STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 15AP000331-CR

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

DANIEL SCOTT KLINKENBERG,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR MONROE COUNTY, THE HONORABLE DAVID J. RICE, PRESIDING

Respectfully submitted,
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ISSUE PRESENTED FOR REVIEW

1. Detective Mark Meyers identified Mr. Klinkenberg as a suspect in this retail theft based on "prior contacts" with Mr. Klinkenberg. Mr. Klinkenberg told his attorney he had never met Detective Meyers. Although trial counsel also represented Mr. Klinkenberg on the case in which that contact occurred, he conducted no independent investigation into the matter. His client's inaccurate testimony on this point resulted in the admission of prejudicial information regarding his client's experience with law enforcement. Does trial counsel's failure to independently investigate the context of Detective Meyers' identification constitute ineffective assistance of counsel?

   The trial court answered no.

2. Trial counsel did not discuss possible topics of cross-examination and did not sufficiently warn his client that his version of events might open the door to the admission of prejudicial material. Was trial counsel constitutionally ineffective for failing to do so?

   The trial court answered no.

3. Trial counsel elicited testimony from his client that he had never met Detective Meyers. Trial counsel did so even though he knew it was possible that this was inaccurate, never investigated the context of that identification, and knew that by asking the

question he would open the door to prejudicial material. Was trial counsel constitutionally ineffective for eliciting this testimony?

The trial court answered no.

4. Before the jury was given an opportunity to view the videotape of the alleged theft, testimony was presented by the State as to what they should expect to see. Officer Jenna Branigan testified that it was Mr. Klinkenberg on the tape based on what another officer had told her. Was trial counsel constitutionally ineffective for failing to object to this testimony?

   The trial court answered no.

5. Was the combined effect of trial counsel's errors sufficient to undermine confidence in the result?

   The trial court implicitly answered no.

6. Was the evidence sufficient to convict Mr. Klinkenberg beyond a reasonable doubt of misdemeanor retail theft?

7. Was the trial court "clearly wrong" to deny a defense challenge to the sufficiency of the evidence during the trial?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Klinkenberg is not requesting oral argument and the case is not eligible for publication.

STATEMENT OF THE CASE

This appeal originates from a conviction obtained after a one-day jury trial. (33:1). That trial was held in Monroe County, the Honorable J. David Rice presiding. *Id.* Mr. Klinkenberg was tried for, and found guilty of, a single count of misdemeanor retail theft contrary to WIS. STAT. § 943.50(1m)(b). (33:208). Specifically, Mr. Klinkenberg was found guilty of taking and carrying away "a laptop computer and/or video camera" held for resale. (22:2).

Mr. Klinkenberg filed a timely notice of intent to pursue postconviction relief. (27:1). Undersigned counsel was appointed. (49:1). A timely motion for postconviction relief was filed pursuant to WIS. STATS. §§ 809.30 & 974.02. (35:1). On January 27, 2015, the trial court held a postconviction hearing and, after taking testimony and hearing argument, denied the motion. (46:1). A timely notice of appeal followed. (48:1-2). Mr. Klinkenberg now challenges both the underlying conviction and the denial of his postconviction motion.

STATEMENT OF FACTS

Trial Testimony

The alleged theft occurred at the Sparta Walmart on December 24, 2012. (33:83). Ms. Kelli Magnus, a member of

store security, testified as to Walmart's internal investigation. (33:81). Ms. Magnus testified that she was unsure of when the alleged theft was discovered. (33:85). She was asked to look into the matter sometime in February of 2013. (33:85). The alleged theft was reported to law enforcement on February 6 of 2013. (33:85). Ms. Magnus did not know why there was a lapse of time between the alleged theft, its discovery, and the report to police, respectively. (33:85).

Walmart's complaint to law enforcement indicated that a "computer and a recorder, video recorder" had been taken. (33:73). At trial, however, Ms. Magnus described the loss in terms of two laptops and a JVC video camera. (33:86). Ms. Magnus testified as to the resale value of these items but gave no other identifying details. (33:92). She testified that items like those allegedly taken were "generally...spider wired or spider wrapped" in order to prevent theft. (33:87). A generic photo of a similar loss-prevention device was shown to the jury. (33:88). That photo represented how Ms. Magnus *believed* the items in question would have been secured. 33:90.

Ms. Magnus testified that loose spider wrap was found in the automotive section of the store. (33:93). The wrap had not been cut but had been "slipped off" the item or items it was ostensibly securing. (33:94). Ms. Magnus did not know when the spider wrap was discovered in the automotive section and asserted that the security device was usually only removable with an employee's assistance. (33:110; 33:116).

Ms. Magnus' report on the alleged theft was reviewed by Officer Jenna Branigan of the City of Sparta Police Department. (33:71; 33:73). As part of her investigation, Officer Branigan received surveillance footage from the Sparta

Walmart. (33:84-85). Officer Branigan described her investigation thusly: "I guess I made sure the video coincided with the statement from Kelli." (33:73).

That video was played for the jury during Ms. Magnus' testimony. (33:97). (Ms. Magnus was actually the second witness, following Officer Branigan. (33:81.)) The video as shown to the jury followed the progress of the alleged suspect from the parking lot, through the store, and then back out to the parking lot. (33:98-107). The State asserted that the video showed the subject placing various items, described as two laptops and a video camera, in his cart while in the electronics section. (33:104).

However, there is a "gap" in the video coverage before the subject is next observed. (33:91). When he is seen next, the subject is in the sporting goods section. (33:105). The cart has only propane tanks in it. (33:106). He appears to place what the State alleged was a laptop case and an "empty" box for a video camera on a counter. (33:106). The individual is ultimately seen paying for the propane tanks and exiting the store. (33:106-109). Officer Branigan testified that the "stolen" items were never recovered. (33:78).

In addition to containing "gaps" in coverage, the quality of the footage is also not "HD." (33:91; 33:104). Both Officer Branigan and Ms. Magnus testified that, in their review of the video, they never witnessed the individual in question "conceal" any items. (33:78; 33:111). However, the State asserted in closing argument that the subject had concealed two computers and a video camera within his jacket before leaving the store. (33:192).

