WISCONSIN COURT OF APPEALS
District IV

STATE OF WISCONSIN,

Plaintiff-Respondent

v. Appeal No. 2014AP000718 CR
Circuit Court Case No. 2013CM000147

TRAVANTI J. SCHMIDT,

Defendant-Appellant.

On appeal from an Order Entered
in the Circuit Court for Grant County,
the Honorable Robert P. VanDeHey, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S BRIEF and APPENDIX

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ISSUE PRESENTED

Whether defendant's Motion for a New Trial on grounds of ineffective assistance of counsel was sufficient on its face to warrant defendant a *Machner* hearing?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issue in this case, oral argument is not recommended.

STATEMENT ON PUBLICATION

Because this case involves nothing more than the application of well-settled rules of law to a set of facts, publication is not recommended.

STATEMENT OF THE CASE

In April 2013, the state charged Travanti Schmidt with disorderly conduct in violation of § 947.01, Stats. (R1). According to the state, the basis for the charge was that on April 7, 2013, Schmidt, then an inmate at the Wisconsin Secure Program Facility in Boscobel, intentionally threw milk on Corrections Officer Travis Parr. (*Id.*). Schmidt pled not guilty to the charge, contending that the milk had spilled accidentally. (R22:12-13). Schmidt went to trial on September 27, 2013. (R26).

At trial Officer Parr testified that on the date in question he gave Schmidt a second carton of milk to replace one he had delivered previously. (*Id.* at 30). He did so at his sergeant's request after Schmidt complained the first carton was defective. (*Id.*). According to Parr, the moment he opened

Schmidt's trap door to send in the second carton, the milk from the first carton, still in Schmidt's possession, came flying out. (*Id.* at 31). It landed on Parr's shirt and pants. (*Id.*).

In addition to Parr's testimony, the state showed the jury a video presumptively recorded by the prison's surveillance camera system. (*Id.* at 33). This particular camera looks down at a long hallway with cell doors on each side. (R10:Ex. 4). It shows Officer Parr enter the hallway opposite the camera, take several steps toward the camera, and then turn sharply right and stop a few feet in front of a cell door. (*Id.*). Parr unlocks the trap door, sets the second milk carton down on the trap, and before closing the door an unknown substance comes flying out toward Parr. (*Id.*). The entire footage last a few seconds. (*Id.*).

The video gets introduced into evidence as follows: First, the prosecutor says to Parr *Maybe while they are getting that set up I can ask you a couple of other questions* and the prosecutor then asks some questions about the milk. (R26:32-33).

The prosecutor then says to Parr, with the video now running in the courtroom, *Can you look up at the screen and tell us if you recognize what that might be?* (*Id.* at 33). Parr says yeah, *that's Range 1* up at prison. (*Id.*). The video continues to play with Parr saying only that it appears to depict him bringing the second carton of milk to Schmidt. (*Id.*). When it ends, the state shows it to the jury again, this time at half speed. (*Id.*). At the end of the second showing the state moves it into evidence, without objection. (*Id.* at 33-34).

During its deliberations the jury watched the video three additional times, twice at regular speed and once at half speed. (*Id.* at 72). Having seen the video a combined five

times it convicted Schmidt of disorderly conduct. (*Id.* at 73). The court sentenced Schmidt to one year of incarceration, to be served in prison, consecutive to the sentence he was presently serving. (R12).

Schmidt promptly filed a motion for a new trial on grounds that his trial counsel provided ineffective assistance. (R16). The basis of Schmidt's claim was that counsel had failed to object to the jury seeing the video before it was properly authenticated. (*Id.* at 3). Schmidt maintained that counsel's failure amounted to ineffective assistance that severely prejudiced him at trial. (*Id.*). Without the video, he argued, it was a he-said, she-said case, with Parr saying Schmidt intentionally threw the milk and Schmidt saying it accidentally spilled. (*Id.* at 7-8). Because there were no other witnesses to the incident, absent the video there was a reasonable probability the state would have failed to prove its case beyond a reasonable doubt. (*Id.*).

The trial court summarily denied Schmidt's motion without a hearing. (R17). It found the motion to contain only conclusory allegations that offered no basis for a *Machner* hearing. (*Id.* at 5, 4).

Believing his motion was sufficient on its face to warrant a hearing, Schmidt now brings this appeal from the order denying his motion.

