted) …
>
> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

466 U.S. 668, 684-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, in order to show that a trial attorney is ineffective in representing a defendant, the defendant must show that trial counsel's performance was deficient and also, that the deficiency was prejudicial to the outcome of the trial. *Id.* at 687.

Where deficient performance is shown in more than one area of a trial, the cumulative effect of all errors must be then considered as a whole, rather than individually. State v. Thiel, 2003 WI 111, ¶ 59-60, 264 Wis. 2d 571, 665 N.W.2d 305.

a. Trial counsel was deficient, by failing to provide notice of expert testimony, which resulted in the trial court's exclusion of expert opinion that Jones did not have a propensity to commit a sexual assault and the exclusion of that evidence was prejudicial to Jones.

Jones had two primary components to his defense at trial: 1) to highlight flaws in the State's case, and 2) to argue that Jones did not match the profile of a sexual offender. R. 111:20.

In order to develop the second, primary defensive strategy, trial counsel hired an expert, Dr. Eugene Braaksma. Trial counsel testified at the Post-Conviction Motion Hearing and confirmed the same:

> Q Okay. Could you just explain for us what he was retained for?
>
> A He was retained to consult about Mr. Jones' propensities to commit the offense.
>
> Also, he was retained to review certain Step-wise interviews of victims in the case that I was involved with.
>
> Q Okay. And with regard to the propensities of Mr. Jones, is it fair to say that he was prepared to testify that Mr. Jones did not match the profile of a sexual offender?
>
> A Yes, ma'am.

R. 111-9.

However, at trial, the trial court excluded Dr. Braaksma's testimony regarding Jones' propensity, or lack thereof, to commit a sexual assault. R. 99:244-246; R. 100:10-11. The trial court cited two grounds for excluding Jones' expert opinion: that trial counsel failed to provide proper notice of the expert opinion and that the evidence was inadmissible character evidence. R. 100:10-11.

Trial counsel made the following offer of proof, in support of the admissibility of the expert opinion:

> Q … Did you have an opportunity to do an assessment on Mr. Jones?
>
> A Yes. My associate did the actual collection of initial data, and I did the analysis and -- and reviewed records.
>
> Q Okay. And what specific personality test did you administer to Mr. Jones?
>
> A I did the Minnesota Multiphasic Personality Inventory. –
>
> Q Okay.
>
> A -- second edition. MMPI-2. The Hare Psychopathy Checklist-Revised. Hare is H-a-r-e.
>
> Q Okay.
>
> A The Washington University Sentence Completion Test.
>
> Q Okay.

A And Personal something -- I always forget the name of it Tennessee Sentence Completion, which is a sexual history kind of instrument. Self-report sexual history instrument.

Q Okay. Real quick. How are these tests how do they facilitate your ability to do a psychological profile of somebody?

A What they provide -- we -- we look for certain characteristics that have been identified over time as far as having to do with sexual offenders.

Tendency to show high levels of psychopathy, which are identified both through the Minnesota -- the MMPI -- as well as the Hare.

There tends to be -- the Washington University Sentence Completion test is something that measures levels of ego development. Lower levels of ego development, um, tend to create situations where people are less able to understand and see the -- the effect of their behaviors, and so on, on other people.

The general idea of psychopathy has to do with just kind of a general disregard both of social mores, as well as a lack of -- of empathy behavior. A very narcissistic approach to everything. That they're very focused on their own needs

and their own perceptions of things. And have little sense or understand of -- again, of the effects of their behavior on other people.

The sentence completion with regard to the sexual history is -- it's a self-report, so that doesn't have any validity scales to it, but it gives a good sense of someone's personal history, and looking at that. Particularly, their sexual history. Um, their tendency toward deviant sexual acts or -- or things along those lines.

And a lot of that has to do with their -- their initial -- initial sexual experiences and -- and the arousal patterns and so on. That'll look at through that.

Q Thank you. So do you actually come up with scores and then base your opinion on whether someone has a profile of a sexual offender or not?