The individual captured on film is wearing a hat and coat. (33:100). He is wearing glasses that cover part of his face. (33:78). Officer Branigan testified that she was unable to see any tattoos or noticeable scars and that she was not sure of the type of eyeglass frame the subject had. (33:78-79). Officer Branigan testified that she was not able to initially identify the subject. (33:74; 33:76). However, she ultimately made an in-court identification of Mr. Klinkenberg based on what she was told by another officer. (33:74). That officer, Detective Mark Meyers, eventually testified that he recognized the subject as Mr. Klinkenberg based on "prior contacts." (33:124). As it turned out, Detective Meyers was basing his identification on one particular contact in question, the details of which were sketched out during the State's rebuttal presentation. (33:142; 33:161-63).

The defense case consisted of a single witness, Mr. Klinkenberg, who denied committing the theft. (33:137).

Postconviction Proceedings

Following his conviction, Mr. Klinkenberg ultimately filed a postconviction motion and a supporting brief. (35:1-39; 40:1-16). In that motion and in the supporting brief, Mr. Klinkenberg attacked the effectiveness of trial counsel's representation. (35:5). A postconviction hearing was subsequently held on January 27, 2015. (50:1).

Mr. Klinkenberg presented essentially two issues. First, Mr. Klinkenberg argued that trial counsel was ineffective with respect to his preparation for, and direct-examination of, Mr. Klinkenberg. (35:7). This claim of error stemmed from trial counsel's elicitation of damaging testimony on direct-

examination. (35:7). Mr. Klinkenberg argued that testimony "opened the door" to the admission of prejudicial material and that this could have been avoided by conducting a more adequate investigation and by sufficiently preparing Mr. Klinkenberg to testify. (40:2-3).

Second, Mr. Klinkenberg argued that it was error to not object to an identification of Mr. Klinkenberg that was based on what other individuals had told the witness, Officer Branigan. (35:13). Trial counsel conceded that he should have objected to this testimony. (50:24).

After conducting an evidentiary hearing, the trial court denied the motion on both grounds. (50:75). This appeal followed.

SUMMARY OF ARGUMENT

First, Mr. Klinkenberg raises a number of challenges related to the effectiveness of trial counsel's representation:

Reasonably competent counsel should have conducted an independent investigation into the context of Detective Meyers' identification. That duty exists regardless of what Mr. Klinkenberg told counsel. If anything, Mr. Klinkenberg's statements that the contact in question never occurred actually make it *more* unreasonable not to investigate that story. Trial counsel represented Mr. Klinkenberg on the case in which the disputed contact occurred. He was in a unique position to "double-check" his client's story. He chose not to do so. This is ineffective assistance of counsel.

Reasonably competent counsel should also endeavor to more thoroughly prepare their client to testify. In this case, trial counsel's lack of investigation abetted the failure to prepare his client. In addition, he did not discuss potential topics of cross-examination and did not sufficiently inform his client of what he was well aware of: That if he insisted on denying Detective Meyers' testimony, the context of his prior contact with law enforcement would be admitted into evidence. Trial counsel knew this would be damaging to the defense case. This is ineffective assistance of counsel.

Reasonably competent counsel should also refrain from eliciting testimony that they know will open the door to the admission of prejudicial material when there is no reasonable strategic reason for doing so. In this case, trial counsel invited his client to disavow meeting Detective Meyers despite the fact that he knew this would open the door to prejudicial material and have a damaging impact on the case. This is ineffective assistance of counsel.

Trial counsel also made one other crucial error: Failing to object to the inadmissible testimony of Officer Jenna Branigan regarding her "identification" of Mr. Klinkenberg, which was really just a recitation of what another officer had told her. His failure to object prejudiced Mr. Klinkenberg and constitutes ineffective assistance of counsel.

Finally, the evidence in this case was insufficient to convict Mr. Klinkenberg beyond a reasonable doubt as the facts do not support a rational inference that he took and carried away property. Because the evidence was insufficient, the defense motion for a directed verdict should also have been granted.

STANDARD OF REVIEW

Determining whether trial counsel provided ineffective assistance of counsel is a mixed question of fact and law. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). An appellate court will not overturn a trial court's findings of fact concerning counsel's conduct and strategy unless the findings are clearly erroneous. *Id.* However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law which this Court reviews de novo without deference to the circuit court. *Id.* at 236-37.

A challenge to the sufficiency of the evidence is evaluated via the "reasonable doubt standard of review." *State v. Poellinger,* 153 Wis.2d 493, 504, 451 N.W.2d 752 (1990). This Court must evaluate the available evidence in the light most favorable to the finding of guilt and ask whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *Id.* (citing *Johnson v. State*, 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972)). This inquiry focuses on the jury's objective reasonableness, as opposed to the correctness of their verdict. *Id.* at 508.

A preserved challenge to the sufficiency of the evidence is evaluated on direct review with a substantially similar standard: "[W]hether the evidence taken most favorably against the accused is sufficient to support a finding of guilt beyond a reasonable doubt." *State v. Mac Gresens*, 40 Wis.2d 179, 182 N.W.2d 245 (1968). Reversal is warranted when the trial court is "clearly wrong" in its decision to deny a motion

challenging the evidence's sufficiency. *State v. Leach*, 124 Wis.2d 648, 665, 370 N.W.2d 240 (1985).

ARGUMENT

I. Trial counsel was ineffective for failing to independently investigate the context of Detective Meyers' identification.

A. Legal standard.

i. Ineffective assistance of counsel.

A criminal defendant has the right to the effective assistance of counsel under both the State and Federal constitution. U.S. CONST. AMEND. VI & XIV; WIS. CONST. ART. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). An attorney's performance is deficient if it falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 33, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine confidence in the outcome." *Thiel*, 2003 WI 111, ¶ 20 (citing *Strickland*, 466 U.S. at 694).

Counsel's deficient performance is prejudicial when there is a reasonable probability "that, but for counsel's [deficient performance], the result of the proceeding would have been different," or when counsel's errors "were so serious

as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. A defendant need not be prejudiced by "each deficient act or omission in isolation;" but prejudice may be established by the cumulative effect of counsel's deficient performance. *Thiel*, 2003 WI 111, ¶ 63.

ii. Duty to conduct independent investigation.

It is well-settled that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. ABA Standards codify this duty:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction....**The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt** or the accused's stated desire to plead guilty.

ABA Criminal Justice Standards: Defense Function, Standard 4-4.1 (available online at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html) (emphasis added). These standards are persuasive authority in assessing trial counsel's performance. *See State v. Harper*, 57 Wis.2d 543, 205 N.W.2d 1 (1973).

