RECEIVED
09-04-2014
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP001362 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN BEAL,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON JUNE 3, 2014 BY HON. LINDSEY GRADY, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 29, 2013, BY HON. MARY TRIGGIANO PRESIDING, BOTH IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

John A. Pray
State Bar No. 01019121

Attorney for Defendant-Appellant

Criminal Appeals Project
Frank J. Remington Center
Univ. of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7461

Table of Contents

Table of Authorities

Wisconsin Statutes

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP001362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN BEAL,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON JUNE 3, 2014 BY HON. LINDSEY GRADY, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 29, 2013, BY HON. MARY TRIGGIANO PRESIDING, BOTH IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUE PRESENTED

1. Beal was charged and tried for committing an Aggravated Battery against his girlfriend. Although Beal's attorney did not expect Beal to testify because he made a poor witness, he told the jury that Beal would testify as to his version of events. However, Beal did not testify.

Issue: Was Beal's attorney ineffective in wrongly telling the jury that Beal would testify at trial?

The trial court ruled that Beal's attorney was not ineffective.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Beal welcomes oral argument to clarify any questions the court may have. Publication may be warranted as there are no published Wisconsin cases deciding whether an attorney is ineffective in wrongly promising the jury that his client will testify when there has not been a change in circumstances.

STATEMENT OF THE CASE AND FACTS

On March 9, 2013, John Beal was arrested for the alleged battery of his longtime girlfriend, Antwonette Henderson. (36:88). The State subsequently charged Beal with Aggravated Battery (Substantial Risk of Great Bodily Harm, with the Use of a Dangerous Weapon and Domestic Abuse Assessment, contrary to Wis. Stats. §§ 940.19(6), 939.50(3)(h), 939.63(1)(b), 968.075(1)(a). (2:1).

The charge was tried before a Milwaukee County jury on March 5-7, 2013. The opening statement of the prosecutor summarized the State's case that was then presented to the jury. According to this version, Beal and Henderson had resided together in Iowa and Arkansas, but then moved to Milwaukee about three months before the incident in this case. (35:13). According to Henderson, on March 9, 2013, at 3:00 p.m., Beal was looking through their computer and found evidence that Henderson was not faithful to him, and she heard him say "I'm going to kill that bitch." (35:13).

Several hours later, Beal and Henderson left their residence on foot and headed to a store. (35:13). Beal saw a squad car, and assumed that Henderson had called the police on him (35:14).

Under the State's version, Beal then grabbed Henderson's scarf and punched her head several times. He also produced a knife and stabbed her twice to the back of her head and the left side of her temple. (35:13). Beal then covered her mouth to muffle her, and in doing so, knocked out two of her front teeth. (35::14). Henderson bit Beal's hand, causing bite marks. (35:14). A metal object—allegedly the tip of a knife—was found in a CT scan of Henderson's head (35:12-13).

Following the State's opening statement, Beal's attorney told the jurors there was an entirely different version of what happened. He repeatedly told the jury that Beal would testify on his own behalf. Beal's testimony would be that as Beal and Henderson were walking in the alley, Henderson—"out of nowhere"—became upset, and pulled a knife on him. (35:16-17). Trial counsel further told the jury that Beal would testify that he struggled with Henderson over the knife to avoid being stabbed by her, and during the course of the altercation, Henderson was injured by the knife. (35:16).

Contrary to trial counsel's opening statement, Beal did not testify. (36:101-02). The defense rested without calling any witnesses. (36:111). In his closing argument, Beal's attorney told the jury that Beal had no obligation to testify because "the presumption of innocence rests with him." (37:20). He referenced his earlier opening statement regarding Beal testifying, but this time, he told the jury that "I told you in opening that Mr. Beal *may* testify and what he *might* testify to." (37:21) (emphasis added).

The jury found Beal guilty of the charge submitted, Battery with Substantial Risk of Great Bodily Harm While Using a Dangerous Weapon. (37:43) (Judgment of Conviction attached as Appendix A).

Beal subsequently filed a postconviction motion. (23) (Attached as Appendix B).[1] His motion claimed that his attorney was ineffective in making, and then breaking his promise to the jury that Beal would testify. (23:1-10).[2]

Following briefing by the parties, the circuit court[3] denied the postconviction motion without conducting a hearing. (27) (Decision Attached as Appendix C). According to the court, the postconviction motion was "factually insufficient," citing the State's argument that Beal had failed to set forth what Beal's intentions were regarding testifying, and whether he had communicated that to counsel. (27:3). The court also held that the motion was insufficient because it did not state what Beal's testimony would have been had he testified at trial. (27:3). Finally, the court found that even if the motion was factually sufficient, and that counsel's performance was deficient, Beal was not prejudiced because "he cannot show that there is a reasonable probability the

[1] Beal's postconviction motion is attached as an appendix because the circuit court questioned the sufficiency of the motion when ruling on the motion.

[2] Beal raised a second claim in the postconviction motion alleging that trial counsel was ineffective in failing to interview a witness—Ebony Anderson—and then failing to call her as a witness at trial. (23:10-13). The trial court also denied that issue in its decision on the postconviction motion (27:4). Beal is not raising that issue in this appeal.

[3] Although the trial was presided over by Hon. Mary Triggiano, the case was subsequently assigned to the court of Hon. Lindsey Grady, who ruled on the postconviction motion.

outcome of the trial would have been any different because he is not claiming that his own testimony would have made a difference." (27:3-4).

This appeal follows.

STANDARD OF REVIEW

Whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This court will uphold the circuit court's findings of fact, including the circumstances of the case and the counsel's conduct and strategy, unless they are clearly erroneous. *Id*. Whether trial counsel's performance constitutes constitutionally ineffective assistance of counsel, which requires a showing by the defendant that counsel performed deficiently and that the error or errors prejudiced the defendant, presents a question of law that this court decides de novo. *Id*.

The proper standard of review for a trial court's decision to deny a postconviction motion without first holding an evidentiary hearing is whether the defendant alleged sufficient facts, which, if true, would entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996) (quoting *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). The movant is required to set forth specific material facts, beyond mere conclusory allegations, which allow a reviewing court to meaningfully assess the movant's claim. *State v. Balliette*, 2011 WI 79, ¶ 40, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433.

In the context of an ineffective assistance of counsel claim, this burden requires the movant to allege these material

facts under the two prong framework set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *Allen*, 2004 WI 106 at ¶ 23; *Balliette*, 2011 WI 79 at ¶ 20. The alleged facts must be specifically and discretely identified (*e.g.* who, what, where, when, how) and the movant must articulate how or why those facts, if true, would satisfy the requirements of an ineffective assistance claim and entitle the movant to relief. *Allen*, 2004 WI 106 at ¶ 23. Where the movant has satisfied this burden, the circuit court has no discretion and must hold an evidentiary hearing. *Bentley*, 201 Wis. 2d at 310. It is a question of law as to whether a defendant has satisfied this burden, and as such the issue is reviewed *de novo. Id.*

ARGUMENT

I. The circuit court erred in denying, without a hearing, Beal's claim that trial counsel was ineffective in making and then breaking his promise to the jury that Beal would testify.

A. The postconviction motion alleged sufficient facts.

In its decision denying the postconviction motion, the circuit court wrote:

> [T]he court finds the defendant's motion factually insufficient as well because it assumes there was another version of events to which the defendant would have testified to. However, the defendant has not made any claim that he would have testified, given any inkling as to what his testimony would have been, or shown that his testimony would have altered the course of the trial.

(27:3) (Appendix C).

The court's ruling fundamentally misses the point of

Beal's postconviction motion. The motion does not complain that Beal's rights were violated by not being allowed to testify, or that counsel was ineffective in his advice regarding testifying. Rather, Beal asserts that counsel was ineffective in promising to the jury that Beal would testify when he did not know that he would testify, or believed that he would not testify.

