STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Appeal No.: 14-AP-518

BERNARD I. ONYEUKWU,
Defendant-Appellant.

Grant County Circuit Court Case No.: 11-CF-68

DEFENDANT-APPELLANT'S REPLY BRIEF

Appeal from the Circuit Court for Grant County, Robert P. VanDeHey, Judge.

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ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT THAT TIFFANY SUFFERED FROM A MENTAL ILLNESS OR DEFICIENCY WHICH RENDERS THAT PERSON TEMPORARILY OR PERMANENTLY INCAPABLE OF APPRAISING THE PERSON'S CONDUCT, AND ONYEUKWU KNEW OF SUCH CONDITION

The State relies upon a 2006 Court of Appeals case, ***State v. Searcy,*** 2006 WI App 8, 288 Wis. 2d 804, 709 N.W.2d 497, to support its claim the trial court was in a superior position to evaluate the credibility of the witnesses, and, therefore, this court should defer to the trial court's determination that the evidence was sufficient to convict Onyeukwu. This case, however, is easily distinguishable from ***Searcy***. Whether the evidence is sufficient or not here does

not turn on credibility of the witnesses.

Searcy was convicted of burglary after his fingerprint was found on a window screen. Searcy offered vague testimony that he had been present at the burglarized home with permission and that's how his fingerprint got there. The victims of the burglary, however, testified that they did not know Searcy, were not friends with him, and did not and would not have given him permission to be in their house. ***Searcy*** presents a classic conflict in testimony: factually inconsistent statements of witnesses. Naturally, the best way to evaluate the credibility of witnesses is by those who observe the witness testify, not by merely reading the transcript of the testimony.

But, it is not witness credibility that is at issue here. It is that there simply was insufficient evidence submitted to the jury that Tiffany suffered from a mental illness or deficiency rendering her incapable of appraising her own conduct. And further, that there was insufficient evidence that Onyeukwu would have or should have known of this mental illness or deficiency. This court can, and should, find, as a matter of law, that the evidence was insufficient in these regards.

2. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS ERRORS WERE PREJUDICIAL

The State seeks to minimize the prejudicial effects of

trial counsel's numerous errors. However, this court must be mindful that the cumulative effect of counsel's deficiencies prejudiced the defendant to the extent that it undermined confidence in the trial's outcome. The Wisconsin Supreme Court in ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305, established the principle here in Wisconsin that "prejudice should be assessed based on the cumulative effect of counsel's deficiencies" ***Thiel***, 2003 WI 111, ¶59.

Thiel was a LaCrosse therapist who was accused of sexual exploitation of a patient. He was convicted after a trial. However, the trial court found that he was entitled to a new trial because his representation was constitutionally inadequate. The Court of Appeals reversed the trial court's determination that a new trial was warranted and the Supreme Court then reversed based upon the cumulative effect of counsel's deficiencies. Among the deficiencies:

1. Counsel failed to read all discovery materials, which contained a medical report that the complainant was enraged at defendant for refusing to support her disability claim.
2. Counsel failed to investigate her credibility by interviewing neighbors who never saw her at defendant's house and discover that she had difficulty locating the house and did not have a driver's license.

3. Counsel failed to prevent the admission of a prior consistent statement.

4. Counsel misunderstood that the law did not bar the State from presenting the complainant's personal and medical history.

Similarly, Onyeukwu presents this court with a handful of deficient actions by trial counsel. The State argues that each action, by itself, renders the performance constitutionally deficient. However, under ***Thiel***, this court must evaluate that whether trial counsel's deficiencies, in their aggregate, render his performance constitutionally deficient. Onyeukwu urges this court to find that he is entitled to a new trial on this basis.

a. COUNTS TWO THROUGH SIX ARE MULTIPLICITOUS AND PROSECUTION OF FOUR OF THESE FIVE COUNTS IS BARRED; COUNTS SEVEN THROUGH ELEVEN ARE ALSO MULTIPLICITOUS AND PROSECUTION OF FOUR OF EACH THESE FIVE COUNTS IS BARRED. TRIAL COUNSEL'S FAILURE TO PROPERLY CRAFT AND ARGUE THIS MOTION WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