A Well, um, similar to in 980 cases, for instance, Statute 980, we look at -- at risk assessment, and that's how we -- we look at that. Either through that, or -- or just, in general. Not necessarily, just those cases, but… Um, and generally, no matter what the instruments, you end up with kind of a low, medium, or high risk of offense or reoffending.

Q Okay.

A Um, there's no zero. So all of us in this room are low, hopefully. Um, and medium, and so on. And high goes from there.

From what I, um, saw, as far as the evaluation results and -- and history and record -- historically information and record information, I place him at low risk level.

Q And so that's why you came up to -- with a conclusion, quote, that he -- what he -- his psychological profile does not present as one that's consistent with what is known in research regarding sexual offenders?

A That's correct.

… (paragraphs omitted)

Q Would you go ahead and have that opinion beyond a degree of scientific certainty? …

A The way we phrase it is "a reasonable degree of psychological certainty"

R. 99:246-251.

The State objected to the admission of Dr. Braaksma's opinion regarding Jones' lack of propensity to commit a sexual offense on two grounds. First, the State objected that the evidence is propensity or character evidence. R. 99:246-

251. Second, the State objected on grounds that the defense had not provided notice of the intention to offer such evidence.

Jones' trial counsel argued that Dr. Braaksma's opinion should be admitted, pursuant to State v. Richard A. P., 223 Wis. 2d 777, 589 N.W.2d 674 (1998). R. 100:8-10.

The trial court agreed with the State on both grounds and ordered the evidence excluded. R. 100:10-11. Specifically, the trial court found that expert opinion about Jones' propensity to commit a sexual assault (or lack thereof), was improper character evidence and was inadmissible pursuant to Wis. Stat. § 904.04, 906.08, and 906.09. The trial court also found that the evidence was excluded because proper notice of the intention to offer expert testimony as not made. R. 100:11.

A short time later that morning, the trial court amended that ruling to note:

> THE COURT: Let's go back on record for just a moment. Be seated. Before we started with the jury here today, counsel for the defense made - - or re-made a motion seeking to admit some testimony. It's testimony, now that I'm thinking about it, commonly called ***Richard A.P.*** evidence, and it comes from a case at 223 Wis. 2d 777.
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> And counsel is correct. In some instances at the discretion of the court for good and proper reasons, that testimony can be admissible.

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R. 100:42-44.

That clarification by the trial court seems to indicate that the trial court was backing off of a finding that the evidence was otherwise excludable and rather finding that the primary or sole basis for exclusion, was the discovery violation. After all, the trial court acknowledged that the prior basis for excluding admission was an incorrect finding, acknowledging that Richard A. P. would support admission

of the evidence. Furthermore, any finding by the trial court that the evidence was inadmissible, was an improper ruling; the proposed testimony of Dr. Braaksma, was clearly the same type of evidence allowable under Richard A. P. [1]

i. Jones' trial counsel performed deficiently because he failed to provide a proper notice of Jones' intention to offer Richard A. P. evidence and failed to provide a copy of the expert's report, as required by the State's discovery demand.

Trial counsel's discovery violation and lack of notice of Jones' intention to introduce Dr. Braaksma's opinion, was clearly deficient performance. A defendant meets his or her burden of demonstrating errors of trial counsel, where an error results from oversight rather than any reasonable defensive strategy. State v. Moffett, 147 Wis. 2d 343, 433 N.W.2d 572, 576 (1989); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986); Wiggins v. Smith, 539 U.S. 510, 534 (2003). In Strickland, the Supreme Court noted that prevailing norms and standards, "as reflected in the American Bar Association" provide guidance in determining what sort of conduct is reasonable amongst trial attorneys. One of the standards relating to effective representation, according to the American

[1] The newly adopted standards for expert testimony, commonly referred to as the *Daubert* standard, were created by 2011 Wisconsin Act 2. Act 2 did not provide a specific effective date; therefore, it became effective on the first day after publication, or on February 1, 2011. Wis. Stat. § 991.11 (2011). Act 2 specified that it applies "to actions or special proceedings that are commenced on the effective date" thus rendering prospective application. This case against Jones was commenced in 2007, prior to the adoption of the *Daubert* standard. Therefore, the trial court's reference to the need to address its implications on any expert testimony offered in this case is misplaced.

