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STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

Wisconsin Statutes
Wis. Stat. § 971.231, 8

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ARGUMENT

I. Jones was denied the effective assistance of counsel.

“Whether a defendant’s trial counsel provided ineffective assistance of counsel is a mixed question of law and fact.” Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The findings of fact that are made by the trial court, relating to what trial counsel did and why, will not be disturbed by an appellate court unless the appellate court can find them to be clearly erroneous. State v. Franklin, 2001 WI 104, ¶ 12, 245 Wis. 2d 582, 629 N.W.2d 289; State v. Weber, 174 Wis. 2d 98, 111, 496 N.W.2d 762 (Ct. App., 1993). However, “[w]hether trial counsel’s performance was deficient, and whether any such deficiency was prejudicial to the defendant, are questions of law” that an appellate court reviews independently. State v. Guerard, 2004 WI 85, ¶ 19, 273 Wis. 2d 250, 682 N.W.2d 12.

- 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.
 - 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.*

The trial court did not expressly state a finding that Jones’ trial counsel was deficient. However, the trial court stated it “does not quibble with Jones’ argument that trial

counsel's failure to timely submit was deficient performance on his part.” (*Defendant's Brief App.* 120). Thus, in reality, the State, on appeal, does not dispute that Jones' trial counsel performed deficiently. To the contrary, the State's argument bolsters that conclusion.

In the State's response to Jones' claim that he was denied his right to present a defense, the State notes that no good cause basis has been presented to explain why Jones' trial counsel failed to provide notice of his expert, consistent with rules of discovery. (State's Br. 17); Wis. Stat. § 971.23. Furthermore, the State argues that Jones' trial counsel did not move for a recess or continuance during trial to cure his breach of the discovery statute. (State's Br. 17). Therefore, the State argues that:

The court was therefore left with little choice. The statute requires that a court exclude evidence not presented for inspection.

(State's Br. 17). While Jones does not agree that the trial court was left with no choice, the State clearly places blame on the exclusion of Jones' propensity evidence, on Jones' trial counsel.

- 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.*

The State's argument focuses on Jones' failure to attack the trial court's ruling relating to whether trial counsel's performance was prejudicial. The State argues, both expressly and in theme throughout their brief that “Jones does not explain how he thinks the circuit court's analysis was incorrect.” (*State's Br.* at 10). However, that line of

argument ignores both the reasonable inferences drawn from Jones' brief, as well as the standard of review on appeal.

First, Jones disagrees with the State's assertion that he has failed to assert any argument that the trial court reached the wrong conclusions in denying him relief. Jones argued how and why he believes prejudice should be found from each of trial counsel's errors; those arguments directly contradict the trial court's ruling and take issue with the trial court's conclusions.¹

Second, Jones need not prove any improper exercise of discretion by the trial court, because this appellate court, on review, reviews the issue of whether trial counsel was actually deficient and whether that deficiency resulted in prejudice to Jones on a de novo basis. State v. Guerard, 2004 WI 85, ¶ 19. The State asks this Court to ignore the de novo standard of review and deny Jones' appeal relating to the

¹ The State cites to the trial court's consideration of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993). Although the State does not argue that reference, it is noteworthy that at the time that this case was initiated, the *Daubert* standard was not yet admissible. Wis. Stat. § 907.02 became effective February 1, 2011, after this case was filed and the statute is not applicable retroactively. Therefore, the trial court's consideration of that factor was improper. The standard of admissibility of *Richard A. P.* evidence that is applicable to this case is found in State v. Davis:

[I]n Wisconsin, the reliability of expert testimony is an issue for the trier of fact, not the circuit court as a predicate for admissibility. . . .

State v. Davis, 2002 WI 75, ¶ 22, 254 Wis. 2d 1, 645 N.W.2d 913.

ineffective assistance of counsel, because Jones does not expressly state that the trial court was wrong in each and every trial court conclusion of law. The State cites no authority for that position. Jones has properly raised the issue of ineffective assistance of counsel at the trial court level, preserved the issue, and pursued the appeal. By appealing, Jones implicitly attacks the trial court's ruling that no prejudice existed.

