STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP002968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAFAEL D. HONIG,

Defendant-Appellant.

On a Notice of Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief, Entered
in the Milwaukee County Circuit Court,
the Honorable Ellen R. Brostrom, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTE CITED

ARGUMENT

Mr. Honig is Entitled to a New Trial Because He was Deprived of his Constitutional Right to Effective Assistance of Counsel.

Mr. Honig was accused of sexually assaulting his young granddaughters, five-year-old Y.H. and three-year-old Y.C. The theory of defense was that Mr. Honig's son-in-law, Raymond, came up with the allegations and told the girls what to say.

Mr. Honig's trial counsel was ineffective in three regards: (1) counsel failed to call George Colon as a witness at trial; (2) counsel allowed the State to admit prejudicial other acts evidence; and (3), counsel failed to present Y.C.'s prior inconsistent statement to police.

This was not an open and shut case for the State. Y.H. and Y.C. were less than ideal witnesses, and their stories were the only evidence against Mr. Honig. As the State acknowledged, both girls were reticent on the stand. (State's response at 23). Moreover, Y.H. made bizarre statements in her recorded forensic interview, which was played to the jury. (brief-in-chief at 5). Y.H. told the interviewer that when she lived in her old house, "bugs and types of animals started coming through the walls." In addition, Y.H. told the interviewer that on one occasion, she was standing with her mom in a hotel room (at the hotel Mr. Honig worked at) when her grandpa "snatched" her. He took her mom's fingers off one by one, and took her away into a room where he assaulted her. Y.H. said her mom started screaming her name and trying to get into the room, but the door was locked. Her mom scratched at the door until her fingernails fell off. Y.H. was

peculiarly specific about this incident, stating that the incident happened "seven weeks ago" in hotel room number "143."

However, Y.H.'s mother, Ziomara, said there was no truth to Y.H.'s story about the hotel room. (52:57). Ziomara explained that while Mr. Honig worked at the hotel, he never resided there. Y.H. had never even been past the hotel lobby. She unequivocally denied ever walking in on her father doing anything inappropriate. Notably, Ziomara testified that Y.H. had been having nightmares. (52:58).

Y.C. was also a problematic witness. She was only three years old when the assaults allegedly occurred and four at the time of trial. (State's response at 2, fn. 1). The State was precluded from showing the jury her recorded forensic interview in its case-in-chief because Y.C. had not been able to promise to tell the truth. (49:13-14). Nor did she take an oath or promise to tell the truth at trial. More importantly, Y.C. did not appear to understand the difference between truth and falsehood. The prosecutor asked her if her mom wanted her to always tell the truth, and she shook her head no. (52:78). The prosecutor tried again but rephrased, this time asking if her mom wants her to lie. Y.C. again said no. The prosecutor asked if what she said about her grandpa was a lie. She said yes. The prosecutor tried again in a leading format, "so did your grandpa do something to that part of you, did he?" And Y.C. said yes. (52:79).

A. Trial counsel was ineffective for failing to call George Colon as a defense witness.

George Colon would have testified that the girls' uncle, Raymond (Mr. Honig's son-in-law), bragged to him that he knew how to "get rid" of people he disliked, and one way was to coach children through an accusation of child molestation. (56:20; App. 122). In attempting to prove that

trial counsel's failure to call George as a witness was not prejudicial, the State argues that the theory of defense was *not* that Y.H. and Y.C. were coached by Raymond. (State's response at 6-9). This attempt fails. Defense counsel first advanced the theory of defense during opening statements. He stated:

> And again back to Raymond Cruz, a.k.a. Adrian Gonzalez. A witness that has a clear bias I believe you will see towards my client. As I said, he has two children with my client's other daughter, Judith, and he's been living with Ziomara and Rafael on Rogers Street. He has a criminal record. He's got some bad feelings toward Rafael. And not obviously now, but this was even before any kind of disclosure of any sort from [Y.H.]. As you heard, he was alone. He was the one that [Y.H.] came out, was sad, he – you know, she disclosed to him…

(51:27).