STANDARD OF REVIEW

This Court reviews a postconviction request for a *Machner* hearing by applying a two-prong test. *See State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). First, it determines whether defendant's motion, on its face, alleges

facts which, if true, constitute deficient performance and prejudice entitling him to relief. *See Bentley*, 201 Wis. 2d at 310. If so, then the trial court has no discretion and defendant is entitled to be heard. *See id.* Whether a motion is sufficient is a question of law which this Court reviews de novo. *See id.*

If the motion is insufficient, the trial court may deny a hearing request based on any one of three factors: (1) the defendant fails to raise a question of fact; (2) he presents only conclusory allegations; or (3) the record demonstrates conclusively that defendant is not entitled to relief. *See id.* at 309-10. Whether the trial court properly exercised its discretion in denying the hearing of an insufficient motion is one this Court reviews under the erroneous exercise of discretion standard. *See id.* at 311. A trial court exercises appropriate discretion when it examines the relevant facts, applies a proper standard of law, uses a demonstrative rational process, and reaches a conclusion that a reasonable judge could reach. *See State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

Because a claim of ineffective assistance requires proof not only of deficient performance, but also prejudice, a defendant must make specific allegations to allow this Court to assess both prongs in a meaningful way. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If not, he is not entitled to a hearing on his claim. *See Bentley*, 201 Wis. 2d at 315-17.

To show deficient performance defendant must demonstrate that his trial counsel made errors so serious that counsel was not functioning as counsel. *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To show prejudice he must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been

different. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

ARGUMENT

In this case the trial court found Schmidt's motion insufficient on its face, reasoning that it contained only conclusory allegations. (R17:1, 4-5). It denied the motion summarily finding no basis to order a *Machner* hearing on his claim. (*Id.* at 1, 4).

I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT CONCLUDED SCHMIDT'S MOTION WAS INSUFFICIENT

A trial court erroneously exercises its discretion when it fails to examine the relevant facts, fails to apply the proper standard of law, fails to use a rational process, and fails to reach a reasonable conclusion. *See State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Because the trial court failed to do all of these things, it improperly exercised its discretion in finding Schmidt's motion insufficient on its face.

A. Schmidt's Motion

In his motion, Schmidt alleged that trial counsel performed ineffectively by failing to object to the state showing the jury a surveillance video that had not been properly authenticated. (R16:3). He alleged the video acted as a silent witness. (*Id.* at 4-5). Because the state had offered it, not as illustrating evidence, but as substantive evidence of the events that transpired on April 7, 2013, it needed to be authenticated pursuant to Rule 909.015(9). (*Id.* at 4-5).

Rule 909.015(9), he said, requires the proponent to offer evidence describing the process or system used to produce the video and must show that the process or system produces an accurate result. (*Id.*). At trial, he said, none of this occurred. (*Id.* at 5). Instead, the video just magically appeared in the courtroom. (*Id.*). In fact, the record shows that the state began playing the video for the jury without even laying the slightest bit of foundation for it. (R26:33 (*Can you look up at the screen now and tell us if you recognize what that might be?*)). No one bothered to testify at all as to its accuracy or the reliability of the prison's surveillance system or to chain of custody or any of those things required by Rule 909.015(9). (R16:5-6).

Schmidt further alleged that counsel had opportunity to object to its showing on several occasions, including the moment the state began playing the video and also when the state offered it into evidence, but took advantage of neither. (*Id.* at 7). He reminded the trial court that failure to object can constitute deficient performance under some circumstances, referring the court to *State v. Domke*, 2011 WI 95, ¶45, 337 Wis. 2d 268, 805 N.W.2d 364, where the supreme court held that failure to object under the circumstances there constituted ineffective assistance. (*Id.* at 4).

Finally, as to prejudice, Schmidt argued that trial counsel's misstep severely prejudiced him in front of the jury because without the video his case was a he-said, she-said case. (*Id.* at 8). Other than the silent witness only he and Officer Parr had any personal knowledge of what had transpired on Range 1 on April 7th. (*Id.*). Had defense counsel kept the jury from seeing the video there was a reasonable probability that the state would have failed in its proof, as the inmate contended the milk spilled accidentally while the guard said Schmidt threw it intentionally. (*Id.*). That the jury asked to see the video three additional times

after seeing it twice during the trial only underscored its impact on the panel. (*Id.*).