The State relies upon the assertion that the charged offenses were not identical in-fact. Indeed, the charged offenses are not identical in-fact, but they were part of the same transaction or episode. The State disingenuously disregards ***State v. Hirsch,*** 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987) which developed the transactional analysis

and claims "that formulation is not the test fro whether different acts were the same in fact for multiplicity purposes." In disregarding ***Hirsch,*** the State naturally fails to distinguish this case from ***Hirsch***. Ignoring ***Hirsch*** does not make it go away. It does not make it a nullity. ***Hirsch*** is good law and, when applied here, counts two through six and counts seven through eleven are multiplicitous and trial counsel was deficient for failing to make this argument and Onyeukwu was prejudiced by this deficiency.

b. TRIAL COUNSEL'S FAILURE TO MAKE PROPER HEARSAY OBJECTIONS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

Here, the State relies upon its misinterpretation of Wis. Stat. § 908.03(4) to claim that the nurse's unobjected-to hearsay testimony fell into an exception to the rule against hearsay. Wis. Stat. § 908.03 reads as follows:

> 908.03 **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

Wis. Stat. § 908.03(4) reads as follows:

> (4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In other words, if a patient makes a statement to a doctor for the purpose a medical diagnosis or treatment or for the patient

to describe his own medical history or symptoms, pain, or sensations, then those statements that the patient makes are considered exceptions to the hearsay rule, whether or not the patient is unavailable at the time of trial. To put it more simply, given the context that the patient made the statements, they are deemed to be sufficiently reliable that the doctor can testify to the statements the patient made. Thus, these statements may be admitted as excited utterances are admitted. It is believed that the patients' statements to their doctors for the purpose of medical diagnosis are of sufficient reliability that they are an exception to the general rule against hearsay.

The State notes that this is a well-understood hearsay exception and that explains why there is a dearth of cases interpreting it. Onyeukwu does not doubt that this exception is well-understood and that that explains the dearth of reported cases on this hearsay exception. However, notwithstanding the State's smugness, the State seems to misunderstand this exception. If, indeed, the State understands this exception, they are choosing to obfuscate it and spread misunderstanding about it.

Although the plain language of Wis. Stat. § 908.03(4) is clear, the confusion sown by the State demands further analysis. The most common issue addressed by the courts on

this hearsay exception is whether patient's statements to social workers or psychologists are excepted. ***State v. Nelson***, 138 Wis. 2d 418, 406 N.W.2d 385 (1987).

The plain language of the exception does not provide an exception for a nurse to testify about what might be on a patient's "chart" or on some vaguely-referenced "paperwork." Yet, this is the nature of the testimony that was given by the nurse. This is the testimony that was not objected to. This is the testimony that became the keystone in the State's case against Onyeukwu.

The State, in its brief, makes reference to Wis. Stat. § 908.03(6m) which provides for an exception to the rule against hearsay for patient health care records. Indeed, if there were patient health care records about Tiffany that made reference to her intellectual capacity, the State could have taken advantage of this provision. But, the State did not introduce such records nor did they seek to introduce such records. Although the State's discusses some case law regarding this exception in its brief, that discussion is totally irrelevant to the proceedings at issue before this court. The nurse's testimony was hearsay. It was not objected to by trial counsel. Failure to object was deficient performance of trial counsel. Onyeukwu was prejudiced by this deficiency.

c. TRIAL COUNSEL'S FAILURE TO

OBJECT TO THE PROSECUTOR'S REFERENCE TO TESTIMONY OF A DOCTOR WHEN NO DOCTOR TESTIFIED IN HER CLOSING STATEMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

Oddly, the State arrogantly and wrongly summarily dismisses this deficiency. The witness was a nurse, not a doctor. The witness's testimony, although it was un-objected-to hearsay and arguably inadmissible, was key to the State's case. The prosecutor led-off her closing by referring to the nurse as a doctor and repeated the mischaracterization no fewer than two times thereafter. It is well-understood that doctors have superior education and training than nurses. It is well-understood that doctors take the lead in diagnosing and managing the care of patients while nurses perform routine duties under the direction of doctors. It is also well-understood that where a litigant fails to refute an argument, it concedes that argument. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

d. TRIAL COUNSEL'S FAILURE TO DISCUSS ONYEUKWU'S DECISION OF WHETHER OR NOT TO TESTIFY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

The record in this case makes clear that Onyeukwu did not knowingly, intelligently, and voluntarily waive his right to

remain silent and that trial counsel's failure to thoroughly discuss this decision with him was deficient performance and that deficiency was prejudicial.

e. TRIAL COUNSEL'S FAILURE TO INTRODUCE AVAILABLE EVIDENCE TO CORROBORATE ONYEUKWU'S TESTIMONY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

Here, too, trial counsel's performance was deficient and that deficiency was prejudicial.

3. ONYEUKWU MUST BE RESENTENCED TO ENSURE A FAIR SENTENCING BASED UPON ACCURATE INFORMATION

The State, in its brief, asserts that the information the court relied upon was not inaccurate, but "conditional." The court affirmatively stated that it did not know if risk-reduction sentences were available any longer. If the court was sentencing Onyeuwku based upon accurate information, it would have known that they were no longer available, and sentenced Onyeukwu accordingly. Thus, it may be that the State can fairly characterize what the court did was to give Onyeukwu a conditional sentence: that, if risk-reduction sentences are available, he can have one. But, at the same time, the court's failure to have accurate information at the time of sentencing as to whether risk-reduction sentences were available is to sentence Onyeukwu with inaccurate

information.

4. THERE WAS AN EX POST FACTO VIOLATION BY DEPRIVING ONYEUKWU OF THE BENEFIT OF THE RISK REDUCTION PROGRAM THAT WAS IN EFFECT AT THE TIME OF HIS OFFENSE

The State, in its brief, summarily claims that ***Peugh*** and ***Singh*** do not apply. Indeed, those two cases did not involve risk-reduction sentences (formerly Wis. Stat. § 302.042 (2009-10)), but the State has nonetheless fail to sufficiently distinguish those cases from this one. Both of the cases involve statutory changes that had the effect of increasing punishment after the offense date, which is what has occurred here.

CONCLUSION

For these reasons, as well as those in the opening brief, Bernard I. Onyeukwu urges this court:

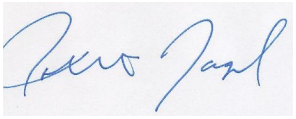
1. To vacate the convictions for counts 7 and 11 as there was insufficient evidence to support those convictions.
2. To grant Onyeukwu a new trial on counts 2 and 6.
3. To dismiss count 6 as multiplicitous with respect to count 2 or alternatively to dismiss count 2 as multiplicitous with respect to count 6.
4. To grant a new trial on the remaining count as trial counsel rendered ineffective assistance prejudicing

Onyeukwu because he failed to make proper hearsay objections, failed to object to the prosecutor's closing argument making reference to a doctor's testimony when no doctor testified, failed to assist Onyeukwu in knowingly, voluntarily, and intelligently waiving his right not testify, and failed to introduce an available corroborating phone record as evidence.

5. At a minimum, Onyeukwu must be resentenced as his sentence is based on inaccurate information and violates his Constituional protection against ex post facto sentences.

Dated: November 8, 2014

Law Offices of Robert Nagel
Attorneys for the Appellant



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CERTIFICATION AS TO FORM, LENGTH,

ELECTRONIC FILING, AND CONFIDENTIALITY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The text is 13-point type with quotations in 11-point type. The length of this brief is 11 pages and the word count for the body of the brief is 2,045. I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12)(f). The electronic brief is identical in content and format to the printed form of the brief.

I further certify that if the record is required 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 person, 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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November 8, 2014

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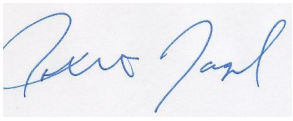

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