Trial counsel emphasized that Raymond was biased against Mr. Honig, and alone with Y.H. when the alleged disclosure occurred. Why else would those facts be relevant except to suggest that Raymond told Y.H. what to say?

Trial counsel also advanced the theory of defense through his questioning of the witnesses. On cross-examination, counsel asked Raymond whether he ever told Y.H. or Y.C. to say anything bad about their grandpa. Raymond denied it. (52:119). However, he admitted to sending threatening text messages to Mr. Honig regarding a dispute over a truck just weeks before Y.H.'s disclosure. However, he volunteered that, "when [Y.H.] told me what happened, I already had my truck for about three weeks." (52:119). This line of questioning leaves no doubt that defense counsel was suggesting that Raymond told the girls what to say.

Counsel also: asked Ziomara if Raymond had any "bad blood" with Mr. Honig (52:59); asked Y.H. whether Raymond ever told her to lie or to say that her grandpa did bad things to her (52:38-39); and (c) asked Y.C. whether Raymond ever told her to say anything about her grandpa. (52:81). Finally, counsel questioned Mr. Honig in detail about his contentious relationship with Raymond. (53:13-18). The theory of defense was clear. The fact that defense counsel changed course during closing arguments doesn't change this; rather, it heightens the prejudice against Mr. Honig by showing that, having failed to produce George Colon as a witness, defense counsel abandoned the theory of defense and left the jury with *no* defense theory whatsoever.

The State acknowledges that George Colon's testimony would have been admissible as a prior inconsistent statement if trial counsel had first asked Raymond about the alleged conversation (and had Raymond denied it). (State's brief at 14). However, the State faults Mr. Honig for not separately alleging that counsel was ineffective for not asking the predicate question. A separate claim was not necessary. Mr. Honig alleged that trial counsel was ineffective for not putting George on the stand. Obviously, he could not have put George on the stand without first securing his admissibility.

The State disputes whether George's testimony would have been admissible as a specific instance of untruthful conduct under Wis. Stat. § 906.08(2). As far as undersigned counsel can tell, the State's argument is that the alleged conversation did not fit the "bias" exception for extrinsic evidence. (State's response at 14). The State contends that Raymond's talk about framing someone for child molestation "says nothing at all about Cruz's feelings toward Honig" in particular. The State ignores George's testimony at the ***Machner*** hearing that during the very same conversation,

Raymond was badmouthing Mr. Honig, telling George he "didn't know Ralph like [he] should." (56:21; App. 123).

During postconviction proceedings, the State agreed with Mr. Honig that it seemed like trial counsel "forgot" to ask Raymond about his conversation with George. (56:39; App. 141). It is only now, on appeal, that the State argues that trial counsel had a strategic reason for failing to call George as a witness, namely, that counsel thought George might be uncooperative.

At the ***Machner*** hearing, trial counsel recalled that he had spoken with George on multiple occasions and George agreed to testify on Mr. Honig's behalf. Even though counsel did not subpoena him, George came to court for trial. (56:8; App. 110). On the first day of trial, defense counsel asked the court for permission to call George as a witness. If trial counsel had already made a strategic decision that George was uncooperative, why would he have moved the court for permission to call him as a witness? Counsel's post hoc speculation that he might have viewed George as an uncooperative witness is unpersuasive.

George's testimony was critical to the theory of defense. The jury heard about Raymond's bad blood toward Mr. Honig and also knew that Raymond was alone with Y.H. when she allegedly disclosed the sexual abuse. George was the missing piece to tie it all together. There is a reasonable probability of a different outcome had he counsel called George as a witness at trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 694, 687 (1984).

B. Trial counsel was ineffective for failing to object to other acts evidence that Mr. Honig sexually abused other children.