The State also argues that Jones' propensity evidence which he sought to introduce through Dr. Braaksma was not his defense; rather, the State argues that Jones' defense was that he didn't commit the offenses. Obviously, the base issue at trial was for the jury to decide whether Jones did or did not sexually assault the two children. While it is true that Jones denied commission of the offense in his testimony, a defendant's right to present a defense encompasses more than the right to testify. The point that Jones tried to make in his initial Brief to this Court is that the only evidence offered by Jones, beyond his basic right to testify, was the testimony of Dr. Braaksma.

The State encourages this Court to agree with the trial court, where the trial court weighed the credibility and weight of the expert opinion offered by Dr. Braaksma against Jones. (*State Br.* At 11). Jones believes that the trial court was wrong in concluding that Dr. Braaksma's expert opinion relating to Jones' lack of propensity to commit sexual offenses had minimal value to Jones' case.

The State does not argue that the propensity evidence offered by Dr. Braaksma was not admissible as *Richard A. P.* evidence. The State acknowledges that Dr. Braaksma's proposed testimony "was evidence that supported Jones's defense." (*State's Br.* At 11). The parties agree on that issue.

The evidence against Jones was void of any neutral witness and void of any physical evidence. Rather, the jury's verdict turned on the credibility of each witness against the credibility of Jones. The Supreme Court of Wisconsin acknowledged the importance of a defendant's credibility in two noteworthy cases. First, in State v. Pitsch, The Supreme Court found:

The defense was "I did not do it." The issue for each juror was, "Whom do I believe?" In denying the defendant's motion for a directed verdict at the close of the state's case, the trial court clearly stated that "the issue ... before the jury [was] a matter of credibility...."

The defendant's credibility was dealt a significant blow when the prosecutor questioned defendant about his convictions.

State v. Pitsch, 124 Wis. 2d 628, 643, 369 N.W.2d 711 (Wis., 1985).

In State v. Davis, , a case much more relevant to these proceedings, the Supreme Court of Wisconsin addressed the importance of credibility, in ruling the admissibility of *Richard A. P.* evidence:

This evidence relates to a consequential fact, that is, whether the defendant committed sexual misconduct with a child. Further, this evidence has probative value in sexual assault cases, where there is often no neutral witness to the assault and there is seldom any physical evidence implicating the defendant. Such profile evidence may be extremely important to the defense. Such testimony may also be useful to the trier of fact, helping it to determine

a fact in issue, that is, whether the defendant committed the crime, by showing circumstances evidence of the defendant's innocence.

State v. Davis, 2002 WI 75, ¶ 18, 254 Wis. 2d 1, 645 N.W.2d 913. The Supreme Court acknowledged the probative value that propensity evidence, like that of Dr. Braaksma, may have in a case where there is no neutral witness or physical corroborative evidence to support an alleged victim. Jones' case was a case where there was no neutral witness or physical corroborative evidence. Therefore, Jones has met his burden on demonstrating that the exclusion of Dr. Braaksma's testimony relating to propensity evidence establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Jones has demonstrated "a probability sufficient to undermine confidence in the outcome." *Id.*

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

The State argues that during the motion hearing on post conviction relief that Jones did not ask his trial counsel any questions relating to the questioning of Detective Kowalski about Detective Swetlik's investigation. The State mischaracterizes the transcript; the transcript from the motion hearing reflects otherwise. Trial counsel actually started to volunteer information about this claim. While testifying

about his strategy for allowing potential hearsay to be admitted, trial counsel testified:

It also goes to the fourth issue of the detective who was present in both of those other Step-wise interviews hoping that he might go ahead and interject that there were other interviews of people who had allegedly assaulted both of these victims. Different individuals. Not the same. Different.