Importantly, as the ABA standard indicates, the duty to

investigate exists *regardless* of what the criminal defendant may have told their attorney. The Wisconsin Supreme Court has explicitly ratified this view, holding that an attorney has an independent duty to investigate material facts and cannot rely solely on his or her client's statements. *State v. Pitsch*, 124 Wis.2d 628, 638, 369 N.W.2d 711 (1985).

The facts of *Pitsch* are similar to the fact pattern at issue here. *Pitsch* also involved a criminal defendant accused of theft. *Id.* at 630. The defense strategy was straightforward—an "I did not do it" defense. *Id.* at 643. While the defendant had initially indicated that he did not want to testify, he ultimately chose to take the stand against the advice of his attorney. *Id.* at 637. The Court described the defendant's decision as being made "somewhat to counsel's surprise during the last phases of the trial." *Id.* Although trial counsel had interviewed his client about his prior convictions, he did not independently investigate the matter. *Id.* at 637-38. When the defendant testified, trial counsel elicited testimony about those prior convictions—testimony that turned out to be inaccurate. *Id.* As a result, the door was opened to the admission of otherwise inadmissible, prejudicial material. *Id.*

Importantly, the Court held that the defendant's statements to his attorney did not excuse trial counsel's failure. *Id.* Trial counsel "should have had reliable information regarding" the matter and "[g]etting this information would not have been difficult." *Id.* Trial counsel had a duty—even though he was not sure his client would testify and even though his client had already made apparent disclosures on the matter—to do his own independent research. Because trial counsel did not, his performance was constitutionally deficient.

Importantly, the duty to investigate is fundamental to the lawyer's *overall* effectiveness. *See Id.* at 638. Trial counsel needs to conduct an adequate investigation in order to adequately counsel their client and to effectively assist the client with important decisions, such as whether or not to testify. *Id.*

B. Trial counsel was deficient for not investigating the context of an identification of his client made by law enforcement.

i. Factual background.

In this case, trial counsel represented Mr. Klinkenberg contemporaneously on two cases, one of which was this misdemeanor retail theft. (50:4). The other was a felony case in which the State alleged that Mr. Klinkenberg was manufacturing or delivering methamphetamine. (50:4-5). Importantly, the cases were factually linked in a number of ways. First, the underlying allegations stemmed from around the same period of time. (50:6). Second, they were investigated by the same law enforcement agency. (50:7). Third, they both took place in Monroe County. (50:5). Fourth, the State, under at least one investigative theory disclosed to the defense, believed that the retail theft was financially connected to the operation of the methamphetamine business. (50:6). Fifth, and most importantly, one of the officers involved in the methamphetamine case made the identification in this case based on a specific contact with Mr. Klinkenberg in context of the methamphetamine investigation. (50:11-12).

The officer in question was Detective Mark Meyers. (50:11). He was the one who viewed the video and helped

Officer Branigan identify a possible suspect, Mr. Klinkenberg. (35:74). Detective Meyers' involvement was crucial to this case as the other two individuals who viewed the tape during the investigation, Officer Branigan and Ms. Magnus, were unable to independently identify a suspect. Without his involvement, it is questionable whether Mr. Klinkenberg would have been identified as a suspect at all.

The specific grounds for Detective Meyers' identification were apparently undisclosed. However, the pretrial discovery indicated that Detective Meyers was basing his identification on "prior contacts" with Mr. Klinkenberg. (50:47; 50:8). Trial counsel summarized his understanding of Detective Meyers' involvement at the postconviction hearing:

> From my understanding, Detective Meyers looked at the video and determined--he identified the individual as Daniel Klinkenberg from prior contacts that he had with Mr. Klinkenberg.

(50:8). Crucially, trial counsel also knew that, aside from the two cases on which he was representing Mr. Klinkenberg, Mr. Klinkenberg had no prior criminal history. (50:49).

Based on the foregoing, trial counsel obviously thought it possible that the contacts in question occurred in context of the methamphetamine case. (50:14). When the State asked to explore the context of those contacts at trial, trial counsel's answer proves that he was aware of where the information was derived from, as he objected immediately and asserted that it was "going to come out that it was involved in a—in a meth case." (50:143). Trial counsel was reasonably "on notice" in advance of trial that Detective Meyers' identification was the

product of, or was linked to, his client's involvement in a felony methamphetamine case. That "suspicion" was confirmed at trial. (50:12).[1]

Mr. Klinkenberg, however, apparently denied ever meeting Detective Meyers. (50:8). Trial counsel testified that he spoke to his client about the matter in advance of trial and "didn't have no reason not to believe him, I guess." (50:10). That is false and contradicted by trial counsel's other testimony, excerpted above. When pressed on the matter at the postconviction hearing, trial counsel affirmed that he did have "suspicions" that Mr. Klinkenberg may have had contact with Detective Meyers. (50:11). Trial counsel also suggested that Mr. Klinkenberg's drug use may have affected the reliability of his memory. (50:13-14). While trial counsel waffled on this point at the postconviction hearing, trial counsel did ratify a prior statement to undersigned counsel in context of the postconviction investigation in which he stated that Mr. Klinkenberg had "smoked his brain away" and that his mental abilities were affected by his excessive use of drugs. (50:13-14).

However, once trial counsel asked his client about the matter, he stopped digging and conducted no further research. (50:9). Besides asking his client about the contacts, he "didn't do anything." (50:14). Trial counsel explained that this is his general practice—to take his clients' assertions at face value without conducting an independent investigation. (50:10). Even though trial counsel had access to all of the discovery in the methamphetamine case—the case in which the contact

[1] It is important to note that Detective Meyers was listed as a witness in advance of trial. (15:1).

occurred—he never double-checked the file to see whether or not his client's recollection was accurate. (50:16).

ii. Trial counsel's failure to investigate was unreasonable.

Even more so than the defendant's prior convictions in *Pitsch*, the context of Detective Meyers' identification was an important issue in this case, regardless of whether or not Mr. Klinkenberg testified. After all, the case was largely about identification—who the person on the videotape was. This was not a case where the jury was asked to view a videotape and make a judgment call in isolation. Rather, there was testimony from members of law enforcement as to what outcome they should reach.