Therefore, there is no obligation for Beal to allege in his postconviction motion that he would have testified absent counsel's promise, or what he would have testified to.[4]

Beal did allege in his motion that when counsel made his opening statement to the jury, he did not expect that Beal would testify. (23:5). Had the court conducted an evidentiary hearing, Beal could have presented testimony from trial counsel that would have established this point. But by alleging this in his motion, Beal set forth sufficient facts to obtain a hearing on his claim of ineffective assistance of counsel.

B. Counsel was deficient.

Except for Beal and the complainant (Henderson), there were no witnesses to the altercation that occurred on March 9, 2013. Therefore, what started and ended the altercation, and what happened during it could only come from the testimony of the two principles—Henderson and Beal.

During the State's opening statement, the prosecutor offered the jury the State's version of what occurred. (35:12-15). This version painted the picture of an unprovoked attack on Henderson by Beal.

[4] Beal's postconviction motion is attached as Appendix B.

Beal's attorney could have postponed making an opening statement until the State's case had concluded. *See State v. Moeck*, 2005 WI 57, ¶ 67, 280 Wis. 2d 277, 695 N.W.2d 783. Or he could have told the jury that Beal might or might not testify, and that he was under no obligation to do so.

However, Beal's attorney did neither. Instead, without qualification, he repeatedly told the jury that his client would take the witness stand and testify to a different version of events than offered by the State. His description of Beal's expected testimony was detailed, as he told the jury:

> *It will be Mr. Beal's testimony,* there was a knife but it was Miss Henderson who had the knife not he. And Miss Henderson, when Mr. Beal puts his arm around her, was upset—angry, pulled the knife and the altercation occurred in the alley between 26th and 27th Street.
>
> And that during the course of that altercation, Miss Henderson had a knife. The parties struggled. Mr. Beal attempted to keep Mr. Beal [sic--Miss Henderson] from stabbing him with a knife. The parties fell to the ground. They struggled on the ground. And during the course of that altercation, Miss Henderson struck Mr. Beal. Mr. Beal struck Miss Henderson. They struggled over the knife. And apparently, during the course of the altercation, Miss Henderson was cut—cut or stabbed or injured by the knife; that Mr. Beal had his hand bit or if not bit, aberrated by Miss Henderson's mouth. *He will testify* that as he was being struck, he struck Miss Henderson. Struck her in the mouth. *Mr. Beal will testify* that this altercation came out of nowhere. He wasn't anticipating this. And there was no discussion about the police being called or the police being seen nearby.

(35:16-17) (emphasis added) (Attached as Appendix D).

Concluding his opening statement, Atty. Rosenthal repeated that Beal would testify, telling the jury that "You'll hear the testimony of both parties." (35:17).

Despite counsel's promise that Beal would testify, he did not. The defense rested without calling a single witness. (36:111).

Standing alone, this would not necessarily mean that trial counsel was ineffective, or that any of Beal's rights were violated. After all, a defendant might tell his attorney that he definitely will testify, but then later change his mind.

But that is not what happened here. In his postconviction motion, Beal alleged that his trial attorney told postconviction counsel that he "never intended on having Mr. Beal testify" because he believed that Beal made a "poor witness." (23:5). The motion also alleged that "nothing unforeseeable occurred during trial that would justify counsel's change in tactics." (23:9).

The problem in this case is not that Beal failed to testify. Instead, the problem is that trial counsel was ineffective when he promised the jury that Beal would testify—even though he believed that Beal would *not* testify. Since Beal did not testify, the jury was left to ponder why he did not, and as stated by numerous courts, it is likely that this left the jury with a negative view of both Beal and his attorney.

There are few Wisconsin cases that address the dangers of counsel wrongly telling the jury during opening that the defendant will testify. However, the Wisconsin Supreme Court has recognized that an attorney's opening statement can be problematic, and can diminish the credibility

of the party who made the unfulfilled promise. In *Moeck*, 2005 WI 57 at ¶¶ 46-49, the defendant's counsel told the jury what he expected Moeck to testify about during trial, but then Moeck did not testify. The circuit court granted the State's motion for a mistrial on the theory that Moeck had, in effect, been allowed to testify without being subject to cross-examination. *Id.* at ¶¶ 53-60. The Court held that a curative instruction would have been sufficient to avoid prejudice to the State's case, based largely on its belief that "any prejudice to the State by defense counsel's opening statement would be outweighed by defense counsel's loss of credibility with the jury for his unsubstantiated opening statement." *Id.* at ¶ 78.

