STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP00867-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES RICHARD COLEMAN

Defendant-Appellant.

ON REVIEW OF A MOTION FOR POSTCONVICTION RELIEF ENTERED MARCH 24, 2014, BY HON. STEPHANIE ROTHSTEIN, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 27, 2012 BY HON. DENNIS R. CIMPL, BOTH IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Trial counsel was ineffective in promising to the jury that Coleman would testify, and then not keeping that promise.

A. Counsel's "broken promise" had a direct effect on CB's credibility and could not be cured by jury instructions.

The State does not agree that Attorney Taylor—Coleman's trial counsel—was ineffective in promising the jury that Coleman would testify, and then failing to keep that promise. The State first argues that Coleman's "broken promise" argument should fail as a matter of law because Coleman did not testify and thus his credibility was not at issue. State's Brief at 4-5. However, the State is wrong because the "broken promise" also related to CB's credibility and the theory of the defense as a whole.

Attorney Taylor took the position in his opening statement that there was more to the story than CB was telling. This became clear when he told the jury why Coleman "has" to testify, stating "we're going to testify and show through cross examination that the facts are not as [ADA] Ms. Falk said…." At the outset, Taylor made sure that the jury knew that the State's case would be based almost entirely on CB's testimony and that he would offer Coleman's testimony to counter her story.

Since CB's testimony was the key piece of evidence, the jury's opinion of her credibility was paramount. Counsel's promise to present a different version of events unavoidably strengthened CB's credibility when no alternative was offered. This is because only two people had

direct knowledge over what happened: CB and Coleman. Taylor's statement that Coleman "has to testify" because the facts were different than alleged by the State casts an impression for the jury that the State's witnesses would offer testimony regarding what happened and then Coleman would offer testimony that differed (54:96). The fact that Coleman did not testify, after a promise that he would, sent a strong message to the jury that he could not offer a different version of events, thus bolstering CB's credibility.

The State also argues that jury instructions cured any defects in the opening statement by informing the jury that statements of counsel are not evidence, and Wisconsin law presumes that the jury followed the instructions given to them. State's Brief at 5. However, certain statements of counsel are sufficiently prejudicial that no jury instruction can cure the problem. *See Ouber v. Guarino,* 293 F.3d 19, 35 (1st Cir. 2002) ("The fact that the jury was advised not to draw a negative inference from the petitioner's failure to testify is likewise irrelevant; the attorney's mistake was not in invoking he petitioner's right to remain silent, but in the totality of the opening and the failure to follow through"). Here, the "broken promise" was so prejudicial that no jury instruction could have cured the deficiency.

B. Counsel's performance was deficient.

The issue presented in this case—the "broken promise"—has not been directly addressed in Wisconsin caselaw. The State cites *State v. Krancki*, 2014 WI App 80, 355 Wis. 2d 503, 851 N.W.2d 824, for the proposition that a defense attorney is not *per se* deficient by promising that his client will testify, and then breaking that promise. The State's reference to *Krancki* is puzzling because Coleman has never contended that a broken promise is *per se* deficient. Obviously, there are times when counsel is reasonably certain

that his client will testify, and tells the jury that he will testify, but then unexpected developments occur that cause the defendant to change his mind about testifying. In such situations, counsel cannot be considered *per se* deficient.

That is exactly what happened in *Krancki*. There, the defendant was charged with operating a motor vehicle while intoxicated. Based on Krancki's insistence, counsel told the jury in his opening statement that Krancki would testify that he was not driving the car. *Krancki*, 2014 WI App 80 at ¶3. However, on the second day of trial, counsel persuaded Krancki not to testify because he believed the jury was "not buying the idea that someone else was driving." *Id.* at ¶8. The Court of Appeals ruled that an appropriate strategic shift had occurred during trial and counsel was "ethically bound" to follow Krancki's change of mind. *Id.* at ¶11.