In a case like this, reasonably competent counsel should look into the context of the contacts at issue, especially if the defendant is claiming they never happened. That duty is heightened when counsel knows or should know it is likely the contacts occurred in connection with a felony methamphetamine case involving the same attorney.[2] If, as trial counsel inconsistently asserted, he believed Mr. Klinkenberg was correct, that is potentially dynamite defense evidence. At the very least, it is vital fodder for effective cross-examination of the State's witnesses as it could disprove at least some of their claims and therefore impugn their credibility. If, on the other hand, his client was incorrect, he

[2] For example, reasonably prudent counsel might wish to know whether or not it was likely that information about their client being involved in the manufacture of methamphetamine could "slip out" during Detective Meyers' testimony. If so, then a defense motion in limine to avoid the issue entirely would be wise. By not looking into the issue, trial counsel arguably flirted with disaster here.

could correct that misconception in advance of trial. Like defense counsel in *Pitsch*, trial counsel "had nothing to lose and everything to gain" by looking into the matter. *Pitsch*, 124 Wis.2d at 638.

The trial court made a finding of fact that Mr. Klinkenberg's desire to contradict Detective Meyers' testimony was dispositive in his decision to testify at trial. (50:70-71). It is arguable, although not self-evident, that Mr. Klinkenberg's desire to proceed to trial may also have been influenced by a belief that law enforcement was basing their case on inaccurate information. This proves the importance of the investigative task at issue. If a client is basing his decisions on a belief about certain facts and the lawyer has a "suspicion" that belief may not be accurate, reasonably competent counsel should take steps to double-check the client's story. Detective Meyers' identification, like the defendant's prior convictions in *Pitsch*, was the type of material fact that needed to be investigated as a prerequisite to constitutionally adequate advice. *See Pitsch*, 124 Wis.2d at 638. It was not.

The trial court advanced two justifications excusing trial counsel's failure, both of which are contrary to *Pitsch*. First, the trial court suggested that trial counsel cannot reasonably be blamed for relying on information provided by his client. (50:73-74). This is the *exact* proposition that *Pitsch* emphatically rejects. *Pitsch*, 124 Wis.2d at 638. Just like the defendant's prior record in that case, here, trial counsel had access to information that could have easily proven or disproven his client's story. His answers at the postconviction hearing suggest that he made a choice, contrary to his own reasonable evaluation of the facts, to "believe" his client and not trouble with facts that might contradict Mr. Klinkenberg's

account. His testimony shows trial counsel not only failed to investigate, he effectively abandoned his ethically mandated role in the face of a questionable defense philosophy.

Second, the trial court suggested that trial counsel had no duty to look into the issue unless they were absolutely sure that Mr. Klinkenberg would be testifying. (50:73). Mr. Klinkenberg's allegedly last-minute decision to testify therefore absolved trial counsel of the duty to investigate his client's story. (50:73). Again, this runs contrary to *Pitsch*, which recognizes that the possibility of a defendant testifying is fluid and unpredictable and that a "surprise" decision does not therefore absolve trial counsel of his error. *Pitsch*, 124 Wis.2d at 638. More importantly, the information in question was important to the case generally and impacted the sufficiency of trial counsel's advice to his client regarding the decision to testify at all, as has already been argued. Trial counsel was also aware of his client's perspective in advance of trial and therefore knew that it was at least a possibility that his client may have decided, after seeing Detective Meyers testify, that he wanted to tell his version of events.

C. Trial counsel's failure to investigate prejudiced Mr. Klinkenberg.

Mr. Klinkenberg chose to testify in part because he did not remember meeting Detective Meyers and wished to contradict evidence he believed to be false. (50:70-71). Mr. Klinkenberg took the stand, whereupon the following exchange occurred:

> Q: And you—you heard testimony from Detective Meyers that he had contact with you between—

from two weeks to a month before he looked at the video, is that correct, do you remember hearing him say that?

A: Yeah, I heard him say that.

Q: Okay. Do you remember having contact with him around that time period?

A: No, I haven't had any contact from him.

(33:142).

In response, the State requested a sidebar. (33:142). The State informed the Court "I believe [Mr. Klinkenberg] has opened the door to Detective Meyers describing the circumstances of that professional contact." (33:143). Trial counsel immediately objected and unambiguously asserted that it was "going to come up that it was involved in a – in a meth case investigation." (33:143). The trial court indicated that while the State could not delve too deeply into specifics, it could inquire into the circumstances of the contact, including whether Mr. Klinkenberg was a "suspect or target" of a "criminal investigation." (33:146).

The State cross-examined Mr. Klinkenberg about his contact with Detective Meyers. (33:149). In response, Mr. Klinkenberg clarified that the detective he had contact with was named "Tester," not Meyers. (33:149). The Court allowed the State further latitude to explore that issue. (33:152). The State proceeded to elicit testimony from Mr. Klinkenberg that he was involved in a "prior case," that the prior case was a "criminal investigation," in which Mr. Klinkenberg had been "in trouble" and that as a result of this "trouble," Mr. Klinkenberg had been "questioned" and photographed.

(33:153-54).[3] Mr. Klinkenberg was frustrated, it turned out, because during that contact he "didn't even see" Detective Meyers, who was now claiming to be present. (33:154-55).

Detective Meyers was then called by the State in rebuttal. (33:161). He testified that Mr. Klinkenberg was a "target or subject of a criminal investigation." (33:161). Detective Tester was involved in the same investigation and was present during the brief contact in question. (33:162). Detective Meyers testified that he was similar in appearance to Detective Tester. (33:163). The encounter happened at night and the area where it occurred was "not well lit." (33:163). Detective Tester was then called as a witness, corroborated that Mr. Klinkenberg was the target of a criminal investigation, and asserted that Detective Meyers was present during the specific contact in question. (33:169-70).

In sum, the manifold prejudicial effects of trial counsel's error are readily apparent. At a base level, his failure to investigate led directly to the admission of prejudicial testimony from two members of law enforcement about Mr. Klinkenberg being the target of a criminal investigation. The lengthy cross-examination and rebuttal presentation by the State put special emphasis on this information. Trial counsel's failure therefore irrevocably damaged Mr. Klinkenberg's credibility with the jury because criminals, as a class, are presumed less trustworthy. *State v. Gary MB*, 2004 WI 33, ¶ 21, 270 Wis.2d 62, 676 N.W.2d 475. Thus, evidence that tends to exaggerate or amplify the defendant's criminality has a

[3] This is obvious description of an arrest scenario would be reasonably decipherable to most jurors.

legally significant impact on the jury's assessment of his credibility.

Trial counsel's failure to investigate his client's story also led to that same story falling apart on the witness stand—a situation that could have been avoided if trial counsel had looked into the matter before trial. Based on Mr. Klinkenberg's testimony, at least one reasonable interpretation is that he was simply mistaken about which officers were present during the disputed contact. After all, Mr. Klinkenberg did not deny he had contact with law enforcement, he just did not recall Detective Meyers being one of the officers. That was a reasonable mistake given a) the two officers looked alike, b) the contact occurred at night and was not in a well-lit location and c) Mr. Klinkenberg was likely under the influence of mind-altering substances that impaired his mental functioning. An adequate investigation would likely have led to this conversation being had in the attorney's office and not on the witness stand in front of the jury.

Again, *Pitsch* is instructive. That case also revolved around an "I did not do it" defense. *Pitsch*, 124 Wis.2d at 643. Given the nature of the defense, the Court held that when trial counsel's underlying failure to investigate results in testimony that negatively impacts the defendant's credibility in front of the jury, this satisfies the prejudice prong of the ineffectiveness inquiry. *Id.* at 646.

In such a case, prejudice exists *regardless* of the sufficiency of the surrounding evidence. *Id.* Allowing the defendant's credibility to be damaged in this fashion results in a "breakdown in the adversarial process that our system counts on to produce just results." *Id.* (citing *Strickland*, 466 U.S. at

685). Accordingly, confidence in the outcome is undermined. *Id.*

Importantly, this case presents *more* prejudice than *Pitsch*. Here, Mr. Klinkenberg's denials and attempts to explain himself in the face of harsh cross-examination resulted in extrinsic evidence of Mr. Klinkenberg's criminality being presented. The State was able to re-call Detective Meyers and introduce the testimony of another officer, Detective Tester. The jury therefore heard from multiple witnesses who reinforced prejudicial information about Mr. Klinkenberg's criminal history. This is constitutionally cognizable prejudice that requires reversal as the error in question "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Accordingly reversal is warranted.

II. Trial counsel was ineffective for failing to adequately prepare his client to testify.

A. Deficient performance.

Trial counsel knew exactly what would happen if his client denied meeting Detective Meyers: The door would be opened to testimony regarding the context of their alleged contact. (50:19). Trial counsel knew this would be prejudicial to Mr. Klinkenberg's case. (50:19). However, trial counsel could not remember if he shared this important piece of information with his client. (50:20). Trial counsel acknowledged that Mr. Klinkenberg would have wanted to know about the possibility of harsh cross-examination on this

point. (50:20). Trial counsel testified that was Mr. Klinkenberg's first trial and the first time he had ever testified. (50:49). Mr. Klinkenberg was not knowledgeable about the law. (50:49). Mr. Klinkenberg was depending on his attorney to help him understand legal concepts like "opening the door." (50:50). Trial counsel never reviewed specific topics of cross-examination with his client and gave only vague, general advice prior to him taking the stand. (50:39). This is deficient performance.

Trial counsel has an affirmative duty to adequately advise their client throughout the entire course of representation. *ABA Criminal Justice Standards: Defense Function*, Standard 4-5.1; *See also* SCR 20:2.1, comment one ("A client is entitled to straightforward advice expressing the lawyer's honest assessment.")

This duty is at its peak with respect to crucial decisions such as whether to take a plea or proceed to trial and whether to testify at said trial. These decisions must be made by the accused after *full* consultation with counsel. *ABA Criminal Justice Standards Criminal Justice: Prosecution and Defense Function*, Standard 4-5.2. Failure to adequately advise one's client can constitute deficient performance especially when, as here, that inadequate or inaccurate advice impacts either a client's decision to testify or the substance of their ensuing testimony. A number of persuasive cases exist on this point:

- *United States v. Frappier*, 615 F.Supp. 51 (D.C. Mass. 1985) (Trial counsel ineffective for erroneously advising defendant that testimony was necessary for defense when information could have been introduced through other

sources);

- *Credell v. Bodison*, 818 F.Supp.2d 928 (D. S.C. 2011) (Trial counsel ineffective with respect to advice whether or not to testify when counsel's advice based on erroneous understanding of rules of evidence);

- *Horton v. State*, 306 S.C. 252, 411 S.E.2d 223 (S.C. 1991) (Trial counsel ineffective for telling client he would face cross-examination on topics that had already been excluded);

- *United States v. Henriques*, 32 M.J 832 (N.M.C.M.R. 1991) (Trial counsel ineffective for advising defendant to testify in support of facts that were actually inculpatory, rather than exculpatory, as counsel believed at the time of testimony).

In addition, trial counsel has a duty to help prepare the client to testify effectively. As an advocate responsible for furthering the client's interests, this makes sense: If a client's goal is to testify, then trial counsel needs to ensure that the goal is *effectively* effectuated. While trial counsel cannot and should not "script" the defendant's answers, reasonably competent counsel should do their best to inform their client of potential topics of cross-examination and acquaint them with basic evidentiary principles—such as how statements might "open the door" to prejudicial material. This did not happen here.

Trial counsel's failure is especially blameworthy in light of the interaction between trial counsel's minimal

preparation of the witness and his minimal supporting investigation. Mr. Klinkenberg's embarrassing testimony on the stand evinces a basic misunderstanding of not only material facts, but also the legal significance of those facts. This is a result of shoddy witness preparation. Asking his client why he wanted to deny Detective Meyers' account would have been an excellent opportunity to walk through what his client wished to say and why and to therefore hopefully avoid the testimony regarding Detective Tester.

Trial counsel's failure is analogous to a Texas case, *Perrero v. State*, in which trial counsel failed to instruct his client on how his testimony might "open the door" to prejudicial material—in that case, evidence of his prior criminal history. *Perrero v. State*, 990 S.W.2d 896 (Tex. App. 1999), *petition for discretionary review refused*, (Nov. 10, 1999). Trial counsel failed to prepare his client to testify and to avoid "step[ping] in the trap" while testifying. *Id.* at 899. This was deficient performance. *Id.* Here, trial counsel evidently did not adequately explain how testifying about Detective Meyers and Detective Tester might open the door to equally prejudicial material.

Importantly, trial counsel's failure is not excused because Mr. Klinkenberg made the decision to testify partway through trial. An experienced criminal defense attorney should understand that the decision to testify is often shaped by trial developments and cannot always be predicted. The fact that a defendant may change their mind at any time—and that their request trumps the wishes and desires of counsel—should

encourage reasonable preparation for that possibility.[4] In any case, there was a recess before Mr. Klinkenberg's testimony during which time a reasonably competent criminal defense attorney could have conveyed the needed information. (33:135). Trial counsel did not take advantage of that opportunity. This is deficient performance.

B. Prejudice.

Here, trial counsel's deficient performance prejudiced Mr. Klinkenberg for the same set of reasons advanced in section I, C, supra. Trial counsel effectively abdicated his role as an advisor and allowed his client to testify in support of questionable assertions without discussing the harmful ramifications of that choice. Trial counsel never confronted his client with possibility that he might be mistaken and did not fully prepare his client to testify by taking basic steps like walking him through potential topics of cross-examination. Trial counsel's failure, inasmuch as it badly damaged Mr. Klinkenberg's credibility and resulted in the admission of prejudicial material, undermines confidence in the outcome.

Accordingly reversal is warranted.

III. Trial counsel was ineffective for eliciting damaging testimony that he knew would open the door to prejudicial material.

A. Deficient performance.

[4] Especially in a case such as this one where the attorney was aware that his client did not accept the State's facts and was the only witness capable of stating that disagreement.

Once the criminal defendant chooses to testify, trial counsel still retains some control over the ensuing content of that testimony. After all, trial counsel may not directly elicit testimony that he knows to be false—proving that the client's agency does not overpower trial counsel's ability to limit or control the presentation of evidence. SCR 20:3.3(3).

Trial counsel also has a duty to avoid eliciting prejudicial information from witnesses, generally speaking. For example, in *In re Jennifer Z*, trial counsel was ineffective for eliciting incriminating testimony that could not be reasonably excused with reference to a strategic decision. *See In re Jennifer Z*, No. 2009AP846, unpublished slip op. (Wis. Ct. App. Jan. 12, 2010).

Persuasive cases from other jurisdictions stand for the proposition that it is ineffective assistance to elicit damaging information from one's own client as well. *See Robertson v. State*, 214 S.W.3d 665 (Tex. App. 2007) (Trial counsel ineffective for "opening the door" on direct examination of defendant in case that hinged on credibility issues); *Bowers v. State*, 929 So.2d 1199 (Fla. Dist. Ct. App. 2006) (Trial counsel ineffective for eliciting information on direct examination of defendant that "impugned" credibility with jury).

Here trial counsel knew his question about Detective Meyers would open the door to prejudicial material regarding Mr. Klinkenberg's prior contacts with law enforcement. (50:19). Trial counsel had not conducted a sufficient investigation on this point before eliciting the testimony in question and may have had grounds to question its accuracy. Trial counsel asked the question anyway, even though it did not materially aid the defense case. Trial counsel had no

strategic reason for eliciting this testimony. Accordingly, trial counsel's performance was deficient.

B. Prejudice.

Here, trial counsel's deficient performance prejudiced Mr. Klinkenberg for the same set of reasons advanced in section I, C, supra. Trial counsel knew that by asking the question he did, the door would be opened to prejudicial material. As a result of that elicitation, the jury was informed of additional information about Mr. Klinkenberg's criminal history that would have otherwise been excluded. Trial counsel's error undermines confidence in the ensuing verdict.

Accordingly reversal is warranted.

IV. Trial counsel was ineffective for failing to object to the inadmissible testimony of Officer Laura Branigan.

A. Deficient performance.

Before the jury saw the videotape of the alleged theft and before Detective Meyers testified, the State elicited testimony from Officer Branigan that Mr. Klinkenberg was the individual on the videotape. (33:77). Officer Branigan testified that her opinion was based on what she had been told by Detective Meyers, who had not yet testified. (33:74). Absent Detective Meyers' identification, Officer Branigan indicated that she was not able to make an identification of the individual on video. (33:74).

Trial counsel did not object to Officer Branigan's

testimony that it was Mr. Klinkenberg on the video. Trial counsel conceded, however, that he should have objected to Officer Branigan's testimony as the identification was based on hearsay. (50:24).

The testimony of Officer Branigan was actually problematic for several reasons. First, trial counsel is correct that it was based on inadmissible hearsay and contravenes WIS. STAT. 908.01 and 908.02. The conclusory opinions of lay witnesses are not admissible if they are themselves based on inadmissible hearsay. *State v. Werlein*, 136 Wis.2d 445, 455, 401 N.W.2d 848 (Ct. App. 1987), *review granted without subsequent opinion*, 422 N.W.2d 860. Here, Officer Branigan was clearly basing her testimony that it was Mr. Klinkenberg on the out-of-court statement of Detective Meyers. This is inadmissible hearsay and was clearly objectionable.

A second basis for objection would have been the requirement of personal knowledge, which is not satisfied in this case. *See* WIS. STAT. 906.02. Officer Branigan based her testimony on what someone else told her. She was not an eyewitness to the event, was unable to make an identification upon first viewing the video, and therefore only baldly restated the conclusions of others. This is not competent testimony and should have been excluded.

Both the personal knowledge doctrine and the hearsay doctrine are effectively meshed together in this case, resulting in what Professor Daniel Blinka refers to as "stealth hearsay." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES § 602.2 (3d. 2008). In other words, a conclusory opinion that is based not on the witnesses' own knowledge but on what someone else has told them. Professor Blinka cautions that "trial lawyers

must vigilantly guard against" this particularly objectionable form of testimony. *Id.* Clearly, trial counsel did not get the message.

Finally, the evidence was also objectionable under WIS. STAT. § 904.03. The relevance of the testimony is extraordinarily low. It is essentially cumulative and unhelpful to the jury, who would have seen the tape themselves and be given the eventual opportunity to hear from Detective Meyers later in the trial. Because there were multiple grounds for objection, trial counsel was deficient for not doing so.[5]

B. Prejudice.

Importantly, Officer Branigan's testimony was the first evidence about identification in this case. At the time she testified, the jury had not yet seen the video in question. By allowing her to offer a conclusory and objectionable identification before the tape was shown to the jury, trial counsel's error tainted any subsequent observations of the tape itself.

That is, the jurors' unconscious psychological biases likely prevented them from deviating from those expectations that they had derived from the State's testimony. This is a classic example of "confirmation bias." "The confirmation bias in human reasoning and behavior is the seed that gives birth to the self-fulfilling prophecy phenomenon in which a person's

[5] The trial court held that the meaning of her testimony—whether she was just restating Detective Meyers' conclusions or was asserting that based on viewing Mr. Klinkenberg, she could now see a match--"wasn't clear." (50:66). It offered an "interpretation" favoring the latter but did not make a clear factual finding on this point. (50:66). Based on that "ambiguity" the Court held that there was no showing of deficient performance. (50:68).

assumption that a phenomenon will happen leads to behaviors that make the phenomenon happen." Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, PSYCH. PUBLIC POL'Y & LAW, Volume 1, No. 4, 765, 776 (1995).