On this claim, the State concedes deficient performance. (State's brief at 17). However, the State argues that the circuit court was correct in finding that other acts evidence during Y.H.'s police interview was "a very brief reference that… was not developed in any way." The State incorrectly argues that Mr. Honig conceded this ruling by not refuting the court's characterization of the evidence. (State's response at 18). In fact, Mr. Honig did dispute the circuit court's characterization by asserting that there were *repeated* references to other acts evidence (not a single brief reference). (brief-in-chief at 14-15). Y.H. told the interviewer that Mr. Honig "always" touches little girls in the privates. When asked which girls, she said "like my cousin, and my um my other cousin." Later in the interview, she said that she saw Mr. Honig put his mouth on her little cousin's private. *(Id.*)

During postconviction proceedings, the circuit court ruled that it would have likely granted a motion in limine. (56:47-48; App. 149-50). This concession belies the State's claim that these references were harmless. Why would the court have granted a motion in limine if the references were innocuous? The Wisconsin Supreme Court has explained why other-acts evidence is so dangerous:

> [Other acts] evidence runs the risk of unfair prejudice when it has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise causes a jury to base its decision on something other than the established propositions in the case."

State v. Muckerheide, 2007 WI 5, 298 Wis. 2d 553, 725 N.W.2d 930.

It is impossible to know exactly how and to what extent the jury considered the improper other acts evidence in this case. However, the prejudice prong in an ineffective assistance of counsel claim does not require that level of certainty. Instead, "the focus is on the reliability of the proceedings" and the defendant is not required to show that counsel's deficient conduct more likely than not altered the outcome of the trial. ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 711.

But for counsel's deficient performance in failing to file a motion in limine, there is a reasonable probability of a different outcome. *See* ***Strickland***, 466 U.S. at 694.

C. Trial counsel was ineffective for failing to introduce Y.C.'s prior inconsistent statement to police.

The State agrees that it is a question of law whether the Y.C.'s video-taped forensic interview qualified as a prior inconsistent statement. (State's response at 21). Thus, if this Court agrees that it *was* inconsistent, then trial counsel's explanation for not playing it (that it was *not* inconsistent (56:14; App. 116)) fails.

The videotaped interview and Y.C.'s in-court testimony were inconsistent. In the video, when given an open-ended opportunity to say what happened to her, Y.C. continuously referred to what her sister told her. She did not say anything about her vagina. She did not say anything about her grandpa hurting her. She demonstrated no unwillingness to speak with the interviewer (brief-in-chief at 18-21). But at trial she was very hesitant and the prosecutor resorted to

using leading questions to prompt responses. It was only when the prosecutor engaged in leading questions at trial that Y.C. indicated that her grandpa touched her vagina and it hurt. (52:73-74).

Counsel's failure to present and make use of these inconsistencies undermines confidence in the outcome of the trial. *See* ***Strickland***, 466 U.S. at 694.

D. Cumulative prejudice.

The theory of defense was that Raymond resented his father-in-law and used his nieces as pawns to get Mr. Honig arrested and locked up. Trial counsel's failure to call George Colon left a gaping hole in this defense. The jury knew that Raymond had bad will toward Mr. Honig and was alone with Y.H. when she allegedly disclosed the abuse. But the jury was never given a reason to believe that Raymond was the type of person to set someone up for a heinous crime. If the jury had been provided a persuasive, alternative explanation for the accusations (other than their truth), the jury would have more carefully scrutinized Y.H.'s bizarre story and Y.C.'s weak trial testimony (which would have been further weakened in light of her prior inconsistent statement to police). Considering counsel's errors in the aggregate leads to the unavoidable conclusion that Mr. Honig was prejudiced. ***State v. Thiel***, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305. As such, he was deprived of his constitutional right to effective representation of counsel and is entitled to a new trial.

CONCLUSION

For the reasons asserted above and in Mr. Honig's brief-in-chief, Mr. Honig respectfully asks this Court to reverse the circuit court and remand for a new trial.

Dated this 30th day of June, 2015.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,241 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of June, 2015.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant