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.

REPLY BRIEF 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..... ii

Argument.....1

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.....1

A. The postconviction motion alleged sufficient facts to establish that Beal's attorney was deficient.....1

B. Beal was prejudiced by his attorney's deficient performance.....4

Conclusion.....7

Table of Authorities

Anderson v. Butler,
858 F.2d 16 (1st Cir. 1988) 4

Francis v. Franklin,
471 U.S. 307 (1985) 4

Ouber v. Guarino
293 F.3d 19 (1st Cir. 2002) 4

State v. Penigar,
139 Wis. 2d 589, 408 N.W.l2d 28 (1987) 4

State v. Krancki,
2014 WI App 80, 355 Wis. 2d 503, 851 N.W.2d 824.....1

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 to establish that Beal's attorney was deficient.

In his postconviction motion and on appeal, Beal claims that his trial attorney was ineffective in promising to the jury that Beal would testify, and then breaking that promise even though there was no change in circumstances.

The State does not address any of the cases cited by Beal that address the dangers of broken promises to the jury. Instead, it argues that Beal's postconviction motion failed to allege facts sufficient to show that his attorney performed deficiently. The State first cites *State v. Krancki*, 2014 WI App 80, ¶¶10-11, 355 Wis. 2d 503, 851 N.W.2d 824 for the proposition that an attorney does not perform deficiently by telling the jury that his client is going to testify when, at the time, the defendant has told counsel that he wants to testify." (State's brief at 4).

Krancki does not address the issue that is presented in Beal's case. In *Krancki*, the trial attorney told the jury that his client would testify, but during trial, the client changed his mind and decided to not testify. *Id.*, at ¶8. An attorney cannot be faulted in such a situation, assuming he had good reason to believe his client would actually testify when he delivered his opening statement promise.

But that is not what occurred in Beal's case. Beal's postconviction motion offered evidence that trial counsel "never intended on having Mr. Beal testify." (23:5). The postconviction motion offered a reason for that—counsel believed that Beal would make a "poor witness." (23:5). The motion then alleged that "nothing unforeseeable occurred during trial that would justify counsel's change in tactics." (23:5).

The State cannot explain how an attorney can be effective when he tells the jury that his client will testify, when he actually believes that his client will not testify. Instead, the State speculates that Beal must have told his attorney that he would testify, thereby letting the attorney off the hook. In support, the State cites to the postconviction motion's statement that "Beal insisted on testifying." (23:5). However, the State omits the rest of that sentence, which adds the proper context. The full statement from the motion is:

> 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) (emphasis added). Contrary to the State's argument, the above sentence does not indicate that Beal insisted on testifying at trial. Nor does it indicate that this was Beal's position at the time his attorney delivered his opening statement to the jury. Rather, at best it merely indicates that at some undefined time, if Beal were to testify, he wanted to testify to details that—in counsel's opinion—were "irrelevant and odd." These are the type of details that would have come out at a postconviction hearing, which would have necessarily included the testimony of trial counsel and Beal. Since the circuit court denied the motion without a hearing, it foreclosed that possibility. But Beal certainly set forth sufficient facts in his motion to warrant a hearing that would

have further developed those facts.

The State also speculates that "Beal may have changed his mind about wanting to testify after the state rested its case" when his attorney told the court that "at this point his election is to stand silent." (36:99-100) (State's brief at 6). The State makes too much of the words "at this point." Those words do not mean that Beal had recently changed his mind about testifying. More likely, "at this point" was merely used to signify the present situation without referring to something in the past, such as a stating, "at this point, the defense rests." Moreover, had Beal actually changed his mind about testifying, it is likely that counsel would have made a record about that event.

The State also argues that it "seems so obvious that counsel would have had no reason to tell the jury repeatedly and in such detail that Beal would testify unless Beal told his attorney that he wanted to testify." (State's brief at 6). Of course, that is the point of conducting a hearing. If the evidence at a hearing reveals that counsel justifiably expected Beal to testify, then he cannot be faulted for his opening statement. But Beal's postconviction motion gave sufficient facts which, if true, can only point to counsel's deficiency:

- That counsel never intended on having Beal testify. (23:5)
- That nothing occurred during trial that would justify counsel's change in tactics. (23:5).

Only sworn testimony can establish those facts, but they were sufficient as offered in the postconviction motion. Therefore, Beal's motion alleged sufficient facts showing that his attorney acted deficiently.