Bar Association, is duty number six, a duty to consider all procedural steps that may be taken in good faith. That sixth duty refers specifically to pre-trial litigation and the sort of notice that trial counsel for Jones was obligated to provide of his intention to introduce an expert opinion at trial.

By trial counsel's own admission, he dropped the ball. The following is trial counsel's testimony, taken from the *Machner Hearing w*here he testified:

> Q Okay. And had you received a written report from Dr. Braaksma regarding on what he planned on testifying to?
>
> A I did.
>
> Q And did you share that with the State?
>
> A I did not.
>
> Q Okay. Can you offer any explanation as to why that did not occur? Whether it was oversight? Mistake?
>
> A A – a little bit of both. I started representing Ricky in '07. We had a rather long litigation in the Court of Appeal and the Supreme Court.
>
> There was a case that was dismissed, and a second one was initiated alleging the same counts.
>
> My recollection in reviewing the docket after all this was done is the State, I believe, according to the docket, filed a discovery demand in June of '08. We

> didn't end up going to trial until May of '11.
>
> So I fully - - when I went to trial, I had believed that the State did not file a discovery demand. But they had. So it was my - - it was my oversight. It was my error. Absolutely.

R. 111:9-10.

Trial counsel admittedly made a mistake when he failed to disclose an expert opinion and turn over a copy of the expert's report, as he was required to do under discovery statute. Trial counsel cannot offer a valid or reasonable strategy for the omission, because none exists.

ii. Trial counsel's deficient performance resulted in the exclusion of Jones' key witness for the defense and excluded a foundational piece of evidence in support of his defense.

A defendant's right to present a defense is grounded solidly grounded in the State and Federal Constitution. The Wisconsin Supreme Court has expressly acknowledged the importance of a defendant's right to present a defense in State v. Pulizzano:

> The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. The two rights have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence. …

155 Wis. 2d 633, 645-646, 456 N.W.2d 325, 330 (1990) (internal citations omitted).

The exclusion of Dr. Braaksma's findings, regarding Jones' lack of a predisposition to commit a sexual offense was a defense he had a right to present and because of trial counsel's error, Jones was denied that right. Particularly in a case like this, where the only evidence against Jones was the testimony of complaining witnesses and those who heard the complaining witness's prior statements, the right to present a defense is of the utmost importance. This is not a case where physical evidence, third-party witnesses, or any other firm direct evidence corroborated the complaining witness's.

In determining whether prejudice is shown, the appellate courts look to the totality of the evidence before the jury because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 695-696. Furthermore, the United States Supreme Court has acknowledged, that where a defendant is constructively denied the assistance of counsel, a legal presumption may arise of prejudice. *Id.* at 692.

Jones has demonstrated that it is reasonably likely that the jury verdict could have been different if he was allowed to present his expert opinion. The Supreme Court has acknowledged that the "fundamental fairness of the proceeding whose result is being challenged" is a valid consideration, particularly where a breakdown has occurred in the adversarial process. *Id.* Jones' inability to present his sole defense, outside of holding the State to their burden, was a breakdown in the adversarial process that was a direct result of trial counsel's deficient performance.

b. Trial counsel was deficient, when he elicited officer testimony that Jones had been investigated on another sexual assault.

During trial, Detective Erik Kowalski was called to testify twice, first by the State, and again by the defense, on rebuttal. The second time, when called to testify by Jones' trial counsel, defense counsel elicited the following line of questions and answers from Detective Kowalski:

> Q [W]as Swetlik with you when you responded the first time?
>
> A No.
>
> Q Okay. When did he - - he become involved?
>
> A I believe when I returned to the Department.
>
> Q And what was his role in all this?
>
> A I believe he was investigating a different case.
>
> Q Okay. So did you guys actually compare notes on a different case?
>
> A I believe he expressed some concern about another case, yes.
>
> Q And so what was this other case that he was investigating?
>
> A Sexual assault.