This Court, in an unpublished decision, has also defined confirmation bias as

> [T]he tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence...it involves unwittingly selecting and interpreting evidence to support a previously held belief.

City of Mequon v. Haynor, No. 2010AP466-FT, ¶ 24, n. 7, unpublished slip op. (Wis. Ct. App. Sept. 8, 2010) (citation omitted). In the same discussion, the Court also cited to Attorney Keith Findley—the director of the Wisconsin Innocence Project—for the proposition that people are 'incapable of evaluating the strength of evidence independently of their prior beliefs.'" *Id.*

Here the jury was never given an objective opportunity to review the evidence and draw their own conclusions. Instead, they were offered a thoroughly backward presentation of the evidence, in which they were first repeatedly told what to see and then, and only then, allowed to view the tape for themselves. Because the tape was crucial evidence in this case, any taint to the jury's interpretation of that evidence undermines confidence in the outcome.

Accordingly, reversal is warranted here.

V. The cumulative effect of these errors prejudiced Mr. Klinkenberg.

In assessing prejudice, it is important that this Court not act as a super-jury. *Neder v. United States*, 527 U.S. 1, 19 (1999). An assessment of ineffectiveness is also distinct from a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434-35. The key question is ultimately whether trial counsel's deficient performance "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

While a single instance of deficient performance, in and of itself, may rise to that legal threshold, it is also important that this Court adhere to the long-standing principle that prejudice must ultimately be assessed in the aggregate. *Thiel*, 2003 WI 111, ¶ 60. When added together, it becomes clear that the cumulative effect of trial counsel's errors prejudiced Mr. Klinkenberg.

By failing to investigate, failing to adequately prepare and advise his client, and ultimately by deliberately eliciting damaging material on direct-examination, Mr. Klinkenberg's case was grievously harmed. As a result of trial counsel's errors, *two* rebuttal witnesses were called—both detectives—who testified about Mr. Klinkenberg being a target or subject of their joint investigation. (33:161; 33:169). The jury, although not told what specific crime Mr. Klinkenberg was investigated for, was free to rampantly speculate about what Mr. Klinkenberg might have done to attract the attention of the two detectives involved in said "investigation." Trial counsel might have avoided this outcome by taking simple steps. With respect to Mr. Klinkenberg's testimony, the three claimed

errors interrelate: In order to adequately prepare his client to testify, trial counsel needed to conduct an adequate investigation. That investigation was also necessary to adequately advise Mr. Klinkenberg as to the wisdom of testifying in his own defense. Certainly, if he had done his due diligence—conducting a sufficient investigation and preparing his client—the decision to elicit damaging testimony might have been entirely avoided. However, trial counsel did not do any of these things.

These errors severely damaged Mr. Klinkenberg's credibility, which should be enough to undermine confidence in the resulting outcome. At the same time, however, the effect of Officer Branigan's testimony adds additional cumulative weight to the prejudice inquiry inasmuch as it tainted the jury's observations and left them without any truly independent means of assessing the evidence.

Accordingly reversal is warranted.

VI. The evidence was insufficient to convict Mr. Klinkenberg beyond a reasonable doubt.

A. Elements of the alleged offense.

At trial, Mr. Klinkenberg faced a single count of misdemeanor theft contrary to Wis. Stat. § 943.50(1m)(b). The trial court instructed the jury in conformity with WIS JI Criminal 1498. According to those instructions, the State was required to prove the following elements beyond a reasonable doubt:

1. The defendant intentionally took and carried

away a laptop computer and/or video camera.

2. The laptop computer and/or video camera was merchandise held for resale by a merchant.

3. The defendant knew that the laptop computer and/or video camera was merchandise held for resale by a merchant.

4. The merchant did not consent to taking and carrying away the laptop computer and/or video camera.

5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of possession of the merchandise.

22:2-3.

Here, the evidence is insufficient with respect to the first element for multiple reasons. Accordingly, the conviction violates Mr. Klinkenberg's due process rights. U.S. CONST. AMEND. XIV.

B. Insufficiency of the evidence as to "taking and carrying away."

In order to prove that Mr. Klinkenberg was guilty of retail theft, the State needed to prove he "took and carried" away property. (22:2). Based on the evidence presented, there was no rational way for the jury to come to that conclusion—even if they believed that it was Mr. Klinkenberg on the video.

First and foremost, there was a surprising lack of evidence regarding what, if anything, was actually "missing." The initial report to law enforcement is vague and asserts that "a computer and a recorder, video recorder" had been taken. (33:73). However, at trial the jury was told that a "JVC video camera" and "two laptop computers"—both display models apparently—had been taken. (33:86). The jury instructions simply informed the jury that a laptop and/or a video camera was at issue. (22:2).

The video camera's brand was named but there were no other identifying details aside from that item's alleged price of $119.00. (33:92). There was no testimony as to a serial number or a store inventory number.[6] Likewise, while there was an estimate of what store security "believe[d]" the laptops sold for, no other identifying details exist for those items either. (33:92). And as pointed out previously, the number of stolen items moved from two, to three, then back to two at the close of evidence. There was no testimony as to any ascertainable gaps in the inventory. No one testified as to the actual discovery of the items going "missing." In fact, according to store security, the "theft" was not discovered until roughly one month later. (33:85). No explanation was given for this gap, which raises doubt as to *when* the items actually went "missing."

While store security testified that they were asked to "look for missing items," there was no basis for that statement. (33:85). Further, as presented at trial, it is only vague hearsay

[6] The store security agent indicated that there was no record of the laptops being sold but gave no testimony as to equivalent records that they were *missing*—which is something else entirely. (33:118).

evidence. The source of that report never testified. Importantly, no "stolen" merchandise was ever recovered. (33:78). Unlike many such cases, there is no record of the items being pawned or resold elsewhere. Without proof that the items existed in the store inventory and were no longer present therein as a direct result of something that happened on the 24th of December, there is not sufficient proof that anything was actually missing.

Taking the evidence in the light most favorable to the State, the jury could have found that Mr. Klinkenberg placed some items in his shopping cart while in the electronics section. So what? Shopping is not a criminal enterprise. The rest of the evidence is too full of holes to make the leap from that conduct to a beyond a reasonable doubt conclusion that he "took and carried away" the items.