Those were the facts and reasonable inferences Schmidt put into his motion. He told the trial court exactly why defense counsel erred and he linked the error securely to the prejudice he suffered, as the jury, after watching the video five times, found him guilty of disorderly conduct. Schmidt submits his motion, on its face, was sufficient.

B. The Trial Court's Response

The trial court found the motion facially insufficient, saying it offered only conclusory allegations. (R17:1, 4-5).

First off, the trial court found the motion flawed saying Schmidt erroneously assumed that had defense counsel objected, the state would have been unable to authenticate the video. (R17:3). The court said clearly this was not the case and cited to three parts of the trial transcript to show otherwise.

The first cite was to page 31, line 18. (*Id.*). But a careful check will show that on page 31 Officer Parr is authenticating two photos of himself burned to a digital disk. (R26:18). The disk is marked as trial Exhibit #1. (R10). This disk is not the disk which contained the video, as the video got entered into evidence as Exhibit #4 later in the trial. (R10; R26:34). Parr's authentication of pictures of himself is not at all relevant to the proper authentication of the video itself.

The second cite was to page 33, line 18. (R17:3). At this point the video is now playing in the courtroom and Officer Parr says:

A That's Range 1.
Q Up at prison?
A Yes.

That was it, the sum total of his testimony on Transcript page 33 about the surveillance video. Schmidt submits that Parr's four words hardly authenticated the video in the manner contemplated by Rule 909.015(9).

The third cite was to page 43, line 20. (R17:3). This cite is to Detective Place's testimony that he obtained the video from the prison. (R26:43). But one can hardly construe it as testimony laying an evidentiary foundation for the video. As page 34 of the transcript shows, the jury already had seen the video and the court already had admitted it into evidence long before Detective Place even testified. (R26:34). So like the court's first cite, its third was not relevant either.

Insofar as the court believed the state did lay a sufficient foundation for the surveillance tape (R17:5), the evidence it points to hardly supports this conclusion.

Second, the court countered that Schmidt testified and he never alleged the video was inaccurate. (R17:3). Insofar as this may be true, this fact has nothing to do with Schmidt's complaint about defense counsel's performance. Not that Schmidt even would know whether the video was accurate, as he was locked in his cell, unable to see what the camera saw out in the hallway.

But the point is neither here nor there. Perhaps the video was spot-on, but this does not change the fact that the onus was on the state to put up a witness, with knowledge, to say the video was accurate. When the state failed to lay the

proper foundation for the exhibit defense counsel should have lodged an objection.

So the trial court's focus on this fact again is not relevant. While it may be true, it does not speak to counsel's performance in any way.

Third, the trial court pointed to the fact that defense counsel actually used the video to support her case. (R17:5). And this fact is true as the record shows counsel, in her closing argument, saying to the jury: *you have seen the video.* (R26:56). At Transcript page 56 she argues that the video shows the milk carton falling to the floor beneath the trap and not flying across the hall, suggesting that her client never threw it as Officer Parr alleged. (*Id.*).

Now whether defense counsel made a strategic decision to let the jury see the video because it bolstered her defense on this point, or whether she was simply doing damage control, we will never know, because the trial court denied Schmidt a *Machner* hearing. Had Schmidt been given the opportunity to ask this important question then we would know for sure. But under the circumstances all we have to go on is the trial court's *ipsa dixit* that counsel strategically used the video to muster a defense.

Fourth, and similar to its third reason, the trial court summarily contends that defense counsel lacked a good faith belief that the video was not an accurate depiction of the incident, and for this reason she had no grounds to object to its admission. (R17:5). But like its third argument, we must take the trial court's word for this. It points to nothing in the record that supports this contention. Truth be known, this Court has no idea what defense counsel believed about the

accuracy of the video, because she was denied the opportunity to say.

But even if she did believe it was unassailable, her belief on this point has nothing to do with requiring the state to lay a proper foundation for its admission. Assuming *arguendo* that the video did accurately record the events on Range 1 on April 7, 2013, that presumption does not change the fact that no sponsoring witness ever told the jury it was an accurate depiction as Rule 909.015(9) requires.