The dangers of breaking a promise to the jury that the defense will introduce particular evidence has been examined more extensively by courts from other jurisdictions. For example, in *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993), the defendant's attorney promised the jury an alibi defense in his opening statement, but then did not deliver on that promise. The Third Circuit stated that:

> The rationale for holding such a failure to produce promised evidence ineffective is that when counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised.

Id. at 166-67.

Similarly, in *Saesee v. McDonald*, 725 F.3d 1045, 1049-50 (9th Cir. 2013), the 9th Circuit explained:

> A juror's impression is fragile. It is shaped by his confidence in counsel's integrity. When counsel promises a witness will testify, the juror expects to hear

> the testimony. If the promised witness never takes the stand, the juror is left to wonder why. The juror will naturally speculate why the witness backed out, and whether the absence of that witness leaves a gaping hole in the defense theory. Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion through negative inferences. In addition to doubting the defense theory, the juror may also doubt the credibility of counsel. By failing to present promised testimony, counsel has broken "a pact between counsel and jury," in which the juror promises to keep an open mind in return for the counsel's submission of proof. When counsel breaks that pact, he breaks also the jury's trust in the client. Thus, in some cases—particularly cases where the promised witness was key to the defense theory of the case and where the witness's absence goes unexplained—a counsel's broken promise to produce the witness may result in prejudice to the defendant.

Id. at 1049-50 (internal citations omitted);

The dangers may be even more pronounced when defense counsel promises the jury that his client will testify and give his version of the alleged crime. For example, in *Ouber v. Guarino*, 293 F.3d 19, 22 (1st Cir. 2002), defense counsel promised the jury during opening statements that Ouber would testify as to her version of an alleged drug buy. However, the defense rested without calling a witness. *Id.* at 23. The First Circuit stated that

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.

Id. at 28. *See also United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir. 2003) ("The damage can be particularly acute when it is the defendant himself whose testimony fails to materialize.").

Naturally, there are times when counsel is certain that the defendant will testify, but the defendant then changes his mind and decides to not testify. In such situations, counsel cannot be faulted for simply following the directives of the defendant. *See State v. Krancki*, 2014 WI App 80, ___ Wis. 2d ___, ___ N.W.2d ___ (petition for review pending).[5]

But that is not what happened in Beal's case. As stated in the postconviction motion, "nothing unforeseeable occurred during trial that would justify counsel's change in tactics." (23:5).

When counsel is unsure whether a defendant will testify, there is simply no reason to take the risk of telling the jury otherwise. As the court in *Ouber* explained:

> The Commonwealth argues that a defendant's decision about whether to invoke the right to remain silent is a strategic choice, requiring a balancing of risks and

[5] The defendant in *Krancki* was charged with operating a vehicle while intoxicated. He told his attorney before trial that another man named "Jason" had given him a ride home from a bar, but that "Jason" "jumped out of the car" when he saw a police officer waiting at Krancki's residence. *Id.* 2014 WI App. 80 at ¶ 7. During his opening statement, Krancki's attorney told that jury that Krancki would testify and tell the jury that it was "Jason," not he, who had driven the car. *Id.* at ¶ 8. The Court of Appeals found that trial counsel was not ineffective in telling the jury that Krancki would testify because, although Krancki had initially "insisted" upon testifying, he then changed his mind and decided to not testify. *Id.* The court held that Krancki's attorney could not be faulted because he was "largely following Krancki's directives." *Id.* at ¶ 10.

> benefits. Under ordinary circumstances, that is true. It is easy to imagine that, on the eve of trial, a thoughtful lawyer may remain unsure as to whether to call the defendant as a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection. Had the petitioner's counsel temporized—he was under no obligation to make an opening statement at all, much less to open before the prosecution presented its case, and, even if he chose to open, he most assuredly did not have to commit to calling his client as a witness—this would be a different case.

Ouber, 293 F.3d at 23.

In Beal's case, counsel had no reason to promise that Beal would testify. During trial, counsel told the court that he did not file a witness list because "it was only my intent to *possibly* have Mr. Beal testify." (36:103) (emphasis added). Reasonable counsel would not tender such promises to the jury if there was only a possibility that Beal would testify.

But even more reason was provided in Beal's postconviction motion, which proffered the additional information that counsel expected that Beal would *not* testify. Judge Grady denied the postconviction motion without conducting an evidentiary hearing. (27). However, in the postconviction motion, Beal stated:

> Trial counsel told undersigned counsel that he did not remember that he had made an unequivocal promise to the jury. Indeed, trial counsel said that he never intended on having Mr. Beal testify. Trial counsel concluded well before trial that Mr. Beal would make a poor witness, because Mr. Beal insisted on testifying about irrelevant and odd details.

(23:5).

Since Judge Grady denied the postconviction motion without an evidentiary hearing, Beal did not have an opportunity to elicit trial counsel's testimony on this issue, but the motion's offer of proof is significant. Obviously, if counsel knew that Beal was not going to testify, as indicated by the above statement, then there can be no possible valid strategic reason for telling the jury that Beal would testify as to his account of what happened. Or, if counsel believed that Beal made a poor witness, this is something that the trial attorney should have known well before trial, and should have alerted him to not promise the jury that he would testify. *Cf. Hampton*, 347 F.3d at 258 (counsel should have known before trial that Hampton would make a "weak witness," and therefore telling the jury that he would testify constituted deficient performance).

Accordingly, trial counsel's performance was deficient in promising the jury that Beal would testify.

C. Beal was prejudiced by his attorney's deficient performance.

The circuit court ruled that even if counsel's performance was deficient, Beal was not prejudiced. (27:4). The court wrote in its decision:

> The court finds the defendant's case was not prejudiced. Because the defendant does not claim he would have testified to a, b, c, and d, he cannot show that there is a reasonable probability the outcome of the trial would have been any different because he is not claiming that his own testimony would have made a difference. As the State points out, the jurors were told that the defendant had an absolute right not to testify, and counsel offered an explanation as to why he did not testify. It is speculative at best to surmise what, if any,

> weight the jurors placed on the fact that he did not testify, but that can happen in any trial. In this respect, the claim is conclusory. It simply cannot be shown that there would have been a reasonable probability of a different result had counsel not told the jurors they would hear the defendant's version. The jurors were required to base their findings on the evidence presented, were instructed to do so, and were presumed to have done so. The evidence pertaining to the battery was presented by the State's witnesses, and the jury heard about the victim's swollen eyes, the blood on her face and clothing, the metal in her head, the puncture wounds to the back of her head, and the fact that defendant did this to her. Consequently, even if counsel's "promise to the jurors constituted deficient performance, the defendant's case was not prejudiced.

(27:3-4).

There are at least two problems with the court's analysis beyond the fact that it incorrectly focuses on what would have happened if Beal had testified, rather than on what would have happened if counsel had not unwisely told the jury that he would have testified. First, it does not adequately account for highly prejudicial nature of counsel making an unfulfilled promise to the jury. Second, it does not account for the fact that the State's case was based on relatively thin evidence. Each of these is addressed below.

1. The prejudicial nature of the broken promise that Beal would testify.

In finding that Beal was not prejudiced by counsel's performance, the circuit court's analysis was misguided. The court apparently believed that Beal had to show that the result would have been different had he gone ahead and testified at trial. This misconstrues Beal's motion. He does not claim that counsel was ineffective in failing to present Beal's

testimony. That is Beal's right alone, and the court conducted a colloquy with Beal to ensure that Beal knowingly, intelligently, and voluntarily waived his right to testify. (36:101-02).

Instead, this court must look at the prejudicial nature of the broken promise that Beal would testify. As explained above, there are common-sense reasons why an attorney should not promise to present evidence if that promise cannot be kept. As stated in *Saesee*, juror's impressions are "fragile," are "shaped" by their confidence in counsel's integrity. Once the jury's trust is broken, jurors will doubt the credibility of counsel and doubt the defense theory. *Saesee* 725 F.3d at 1049-50.

Because of the damaging nature of such statements, courts have found that that the prejudice prong is satisfied, and granted new trials. For example, in *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), defense counsel told the jury during opening that he would call a psychiatrist and a psychologist who would show that the defendant was "like a robot programmed on destruction" when he murdered his wife. *Id.* at 17. At trial, the defense did not call the doctors as witnesses, and the defendant was convicted of first degree murder. *Id.* In assessing the damage, the First Circuit stated that "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id.* at 19. The court noted that the opening statement was only the day before, and concluded that "the first thing that the ultimately disappointed jurors would believe, in the absence of some other explanation, would be that the doctors were unwilling, viz., unable to live up to their billing. This they would not forget." *Id.* Accordingly, the court concluded that the promise to produce such powerful evidence, and then not produce it "could not be disregarded as harmless," and was "prejudicial as a matter of law." *Id.*

In *Hampton*, 347 F.3d at 257, the Seventh Circuit found that Hampton was prejudiced by his attorney telling the jury during his opening that he would testify, and that his testimony would be that although he was present at the crime scene, he was not involved with the crime charged. The court held that "when the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, and then cited *Anderson's* holding that "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id.* The *Hampton* court explained that, in combination with other factors, counsel's broken promise was prejudicial because after the promise, Hampton's absence on the witness stand "may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place, and that the inculpatory testimony of the prosecution's witnesses was essentially correct." *Hampton*, 347 F.3d at 258.

Beal's attorney's broken promise had a similar prejudicial effect. First, Beal was not a minor witness—he was the *only* witness to the incident besides Henderson, and the jurors would surely make note of counsel's promise (and then failure) to present his testimony at trial. Second, trial counsel described Beal's anticipated testimony in detail, dramatically recounting an alternate version of the incident. Third, trial counsel's promise encompassed virtually his entire opening statement, making Beal's testimony the centerpiece of his defense. Fourth, nothing occurred during trial that rendered the promise irrelevant—the jury had every reason to continue to believe, through the course of trial, that Beal was going to directly rebut Henderson's testimony. Fifth, the jury delivered its verdict on the day after the opening statement, so the jury was unlikely to have forgotten trial counsel's promise. Finally, the theory of defense that

Henderson had started the physical altercation, that it was she who produced the knife, and that Beal was acting in self-defense—was not presented to the jury as evidence. *Cf. Krancki*, 2014 WI App. 80 at ¶ 12 (court finding no prejudice because "the jury knew what Krancki's defense was, with or without his testimony and with or without his trial counsel's reference to Krancki's potential testimony").

The fact that, in his closing argument, Beal's attorney attempted to explain why Beal did not testify does not remedy the situation. In his closing argument, counsel explained:

> I told you in opening that Mr. Beal *may* testify and what he *might* testify to. And then came trial. The State finished its case; Mr. Beal didn't testify. You may be wondering what he would have told you. But, remember, he has no obligation to testify. He has no burden to take the stand and explain what occurred and defend himself because the presumption of innocence rests with him. The burden of proof rests with the State. State finished its case. The assessment made by defense was the burden of proof wasn't met, that, therefore, State hasn't proved its case. Mr. Beal has nothing he needs to testify to, explain to you.

(37:20-21) (emphases added) (Attached as App. E).

This statement cannot have had its desired effect. Significantly, it misrepresented what counsel told the jury in opening. Counsel did not tell the jury that Beal *may* testify, or what he *might* testify to. He told the jury in no uncertain terms that he *would* testify. (35:16-17). Given its inaccuracy, counsel's statement could only further persuade the jury that the defense cannot be trusted.