However, in Coleman's case, there were no new developments to cause the defense to change its strategy. At the time of his opening statement, Attorney Taylor had no idea whether Coleman would testify. As Taylor later testified, "the decision was not made until the final moment even though [Coleman] had some apprehension about testifying from the beginning." (62;17-18). In a case based almost exclusively on the complainant's testimony, a promise that the defendant will testify, when the certainty of such testimony is uncertain constitutes deficient performance. *See Ouber*, 293 F.3d at 28; *See United States ex rel. Hampton v. Leibech*, 347 F.3d 219, 257 (7th Cir. 2003)[1] (citing *Anderson*

[1] On page 16-17 of his brief-in-chief, Coleman offered a quote purportedly from *Hampton*. The quote is actually found in the same court's decision in *Barrow v. Uchtman*, 398 F.3d 597, 606 (7th Cir. 2005), which was paraphrasing their previous decision in *Hampton*. Coleman apologizes for the error.

v. Butler, 858 F.2d 16,17 (1st Cir. 1998)). *See also Saesee v. McDonald*, 725 F.3d 1045, 1049-1050 (9th Cir. 2013).

Further, the State's argument that counsel's promise somehow gave Coleman credibility makes no sense. State's Brief at 11. The State does not give any explanation as to why such a strategy would "soften the blow of the horrendous charges," or "foster doubt in the jurors' minds." When counsel is unsure of whether the client will testify, the risks of such a statement far outweigh any conceivable temporary benefit. If counsel breaks his promise, the credibility of the defense is harmed. Even if counsel ultimately keeps his promise and presents the testimony of his client, there is no reason to believe that an opening statement promise somehow "softens the blow" or "fosters doubt."

C. Coleman was prejudiced by counsel's deficient performance.

The State argues that Coleman has failed to demonstrate prejudice. State's Brief at 12.

The amount of prejudice required in cases of such "broken promises" has differed throughout jurisdictions and is again an unsettled area of Wisconsin case law. Nonetheless, some jurisdictions have called such a transgression prejudicial as a matter of law. In *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1998), the court found that the failure to call a key witness who the defense counsel promised would testify is prejudicial as a matter of law. If this court decides to adopt such an approach, prejudice will not need to be shown as Coleman, as the only other witness to the event, was a key witness.

Even if this Court does not adopt a *per se* approach, many other Courts have found prejudice in similar

circumstances. As discussed above, the Seventh Circuit has found such a promise to be prejudicial in *Hampton v. Leibech*. Similarly, in *Ouber,* 293 F.3d at 35, the First Circuit found that jury instructions stating that counsel's opening statements are not evidence is not enough to cure the deficiency and the result is prejudicial.

The facts in Coleman's case strengthen the argument that he was prejudiced. In its brief, the State fails to acknowledge obvious weaknesses in the State's case, or articulate why the State's case was strong. Instead, it merely provides a conclusory statement that the "weight" of the testimony of CB dictates that Coleman cannot establish that a different result would be "reasonably probable" absent counsel's broken promise. State's Brief at 12.

However, there were many other problems with the evidence that the jury could have found problematic. Among the deficiencies were the lack of physical evidence that Coleman assaulted CB, including a lack of DNA, the testimony of Floyd Miller and Miller's wife that they initially couldn't believe CB's allegations, the fact that upon hearing the allegations the police were not called and CB was not taken to the hospital, and evidence from the postconviction motion that would have developed further inconsistencies with CB's story. *See* Coleman's Brief-in-Chief at 18-34.

Absent trial counsel's deficient performance, there is a reasonable probability of a different outcome.

II. Trial counsel was ineffective for telling the jury that Coleman had a prior criminal record.

Coleman maintains that Attorney Taylor provided ineffective assistance by prejudicially revealing Coleman's

criminal record and prior incarceration to the jury during *voir dire* and opening statements. In response, the State offers four justifications for the revelations, and argues that they were not prejudicial.