Finally, as to the prejudice prong, the trial court reasoned that even if counsel had erred, her error could not have hurt Schmidt because, had she objected, the state simply would have asked a few more questions. (R17:5).

Well the obvious flaw in this argument is that the state never did ask a few more questions. It asked no foundational questions at all, which is what Schmidt is complaining about.

But more importantly, the trial court's argument is misplaced. The state had no other witnesses available to authenticate the video in the manner required by Rule 909.015(9). That is, the proper witness needed to describe the process or system used to produce the video and needed to show that the process or system always produces an accurate result. *See* Wis. Stats. § 909.015(9). Surely Detective Place from the Grant County Sheriff's Department would not be this witness. (R26:42). Although it might be possible that Corrections Officer Parr, who was employed by the prison, might have this knowledge, this too is doubtful. (R26:28). But these were the only witnesses the state called at trial.

If either had the knowledge to properly authenticate the video, then defense counsel's objection would have served an

important purpose. The sponsoring witness could have shared with the jury how he knew the video was accurate, the number of times he had tested the system, the process he used to get the video into the court room, and so forth. Important stuff!

Likewise, had neither Parr nor Place had this knowledge, then her objection would have served another very important purpose, at least for Schmidt. It would have kept the jury from hearing from the silent witness.

In summary, the trial court's contention that the state could have properly authenticated the video in the wake of an objection, is based not only on conjecture, but inaccurate facts. Whether Parr could have properly authenticated the video in the manner contemplated by Rule 909.109(9) is wholly unknown. And, any questions put to Detective Place would have been too late, because by the time Place took the stand the video was already in evidence. The trial court is only guessing that the state could have authenticated the video by asking these witnesses a few more questions.

Likewise, the citations the court gave do not support its conclusion that the witnesses did, or could have, laid a sufficient foundation. The testimony found at the first and the third cites are not even relevant. The second one, while relevant, consists of four words about what Officer Parr sees on the screen. It hardly lays a proper foundation for silent witness testimony.

As to its second and fourth reasons (Schmidt failed to complain the video was inaccurate; counsel lacked a good faith belief it was inaccurate), neither of these reasons bear any rational relationship to Schmidt's complaint. Schmidt is complaining the state failed to lay a proper evidentiary

foundation for the video and that his trial counsel stood idly by and did nothing about it. Whether he believed or she believed the video was accurate is immaterial. Presumptively it was. But this was the problem – neither they nor anyone else presented any evidence at trial that it was an accurate depiction of the events that gave rise to the charges against Schmidt.

As to its third reason – that defense counsel, as a matter of strategy, used the video to bolster her defense – while plausible, is also pure conjecture by the trial court. Perhaps this is the reason counsel lodged no objection to it. But this is only a guess. It is equally plausible that counsel missed a beat and forgot about Rule 909.109(9). Either way a hearing would ferret this out. It hardly seems reasonable to deny a hearing and make Schmidt take the trial court's word for it.

As to its fifth reason, this too is pure speculation. To say that Schmidt would have suffered no prejudice, because had counsel objected, the state just would have asked a few more questions, is to beg the question. The fact is, counsel did not object, the state did not ask a few more questions, and that is why Schmidt is complaining.

Maybe the trial court is guessing correctly. Following counsel's objection Officer Parr may have said all the right things, e.g., I have tested the surveillance system many times, I have always found it to accurately record activities on Range 1, I myself copied the video from the camera system to this DVD I have in my hand, I have not altered it in any way, and so on and so on.

Alternately, maybe the trial court is guessing wrong and following an objection Parr might have said "I have no idea how the prison's surveillance system works, I have never

watched this video before, and I did not even know there was a surveillance camera in that hallway."

The point being, it is equally plausible that an objection could have kept the jury from seeing the video, giving rise to a reasonable probability that the jury may have remained unconvinced of Schmidt's guilt.

A conclusory allegation is "my trial counsel was ineffective" with nothing more added. But Schmidt's motion goes way beyond conclusory. It tells the trial court exactly why defense counsel erred and he properly linked the error to the prejudice he suffered. On its face it was sufficient and the trial court had no discretion to deny Schmidt a hearing.

CONCLUSION

For the reasons stated, Schmidt respectfully asks this court to reverse the trial court and remand his case for a *Machner* hearing.

Dated this _____ day of May 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 3,081 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding 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 this _____ day of May 2014.

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