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

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

DANIEL SCOTT KLINKENBERG,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully submitted,
DANIEL SCOTT KLINKENBERG
Defendant-Appellant, by,
AUGUST LAW OFFICE L.L.C.
Attorney for the Defendant-Appellant
10 E. Doty Street, Suite 821
Madison, WI 53703
(608) 204-5804

BY: CHRISTOPHER P. AUGUST
State Bar No. 1087502

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

WISCONSIN CASES

WISCONSIN STATUTES

ARGUMENT

I. Ineffective assistance of counsel.

A. Deficient performance.

i. The State's failure to address trial counsel's specific instances of deficient performance.

Mr. Klinkenberg's opening brief recounted four instances where trial counsel's performance fell below an objective standard of reasonableness. (*See* Opening Brief at 1-2). The State's brief fails to meaningfully address each instance of claimed deficient performance, focusing its inquiry on the prejudicial effect of those errors. At times, the State appears to concede trial counsel's performance *was* deficient.[1] Because the State has failed to meaningfully address the first prong of the ineffectiveness inquiry, that issue should be conceded in Mr. Klinkenberg's favor with respect to each claimed instance of deficient performance. *See Charolais Breeding Ranches v. FPC Securities*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

ii. Inaccurate statements of law.

The State also fails to get the two-pronged case law right, asserting that "[t]he defendant has failed to show his trial counsel's performance was deficient because the defendant has failed to show the performance or lack of performance of his

[1] In fact it does so explicitly with respect to the failure to object to Officer Branigan's testimony. (State's Br. at 14).

trial counsel led to a breakdown in the adversarial process to such a degree that the result of the proceeding in the present case was rendered unreliable." (State's Br. at 3). Translated into plain English, the State's claim is that Mr. Klinkenberg has failed to prove deficient performance because the deficient performance was not prejudicial. Such a claim is self-evidently wrong on multiple levels.

iii. This Court should address both prongs of the *Strickland* test and should not simply focus on prejudicial effect.

The State explicitly urges this Court to ignore deficient performance altogether and focus instead on the prejudicial effect of trial counsel's errors. (State's Br. at 4). The State is confident that because the evidence against Mr. Klinkeberg is overwhelming, it need not deal with doctrinal nuance.

Although the Court is obviously not required to make findings as to each prong, it is Mr. Klinkenberg's position that this is the better analytical and jurisprudential approach. The ineffectiveness inquiry, at its core, is about a cause and effect relationship. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). It therefore makes little sense to assess "effect" without first acknowledging, investigating, and understanding the underlying "cause." In other words, in order to consider the possibility of a different outcome, the Court first needs to understand trial counsel's role in producing the original, disputed result. Often, claimed instances of deficient performance will reveal fault lines in the case which are not disclosed by a bare reading of those facts superficially unfavorable to the defendant. This is certainly the case here.

Examining trial counsel's errors in light of the points and authorities raised in the opening brief, Mr. Klinkenberg is confident that this Court can reasonably conclude that trial counsel's performance fell below an objective standard of reasonableness. Prong one of the ineffectiveness inquiry, with respect to each claimed error, has therefore been fully satisfied.

B. Prejudicial effect.

i. The State's proffered analytical stance is at odds with controlling precedent.

Essentially, the State is of the opinion that an inquiry into trial counsel's ineffectiveness can be neatly dealt with by taking a backwards-looking approach emphasizing Mr. Klinkenberg's alleged guilt. However, the ineffectiveness inquiry is clearly distinct from a sufficiency of the evidence analysis.[2] *See State v. Pitsch*, 124 Wis.2d 628, 645-46, 369 N.W.2d 711 (1985). What matters is whether trial counsel's errors undermine the confidence this Court has in an otherwise valid result. *See Id*.; *Strickland v. Washington*, 466 U.S. 668, 694. Throughout its brief, the State conflates whether or not a breakdown in the adversarial process occurred with the results of that process. This is problematic because it ignores the basic reality that a superficially valid result can be (and, in cases of ineffective assistance of counsel, often is) obtained as a result of a transparently unfair process. Reversal will result if it can

[2] It would appear that the opening brief cites to two Supreme Court opinions concerning the assessment of prejudicial effect of a constitutional error generally. (*See* Opening Brief at 32). However, upon closer review it would appear that the brief misleadingly, albeit unintentionally, directly cites to these cases with respect to ineffectiveness *specifically*. A *see* cite with an explanatory parenthetical would have been the correct choice. Undersigned counsel respectfully apologizes for the error.

be shown that a fair process (i.e. a process in which the defendant's lawyer satisfied basic constitutional standards) may have led to a different result. That standard is satisfied here.

ii. Settled case law holds that confidence is undermined when the credibility of the defendant is destroyed as a result of trial counsel's failures, notwithstanding the sufficiency of the evidence.

The State claims above all that Mr. Klinkenberg was not prejudiced by his attorney's ineffectiveness because of the strength of the video evidence. (State's Br. at 6). It further asserts that because his credibility was not important to the case, it did not matter whether that credibility was damaged. *Id.* Both of these statements are inaccurate.