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

The State argues that Beal was not prejudiced by his decision not to testify after his attorney said he would. In support, the State first points to the fact that the jury was instructed that the "defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." (37:12) (State's brief at 7).

It first must be noted that jurors could faithfully follow this instruction, and yet be unfairly prejudiced against Beal. Such jurors would not hold the *decision* to not testify against Beal, but that is different from holding the *broken promise*, against the defense.

Moreover, jury instructions are not always sufficient to cure the prejudicial nature of a broken promise. *See Ouber v. Guarino*, 203 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 the petitioner's right to remain silent, but in 'the totality of the opening and the failure to follow through.'") (*citing Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988)). Indeed, if jurors always followed such instructions, there would never be reversible error when jurors heard inadmissible prejudicial information, such as inadmissible other acts evidence, inadmissible information about a defendant's criminal history, or incriminating statements of a defendant that had been ruled inadmissible. *See, e.g. State v. Penigar*, 139 Wis. 2d 569, 581, 408 N.W. 2d 28 (1987) (jury instructions to disregard admissible evidence insufficient to protect defendant's right to a fair trial). *Francis v. Franklin*, 471 U.S. 307 n.9 (1985) ("cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting

instruction will not adequately protect a defendant's constitutional rights.").

The State also points to the prosecutor's comments during closing argument that Beal's decision not to testify could not be used as evidence of guilt. (37:36) (State's brief at 7-8). While the prosecutor's statement was correct, it focused on the decision to not testify rather than on counsel's broken promise, and served to remind the jury of that earlier broken promise.

The State then refers to the *voir dire*, where Beal's attorney told the prospective jurors that Beal may or may not testify, and ascertained that none of the panel indicated that they would hold it against Beal if he did not testify. (34:10, 44; 37:20). (State's brief at 8). The problem with this argument is that during *voir dire*, counsel did not pose the question of what the juror would think if he promised that Beal would testify, and then he did not.

The State then argues that Beal was not prejudiced because during the closing argument, Beal's attorney gave a "plausible explanation" for his decision not to take the stand. (State's brief at 8). The "plausible explanation" was that the defense concluded that the State "had not met its burden of proof," and that "there was nothing Beal needed to say to rebut the State's case." Besides the fact that this is hardly a convincing "explanation," the State neglects to point out that before offering his "explanation," counsel incorrectly told the jury "I told you in opening that Mr. Beal may testify and what he might testify to." This was a misstatement. Counsel did not tell the jury that Beal *may* testify; he told the jury that he *would* testify ("You'll hear the testimony of both parties"). (35:16-17). Thus, given its inaccuracy, counsel's statement could only further persuade the jury that the defense cannot be trusted.

Finally, the State attempts to minimize the harm by arguing that Beal's attorney told them what Beal's testimony would be, thereby alerting the jury "that Beal disagreed with his girlfriend's claim that he attacked her." (37:12) (State's brief at 9). Besides the fact that this argument contradicts the State's earlier point that jurors follow instructions, it also is dubious. The fact that counsel promised specific testimony regarding Beal's version of events, and then failed to put on any evidence supporting that version is more likely to work against Beal than for him. The reason for this is simply that what could have been a *single* promise (Beal will testify) became *multiple* promises (Beal will testify that Henderson had the knife, that Henderson pulled the knife, that Henderson stabbed him, that he struck Henderson, that the altercation came out of nowhere, or that police were nearby). (35:16-17). Failure to adduce any evidence on any of these points further prejudiced Beal.

The State does not dispute that the case against Beal was made almost entirely on the testimony of Henderson. Further, the State admits that "there were problems with the victim's credibility." (State's brief at 9, n.2). However, the State tries to salvage Henderson's testimony by asserting that it was not incredible as a matter of law. (State's brief at 9). Whether Henderson's testimony was incredible as a matter of law, it is evident that portions were implausible in that it contrasted with the physical evidence at trial. For example, Henderson testified that she was stabbed by a knife that penetrated her head to the butt of the knife, and testified that her teeth had come out at the scene, contrary to Dr. Swart's testimony. (36:35-36, 77; 36:28, 81; 37:30). Henderson's testimony was also full of inconsistencies, especially regarding her interactions with Beal on the day of the incident and why she would continue to intentionally make contact with him after he supposedly threatened her. (*See*

Defendant's brief at 19-22 for a more complete discussion of these points).

Consequently, 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 21st day of October, 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 1,805 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