The jury was not explicitly told how much time passed between Mr. Klinkenberg's (taking the facts in the light most favorable to the State) sighting in the electronics section and his appearance in the sporting goods section. Although the record does contain references to time markers, they do not correspond to any natural, coherent time system that undersigned counsel is able to comprehend. Rather, the record jumps from "twenty-three forty-four" to mark the time in the electronics section to "four fifty" in the sporting goods section. (33:104-105). No base line or natural timeline was presented to the jury on this point.

At that time, Mr. Klinkenberg is seen with a changed shopping cart load. (33:105). Where once were electronics (note that throughout the State's presentation of the evidence they persistently made conclusory factual statements as to what the video depicted) now there are only propane tanks. (33:105).

No video exists of the shopper switching out items. Without circumstantial evidence—like how far apart the two sections of the store are or how much time elapsed between the two sightings—the jury can draw no strong conclusions about what happened in between the two sightings.

The shopper then places what is *described* as a "laptop case" and an "empty JVC video box" on the counter. (33:106). Again, that is the witness' gloss: The video itself is unclear and neither the box nor the case were preserved as evidence. Ms. Magnus never testified that she personally viewed the box or the case so her conclusion that the box was "empty" is unsupported by any corroborating evidence. No one from the sporting goods section was called as a witness as to when they discovered these items and what their reaction was.

Finally, the shopper is seen at "three thirty-seven" paying for the propane tanks he has in his possession. (33:106-07). The laptops and the camera are nowhere in sight. No video was presented of the shopper concealing or hiding them on his person or elsewhere. Notably, both individuals who viewed the video testified that they did not see him conceal anything. (33:78; 33:111). The checkout clerk was not identified or called as a witness. From the video at least, the shopper manages to walk normally out of the store, get in his vehicle and drive off. However, the State averred in closing argument (which is not evidence) that Mr. Klinkenberg had somehow secreted these items on his person. (33:194). The clerk was never called to testify as to Mr. Klinkenberg's demeanor or gait, which would be suggestive evidence here. The State never presented evidence, such as the coat Mr. Klinkenberg was wearing, that could demonstrate how exactly he managed to fit

the items into his pockets and appear to walk naturally on video.

Perhaps sensing the weakness of their position, the State presented additional evidence about how the laptops *might* have been secured and then tried to link that to a discovery of a discarded store security device in the automotive section. (33:93). However, there is no footage of Mr. Klinkenberg in the automotive section. There was no testimony about whether his travel from the electronics section to the sporting goods section would have taken him past that location or whether he would have had sufficient time to slip into some unobserved place and remove the security device. There was no circumstantial evidence presented that Mr. Klinkenberg had any packaging or suggestive items in his possession upon arrest.

No testimony was presented about when that "spider wrap" was discovered. (33:110). Notably, it had not been cut or tampered with. (33:94). Like the box and the case, the spider wrap was never preserved as evidence and was therefore not tested for fingerprints or DNA. The jury was also led to believe that Mr. Klinkenberg took the item off the laptops without damaging it although to do so, the assistance of store personnel would usually be required. (33:116). No explanation was offered as to how the device was allegedly removed.

The State therefore presented an evidentiary picture with a baffling number of holes. At best, the State may have been able to prove that Mr. Klinkenberg moved some items around the store in a suspicious fashion. However, theft would require that he took the items outside of where the owner intended them to be—and moving them around the store in a

cart while continuing to shop for propane tanks is not legally sufficient. The evidence is therefore not sufficient that Mr. Klinkenberg "carried away" the items in question. The evidence does not support that inference and "no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis.2d at 502.

Accordingly, the evidence was insufficient to sustain the conviction and reversal is warranted.

VII. The trial court erred by denying the defense motion regarding the sufficiency of the evidence.

At the close of the State's case, the defense made a motion for a directed verdict. (33:133). Trial counsel did so at the prompting of the State. (33:133). Trial counsel argued that there was no evidence that Mr. Klinkenberg had "concealed" the items. (33:133). It is unclear why the objection was phrased in this matter since Mr. Klinkenberg was actually charged with "taking and carrying away." However, the trial court ruled with respect to an alleged "taking and carrying away" and made sure that this is the method the State was alleging. (33:134; 33:135).

The trial court held that while the evidence was "certainly circumstantial" there was evidence that "the person identified as the defendant" could be seen on video "going through the checkout and not paying" for the items in question. (33:134). Accordingly, the Court held that it was "up to the jury to determine whether that satisfies them beyond a reasonable doubt." (33:134). The motion was denied. (33:135).

This was "clearly wrong." *Leach*, 124 Wis.2d at 665. As

has been argued at length in section VI, supra, the evidence was not sufficient here. Accordingly, the defense motion should have been granted. The trial court's erroneous ruling requires reversal.

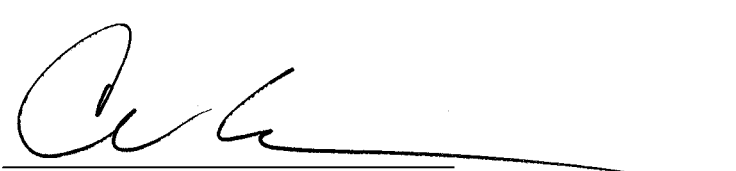
CONCLUSION

Trial counsel's performance was constitutionally deficient and, when the effect of those errors is measured in the aggregate, his deficient performance prejudiced Mr. Klinkenberg. In addition, the evidence was insufficient to convict him of "taking and carrying away" property. For that reason, the trial court was also "clearly wrong" to deny a defense challenge to the evidence during the trial.

Dated this 27th day of April 2015.

Respectfully submitted,

Mr. Daniel Klinkenberg
Defendant-Appellant



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CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in WIS. STAT. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9,808 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to WIS. STAT. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

I further certify that I have complied with WIS. STAT. § 809. 86 requiring the usage of pseudonyms for crime victims.

Dated this 27th day of April, 2015.

Christopher P. August
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CERTIFICATION OF APPENDIX

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. 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 been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of April, 2015.

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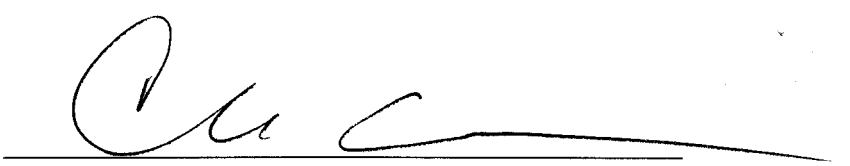
CERTIFICATION OF SERVICE

I hereby certify that on this 27th day of April, 2015, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 27th day of April, 2015.



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