Moreover, counsel's error gave the State the opportunity to remind the jury of trial counsel's opening statement promise. The prosecutor told the jury that "defense

counsel during his opening remarks alluded to the defendant's versions of events." (37:36). The prosecutor appropriately advised the jurors that they could not consider the defense version of events set forth in the opening, but at the same time, the prosecutor's statement had the effect of reminding the jury of counsel's earlier promise.

In short, trial counsel's broken promise caused grave harm to Beal. After anticipating throughout trial that they would hear a contradictory version of events, and then not receiving that evidence, the jurors were left to conclude that either no alternate version of events existed and that Henderson's version must be true, or that Beal's attorney was engaging in legal chicanery. This left Beal in an untenable position that was completely avoidable.

2. The weakness of the State's case against Beal.

The evidence against Beal was far from overwhelming. While there was no doubt that Beal had an altercation with Henderson (37:27), and no doubt that Henderson (as well as Beal) sustained injuries, the details as to what happened during the altercation were less clear.

Since no one else testified to witnessing the altercation, the State's case against Beal was made largely through the testimony of Henderson. Her version of what occurred was challenged during cross examination, and Beal's attorney was able to argue during closing that her account was "not logical, it's not rational, it's not believable that this is what happened." (37:34). In his closing argument, Beal's attorney highlighted the following problems with Henderson's testimony:

- Henderson claimed that she feared for her life, but noted that she made no effort to call 911. (37:23).

- Although claiming that she was shocked and terrified, and earlier that day allegedly heard Beal threaten to "kill that bitch," Henderson kept returning to the residence with Beal, even after she was safely away from him, first at a liquor store and, later, at the women's shelter. (37:22-23).

- Henderson inexplicably invited Beal to accompany her to the women's shelter. (37:25).

- Henderson testified that she did not like walking through alleyways, yet she walked through one on her return to the residence from the shelter and with Beal shortly before the alleged assault. (37:27).

- Henderson left the residence to buy cigarettes and return to the shelter, and then invited Beal to accompany her. (37:26).

- The injuries did not comport with the conduct described by Henderson. (37:28-29). Henderson said she was stabbed by a knife that penetrated her head all the way to the "butt of the knife." (36:35-36). Yet Dr. Swart testified that the deeper of the two wounds was between one-half and one centimeter deep. (36:77-78).

- Henderson testified that her teeth came out when Beal pulled his hand out of her mouth (36:28), yet Dr. Swart testified that when he first examined her, the teeth were in place (36:81) (37:30).

- Trial counsel questioned Henderson's testimony that a man and a boy saw at least some of the attack, and saw

her injuries, but they "didn't involve themselves." (37:31). Counsel posed to the jury this question: "Why didn't they stick around to say anything to the officers about what the saw?" (37:31). Counsel also pointed out that the officers did not see anybody at or near the scene, even though police officers were very near the scene. (37:32).

Besides those raised in the defense's closing argument, the State's case had other obvious weaknesses, including the following:

- Officer Holzem testified that when he first interviewed Henderson, she told him that Beal had used only a single knife in the alleged attack—a Swiss-army style knife. (35:49-50). However, Off. Holzem testified that at a subsequent interview, Henderson said for the first time that Beal used a second knife during the alleged assault, a "long serrated kitchen knife." (35:50).

- Henderson had been convicted of a crime previously. (36:37-38).

- The State did not introduce into evidence any weapons that may have been used.

- The State did not introduce any incriminating statements made by Beal. Nor was there any evidence that Beal attempted to hide or flee from the officers. (36:87-88).

To sustain the conviction, the State had the burden of proving beyond a reasonable doubt that Beal committed an aggravated battery against Henderson, while using a dangerous weapon. The evidence against Beal was far from

overwhelming. Therefore, there is a reasonable probability that the result of the trial would have been different but for counsel's deficient performance.

CONCLUSION

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

Respectfully submitted this 4th day of September, 2014.

_____

John A. Pray
State bar No. 01019121

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 5,543 words.

_____

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.

_____

John A. Pray

CERTIFICATION AS TO APPENDICES

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 so reproduced to preserve.

_____

John A. Pray

TABLE OF APPENDICES