R. 111:17-19. Trial counsel clearly was referring to the fourth issue raised in Jones' post conviction motion. The fourth issue in Jones' motion was whether trial counsel was deficient in eliciting testimony from Detective Kowalski about other sexual assault allegations against Jones. R. 105. In response to that testimony, Jones then questioned trial counsel, who acknowledged that he didn't think about or consider the risk of whether the jury might end up hearing about the other, uncharged allegations against Jones himself. R. 111:18-19.

The remainder of the State's argument asserts that the jury would certainly have thought that Detective Kowalski was referring to the alternate alleged victim of this case. However, the State's argument ignores the common-sense, plain meaning of the words "other case" and "different case." R. 100:120-121. The State argues that what the detective meant was a different victim. However, the jury heard the words "other case" and "different case."

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

The State does not address any argument specific to whether prejudice can be found from this claim. Therefore,

Jones offers no further argument beyond that which was asserted in his initial brief.

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.

Jones agrees that the trial court had the ability to exclude the propensity evidence he sought to introduce through Dr. Braaksma, on the grounds that it was disclosed in an untimely manner. That is, of course, the first basis for his claim that trial counsel was ineffective. However, Jones disagrees with the State, that the trial court was required to actually exclude the evidence.

The State concedes that the trial court had the discretion to alternatively, order a recess or continuance. Wis. Stat. § 971.23(7m)(a). Granting a recess or continuance, either upon motion of the State, or upon motion of the Court, would have been the reasonable course of action to preserve Jones' constitutional rights.

- 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.

Appellate review of a trial court ruling to admit or exclude evidence is reviewed as a discretionary decision:

An appellate court will affirm a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

State v. Klesner, 2010 WI 88, ¶ 37-38, 328 Wis. 2d 42, 786 N.W.2d 144. On remand from interlocutory appeal, the trial court addressed the new standard established in State v. Ringer and thereafter simply stated “no reasonable jury could find that - - that the complainants made prior untruthful allegations of sexual assault.” State v. Ringer, 2010 WI 69, 326 Wis. 2d 351, 785 N.W.2d 448. Aside from discussing interpretation of the words “infer” and “find,” the trial court did not explain its reasoning. While it is true that the trial court recited more facts and reasoning prior to the interlocutory appeal, that ruling was overturned because the trial court applied the wrong legal standard. On remand, the trial court did not expressly consider the facts of the case under the correct law and did “not reason its way to a rational conclusion,” as it was required to do. State v. Davis, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

Furthermore, in the opinion and decision, remanding the case back to the trial court for the trial court to rule on the admissibility of the evidence under Ringer, the Court of Appeals acknowledged that the trial court originally focused on weighing the credibility of the alleged victim’s prior allegations of sexual assault himself, which “usurped the role of the jury.” *Jones*, slip op. § 11; 2010 WI 69 at ¶ 31. The Court of Appeals noted that the trial court acknowledged (in the first decision to exclude the evidence), that the trial court’s own comments “suggests that competing but reasonable inferences may be drawn from the evidence.” *Id.* On remand, the trial court did nothing to properly consider

how and why those competing inferences could not reasonably form a basis for a jury to find that the complainants had made prior untruthful allegations of sexual assault. Ringer, 2010 WI 69 at ¶ 31.

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

The trial court improperly excluded three pieces of evidence: the propensity evidence offered through Dr. Braaksma and the evidence of each complainant's prior untruthful allegations. Therefore, the jury was denied the opportunity to hear each of the three relevant, important pieces of evidence. Thus, the case was not fully tried and this Court should consider exercising its authority to order a discretionary reversal.

CONCLUSION

Jones respectfully requests that for all of the reasons asserted in his initial brief to this Court and further supported by this reply brief, that this Court should grant him a new trial.

Dated: March 12, 2014.

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 2,453 words.

Dated: March 12, 2014.

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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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