Q Okay. And - - and what case did that - - who did that involve?

A I believe the defendant.

Q Okay. So what you're telling us is that both of you would been investigating a different case concerning Mr. Jones; right?

A Correct.

R. 100:120-121.

i. Trial counsel performed deficiently, by opening the door and eliciting testimony from Detective Kowalski, that Jones had been the subject of other sexual assault allegations, in another case.

Jones raised this concerning line of questioning, as being deficient performance of his trial counsel because it drew negative jury attention to a separate sexual assault investigation. At the *Machner Hearing* held on Jones' Post-Conviction Motion at the trial court level, trial counsel acknowledged that Jones had been the subject of several other, uncharged sexual assault investigations at the same time as the charged offenses:

Q Okay. It's -- is it fair to say, also, that there were additional allegations made against Mr. Jones that were not charged out formally in this case?

A Yes.

Q Okay. Specifically, there was an allegation made, even by his ex-wife or ex-girlfriend, that Mr. Jones' daughter had made an allegation some years back?

A That's right.

Q Okay. And then, also, there were three children questioned throughout the investigation by officers, Caitlyn, Chelsea and Mykaela, and, um, one of those three children, I believe it was Chelsea, was not charged? Or there was no allegation against her charged out?

A Yes. …

Q … did it concern you at all that in -- in allowing kind of carte blanche freedom for these witnesses to testify about other assaults, generically, that the other allegations against Mr. Jones might come out and prejudice him during the trial?

A That was a possibility. You're right.

R. 111:18-19.

The trial court found that Detective Kowalski was referring to Detective Swetlik's involvement in investigating the other charged offense, involving Caitlyn B. However, Jones believes that this finding by the trial court is incorrect and not supported by the record. The transcript of the trial shows that Detective Kowalski (the declarant in the proposed deficient questioning), was the assisting officer to the State's case in chief. In other words, he was present for the entirety of the trial, at the State's side. His use of the words "a

different case" explicitly identifies a sexual assault investigation, involving Jones, that is separate from the case before the jury. Furthermore, even if it is possible that Detective Kowalski intended to refer to Detective Swetlik's investigation of Caitlyn B. as an alleged victim, his reference to the investigation as being "a different case," made not once but four times, drew the jury's attention to other, prior bad acts, that were not ruled admissible.

Not only did the jury hear that evidence, but the jury heard it at the encouragement of the defense, because trial counsel was going on a wild goose chase to force a door open to previously suppressed evidence, and was being careless in the process. Trial counsel himself admitted that he may have very well opened the door to the other, uncharged sexual assault investigations with that line of questioning and acknowledged the dangers of his questioning, in hindsight. R. 111:18-19. Trial counsel admitted that he did not even realize the dangers of his line of questioning, once again, oversight cannot form a basis for justifiable defensive strategy.

ii. Detective Kowalski's testimony that Jones had been the subject of a sexual assault investigation, on another case, was prejudicial.

Evidence of other crimes, wrongs or acts, outside the scope of the direct facts of a case are generally inadmissible. Wis. Stat. § 904.04(2) (2007). The Court of Appeals has acknowledged the underlying theory or basis for excluding other acts evidence in State v. Goldsmith:

> The general rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge

> merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

122 Wis. 2d 754, 756-57, 364 N.W.2d 178 (Ct. App. 1985).

The prejudice attributable to trial counsel's questioning of Detective Kowalski are in line with that holding. First, there is the prejudicial affect the reference to an investigation against Jones for sexual assault in "a different case," had on a jury where they would be more inclined to find him guilty, as a person likely to commit such acts. Second, there is the risk associated with the possibility that Jones had gotten away with something before, having been on police radar for multiple investigations, beyond what was before the jury. Finally, the testimony surely must have confused the jury to hear from Jones' own defense counsel, that he was the subject of other sexual assault investigations outside of the case at hand.

II. Jones was denied his constitutional right to due process, because the trial court denied Jones his right to present a defense.

a. The trial court denied Jones his right to present a defense, when the trial court excluded Jones' expert witness's opinion, regarding Jones' propensity to commit a sexual assault.

Whether by error of trial counsel, in failing to disclose notice and scope of expert testimony, or because the trial court improperly found Jones' expert opinion to be inadmissible, either way, Jones was improperly denied his right to present a defense. Neither can form a justifiable basis for precluding Jones from presenting a defense to the charges against him.

The expert opinion, as illustrated in Jones' offer of proof, clearly demonstrates that Dr. Braaksma's expert opinion was evidence that was relevant and admissible under the Wisconsin Rules of Evidence. R. 100:246-251. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01 (2007).

Expert opinion about character or propensity to commit sex offenses has already been addressed by the courts in Wisconsin. In State v. Richard A. P., 223 Wis. 2d 777, 589 N.W.2d 674 (Wis. App. 1998), the Court of Appeals held that exclusion of such evidence was error and that defendant was granted a new trial. The facts of that case, like Jones' case, were 'he-said, she-said' allegations that were not corroborated by DNA, surveillance, witness observation, or other strong evidence. Therefore, just like in Jones' case, the jury had to weigh credibility of the complaining witness against the defendant. In Richard A.P., the defendant hired a psychologist to offer an opinion about whether that defendant had any diagnosable sexual disorder that would predispose him to commit a sexual offense. The Court of Appeals found that sort of testimony to be relevant and admissible, as expert opinion offered to show a defendant's character, consistent with the rules of evidence. Wis. Stat. §§ 904.04(1)(a), 904.05

(2007). Richard A.P., 589 N.W.2d at 681; State v. Pittman, 174 Wis. 2d 255, 267, 496 N.W.2d 74, 79 (1993).

Thus, Jones' expert witness's opinion, regarding Jones' propensity to commit a sexual assault was relevant and admissible under the rules of evidence. Jones should have been allowed to introduce that evidence, as a part of his defense.

b. The trial court committed an abuse of discretion in excluding a prior allegation of sexual assault, made by each of the complaining witnesses, offered by Jones as evidence of prior untruthful allegations under Wisconsin's Rape Shield statute.

Jones filed a Motion for In Camera Inspection, as to each complaining witness, requesting records that would otherwise be confidential. R. 16; R. 24. As grounds for each motion, Jones alleged that both complaining witnesses had made prior allegations of sexual assault against other persons, for which each prior allegation of sexual assault against a third-party were untruthful. The trial court granted the request for in camera inspection, as to each witness, and ultimately Jones received copies of audio/visually recorded interviews of each witness. R. 17; R. 26-27. Jones sought a pre-trial ruling, requesting that the trial court rule both recordings as admissible at trial. R. 29; App. 125-139. The trial court denied Jones' request and ruled that both recordings were inadmissible because the trial court did not find that Jones had shown that the prior allegations made by each witness were untruthful. R. 43.

Jones appealed to the Court of Appeals, by interlocutory appeal, and the Court of Appeals reversed the trial court ruling and remanded. R. 56; App. 141-149. The Court of Appeals found that the trial court had applied the

wrong legal standard and usurped the jury's role, by finding that the proffered recordings were not prior untruthful statements. Rather, the Court of Appeals remanded with instruction that the trial court needed to determine whether a jury could reasonably find the allegations to be untruthful.

On remand, a hearing was held February 17, 2011 and the trial court re-decided the issue and again excluded the recordings. R. 98: App. 150-151. First, the trial court heard brief arguments from the parties. R. 98:2-5. The trial court then issued the following oral ruling:

> Had I been asked to rule on the - - the standard that the court sets in this case, whether a reasonable jury could reasonably infer that the girls had been untruthful, I would have found, in my opinion, that a reasonable jury could not have reasonably inferred that the – that the girls had been untruthful.
>
> But I think the - - the standard changes just a little bit, and - - and part of this - - it - - it - - it seems like pure semantics o casuistry, which is a fancy way of saying, oversubtleness.
>
> But in Justice Ziegler's opinion, she points out that we use the words "infer" and "find" almost interchangeably. She then goes on, at least as I read what she says, to prefer using the word "find" rather than "infer." And I'm quoting - - or I'm noting here that she says that at paragraph 31.
>
> She also goes on to say, at paragraph 32, the - - quote, the judge determines whether a jury, acting reasonably, could find that it is more

> likely than not that the complainant made prior untruthful allegations of sexual assault, end quote.
>
> Again, it's a sentence that - - that, in a way, almost reverses the way in which we typically think.
>
> But were I to use "find" as a standard, it would be, I think, even easier for me to conclude that no reasonable jury could find that - - that the complainants made prior untruthful allegations of sexual assault.
>
> So that's the ruling of this Court.

R. 98: 6-7; App. 150-151. The trial court commented briefly upon its interpretation of the words "infer" and "find" as it related to the trial court's interpretation of the proper legal standard. However, the trial court did nothing to explain its rationale for the ruling. Rather, the trial court summarily stated that it was denying the defense motion and was doing so because the trial court did not find that a jury could reasonably find that the prior allegations of sexual assault, as to each witness, were untruthful.

The Court of Appeals has held:

> An erroneous exercise of discretion occurs when the circuit court does not consider the facts of record under the relevant law or does not reason its way to a rational conclusion.

State v. Davis, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62. That is precisely what occurred in this case, on remand. The trial court simply restated its prior ruling with the magic words of the revised legal standard. The trial court

did not reason its way to the end conclusion. Further, the trial court did not recite relevant facts from the record that supported its ruling.

Therefore, the trial court ruling to exclude the evidence that each complaining witness had made prior allegations of sexual assault against other persons (other than Jones), were improperly excluded from trial because the ruling to exclude them was an erroneous exercise of discretion.

III. Jones should be granted a new trial in the interest of justice.

The Supreme Court has acknowledged the statutory authority for a defendant to appeal to the discretionary power of the appellate courts, to order a new trial in the interest of justice. State v. Henley, 2010 WI 97, ¶ 63, 328 Wis. 2d 544, 787 N.W.2d 350. Specifically, Wis. Stat. § 752.35 grants the Court of Appeals such authority:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Both grounds for discretionary reversal exist in this case.

The Supreme Court held that the real controversy of a case is not fully tried where "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case. Henley, 2010 WI 97 at ¶81, *citing* State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). In the present case, Jones sought to introduce expert testimony, through Dr. Eugene Braaksma, that he did not have a propensity to commit a sexual assault. Such evidence is recognized as being relevant and admissible for such purpose. Richard A.P., 223 Wis. 2d 777. Due to both the negligence of Jones' trial counsel in failing to provide notice of Jones' intention to introduce that testimony and also due to the trial court's improper evidentiary rulings to exclude the evidence, Jones was prevented from offering that evidence.

Furthermore, the trial court erroneously exercised its discretion, in excluding evidence that both complaining witnesses had made similar allegations of sexual assault, within a close time frame, as those alleged against Jones. If admitted, Jones should have been able to argue that the evidence constituted prior untruthful allegations, thus calling into question the children's motive to falsify allegations against Jones and their character for truthfulness as a whole. The trial court summarily denied the motion, after having the case remanded for a determination under the proper legal standard without citing any factual basis or reasoning to support its ruling.

Both exclusions prevented Jones from fully litigating a defense to the charges. Their exclusion, without proper legal framework and without proper exercise of discretion from the parties involved at trial, resulted in a miscarriage of justice and prevented the matter from being fully litigated.

CONCLUSION

Jones was denied his right to present a defense, denied his right to counsel, and the jury was allowed to hear reference to other bad acts, outside the scope of the case. The individual effect of any one of those errors is sufficient to warrant a new trial. Therefore, Jones respectfully asks this court to find that a new trial is warranted because he was denied the effective assistance of counsel, because he was denied his right to present a defense to the criminal charges against him, and/or because a new trial is warranted in the interest of justice.

Dated: November 11, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,215 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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