First, The State references counsel's belief that revealing Coleman's criminal history to the jury allowed him to "take the thunder away from the state." State's Brief at 12. Tellingly, the State stops short of endorsing this theory, perhaps because it makes no sense.

One problem with this justification is that it assumes the jury would hear about Coleman's criminal record. However, the only way the jury could have heard this information was if Coleman testified. Attorney Taylor did not know whether Coleman would testify when he revealed Coleman's criminal record to the jury. Therefore, he needlessly presented Coleman's criminal record to the jury.

The State's second justification is counsel's explanation that while admissibility of Coleman's criminal record was limited, he "didn't want to take that chance" and "that would have been damaging to him if they heard it from someone other than me first" State's Brief at 13. Again, the State does not endorse this justification. The State does not—and can not--explain how this demonstrates that counsel was using a reasonable trial tactic.

Third, the State adopts the trial court's reasoning that revealing Coleman's record to the jury allowed him to "weed out" potentially biased jurors. State's Brief at 13. While this might be a worthy goal, Coleman did not benefit by Taylor's revealing Coleman's record to the jury because he did not testify. In addition, Taylor could have used other means to effectively "weed out" biased prospective jurors. In his brief-in-chief, Coleman suggested that Taylor could have asked the

jury whether prospective jurors would hold *any* witness's criminal record against them. The State does not respond to this suggestion, or give any indication as to why this would not be an effective way to weed out jurors who harbor a bias. Consequently, counsel's performance was deficient because there were other, less damaging means to achieve the same effect.

Fourth, the State adopts the trial court's reasoning that counsel was justified in revealing Coleman's recent release from prison, as there was a "real risk" this information would be revealed by another witness. State's Brief at 13. The flaw in this argument is that any risk could have been alleviated by simply ordering witnesses not to reveal that Coleman was recently incarcerated. Additionally, if a witness did violate the order and reveal this prejudicial information, curative jury instructions could have mitigated the harm, or a mistrial could have been granted. The State fails to address any of these points raised in Coleman's brief.

The State also ignores the distinction between revealing the number of Coleman's prior convictions and revealing the fact that Coleman was recently released from *prison*. This distinction is important. Had he testified, the only facts Coleman would have had to reveal about his criminal record were: (1) the fact that he had prior convictions, and (2) the number of times he had been previously convicted. Learning that Coleman had been in prison unnecessarily told the jury that Coleman had been convicted of a crime serious enough to land him in prison. This constitutes deficient performance.

The State insists that counsel's decision to reveal information about Coleman's criminal record is due *Strickland's* "highly deferential" standard (State's Brief at 14). But decisions labeled "strategic" still must be reasonable

and cannot be based on "irrational trial tactic[s]" or "based upon caprice rather than upon judgment." *State v. Felton*, 110 Wis.2d 485, 503, 329 N.W.2d 161 (1983).

Finally, the State argues that no prejudice occurred because it is presumed that juries decide cases based on the evidence and applicable law. State's Brief at 14. However, with good reason, the law restricts certain comments by counsel during *voir dire*, opening statements and closing arguments. Not every violation can be fairly neutralized by jury instructions. Additionally, this presumption contradicts the rationale of Wis. Stat. § 906.09, which limits the use by counsel of criminal convictions in order to avoid causing prejudice to parties. Furthermore, needlessly allowing a jury to hear evidence of a defendant's prior convictions may constitute ineffective assistance. *State v. Pitsch*, 124 Wis. 2d 628, 646, 369 N.W.2d 711 (1985).

Ultimately, Coleman was prejudiced because counsel's pre-trial disclosure of Coleman's criminal past changed the outcome of the trial by indicating that Coleman has a flawed character and a serious criminal record.

III. Trial counsel was ineffective in failing to present evidence that would have been favorable to Coleman.

A. Counsel failed to impeach CB's testimony that she went to bed at 6:00 on the night of the first alleged assault.

Coleman argues that counsel performed deficiently by declining to impeach CB's testimony that she went to bed at 6:00 p.m. the night after the first assault.

The State disagrees. It first quotes Taylor's stated

rationale for refusing to impeach this part of CB's testimony because: "[i]t's a minor detail.... [that] would have drawn out something that I wanted to get away from." State's Brief at 15). The State also paraphrases Taylor's conclusion that this detail was a "collateral matter" that would not be worth quibbling about" State's Brief at 15. However, the State does not defend this rationale perhaps because it is untenable. Counsel's performance was deficient not because he avoided cross-examining CB on what he believed to be a minor inconsistency, but because he dismissed as a minor inconsistency an important detail that casts doubt on CB's allegation altogether.

This was significant because it demonstrates that CB was not afraid to encounter Coleman the night after the alleged first assault, thereby providing evidence that the alleged assault did not occur. This also indicates that CB was a poor historian, or that her testimony is not as credible as otherwise believed. Counsel did not articulate what he "wanted to get away from" by refusing to pursue impeachment of CB on this detail. This information is of the utmost importance in a sexual assault case because such cases are often decided on a relative assessment of the respective credibility of the alleged victim and defendant.

The State also references Taylor's concern that impeaching CB's testimony would risk "appearing to beat-up on the victim." State's Brief at 15. However, the State ignores Coleman's assertion that impeachment of CB could have been performed tactfully. CB's testimony could have been impeached by questioning her father about his statement to police that he saw CB watching television with Coleman at 8:15 p.m. the night after the first alleged assault. CB could have been impeached without appearing to attack her. Consequently, counsel's refusal to impeach CB's testimony was based on an unreasonable concern.

The State also endorses the trial court's view that cross-examining CB on this point could have opened the door to "other information that would have made Coleman look even worse for the jury. State's Brief at 15. However, neither the trial court nor the State articulate what adverse evidence might have been allowed had counsel proceeded with cross-examination on this point. Without describing the evidence that could have been introduced by proceeding with impeachment, it is impossible to conclude that Taylor's decision was part of a reasonable trial strategy.

B. Trial counsel was ineffective in failing to present evidence that would have dramatically increased the probative value of the DNA analysis.

In his brief, Coleman asserts that counsel performed deficiently by not cross-examining CB about her statements to police and others that Coleman left a "sticky, wet substance" on her leg after the second alleged assault. The State disagrees, and offers two arguments in support: (1) that Coleman already obtained benefit from the State's case in its lack of DNA evidence; and (2) that counsel's decision to forego cross-examination was reasonable because discussing a "sticky, wet substance" with CB might have done more harm than good. State's Brief at 17-18.

While the jury heard there was no DNA evidence linking Coleman to any assault, this fact would have carried far greater impact had the jury heard that the alleged assault supposedly produced a "wet, sticky substance" on CB's leg. Had counsel questioned CB about this, she likely would have confirmed her earlier reports that Coleman ejaculated. This would have given the defense a powerful argument that—if CB was telling the truth, surely Coleman's DNA would have

been found somewhere on the sheets or CB's clothing. Alternatively, had CB denied reporting that Coleman ejaculated, she could have been impeached by her statements to the contrary. In either case, CB's credibility would have been greatly diminished. Pursuing this line of questioning in cross-examination of CB offered a high reward at minimal risk, thus counsel's refusal to pursue this point in cross-examination was unreasonable.

The State also appears to endorse Taylor's concern that questioning CB about the substance could have "done more harm than good in the eyes of the jurors." State's Brief at 16-17. However, neither Taylor nor the State articulate how this questioning would have done any harm. Information of a wet substance does not relate to the jury's duty to return a verdict. Because Attorney Taylor had no reasonable basis for not pursuing this point in cross-examination, his performance was deficient and prejudicial.

CONCLUSION

For the above reasons, Coleman is entitled to a new trial.

Respectfully submitted this 3rd day of October, 2014.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,949 words.

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John A. Pray

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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John A. Pray