The ineffectiveness inquiry focuses on this Court's confidence in the ensuing result. Even if this Court views the video and forms a belief that it is Mr. Klinkenberg captured therein, it is still possible to doubt the legitimacy of the underlying conviction. In fact, this is in accord with the result reached by the Wisconsin Supreme Court in *Pitsch.* In that case, the Court held that the destruction of the defendant's credibility which resulted from trial counsel's deficient performance "infected the trial." *Pitsch*, 124 Wis.2d at 645. That failure constituted a "breakdown in the adversarial process" and thereby undermined the Court's confidence in the ensuing result. *Id.* That conclusion was separate and distinct from the Court's observation that the evidence was otherwise

sufficient to support a conviction.[3] *Pitsch*, 124 Wis.2d at 645-46..

In this case, Mr. Klinkenberg asserted his innocence and took the stand to personally testify that he was not the person captured on film. While the State is confident that it was Mr. Klinkenberg on the video, this does not mean Mr. Klinkenberg's adamant declamations to the contrary were ipso facto absurd and unreasonable and that his credibility was therefore incapable of being damaged by trial counsel's errors.[4] After all, mistaken identifications resulting from videotaped evidence, while rare, may still happen. Accepting that basic principle, Mr. Klinkenberg's urge to testify is actually quite understandable, the classic cri de coeur of the wrongfully accused: I know what this looks like but *please*, you must believe me—it was not me. Faced with an appeal of this sort, Mr. Klinkenberg's credibility was of the utmost importance. If any member of the jury was sufficiently discomfited by the lack of fit between these two pieces of evidence—an alleged video identification and an adamant denial from the defendant—that is a reasonable doubt. Such a possibility is erased when that passionate appeal is undercut by the kind of credibility-busting at issue here.

Or consider an alternative line of argument: What if a

[3] And, as Mr. Klinkenberg has argued, the evidence in this case was clearly not sufficient.

[4] Mr. Klinkenberg is also of the opinion, more fully fleshed out in the opening brief, that a defendant's credibility is always at issue and does not cease being an issue simply because of other facts and circumstances in the trial. After all, the criminal defendant, by proceeding to trial, is communicating a simple message to the jury: I did not do this. While the burden is not technically on the criminal defendant in our system of justice, most experienced criminal litigators would agree that the jury's verdict hinges on whether or not that implicit declaration is believed.

juror was skeptical or on the fence regarding the case for any of the myriad reasons stated in the opening brief (including the lack of evidence that Mr. Klinkenberg actually took and carried away anything)? If it is at all possible that their opinion was shifted at the last moment by what is essentially propensity evidence—Mr. Klinkenberg's prior criminal contacts—and the apparent (although explainable) contradictions in his trial testimony, that too constitutes a breakdown in the adversarial process that should undermine this Court's confidence in the outcome. A broad reading of *Pitsch* supports the conclusion that the ineffectiveness inquiry is predominantly concerned with *how* a conviction is obtained. Having the defendant be convicted on the basis of otherwise inadmissible character evidence contravenes basic principles of fairness and undermines our confidence in a "valid" result. The possibility that a vote of guilt was swayed by an attack on the defendant's credibility, notwithstanding the relative strength of other evidence in the case, is simply unacceptable in a fair adversarial system. Because there is a possibility that this occurred in this instance, reversal should result under such circumstances.

iii. Trial counsel's choice not to investigate Detective Meyers' identification impinged on an issue "in question."

The State presented evidence from Detective Mark Meyers that Mr. Klinkenberg was the individual on the videotape. Yet, bizarrely, the State claims that identification had nothing to do with any issues at play in the case. (State's Br. at 10). This is flat-out wrong. As was argued in the opening brief, Det. Meyers' identification was a central piece of evidence in the case. Trial counsel had a duty to investigate the

basis of that investigation. Det. Meyers' identification was also a central issue *for the defendant* and played a critical role in his decision making process. That identification is at the root of many subsequent acts or omissions on the part of trial counsel which are highlighted in the opening brief.

Not for the first time, the State backs up its argument with the supposition that *nothing else* in the case mattered because of its all-important videotape.[5] This argument cannot be taken seriously. Would the State excuse any and all hypothetical errors, even the most egregious ones, simply because they had a few minutes of videotape? It appears the answer is yes, which suggests a deep-seated misunderstanding of the legal concepts at play.

iv. Trial counsel's elicitation of damaging testimony was prejudicial.

The State gives short shrift to this issue, lumping it in with the failure to investigate. Because it received light treatment in the State's brief, Mr. Klinkenberg believes the issue can be fairly assessed based on those arguments and authorities already raised.

v. The State has not meaningfully responded to the claim regarding trial counsel's deficient preparation of Mr. Klinkenberg as a witness.

The State does not meaningfully respond to Mr.

[5] A videotape which does not show Mr. Klinkenberg taking and carrying away a single thing.

Klinkenberg's claim that trial counsel failed by not adequately preparing his client to testify. Any argument that does exist can be reduced to a series of misleading asides, like the assertion that the claimed error is one of insufficient witness "coaching." (State's Br. at 8). Because the State has not meaningfully addressed this issue in its response, the issue should be conceded in Mr. Klinkenberg's favor. *See Charolais Breeding Ranches*, 90 Wis.2d at 109.

vi. The State has mischaracterized Mr. Klinkenberg's argument regarding the prejudicial effect of Officer Branigan's identification.

The State asserts that failure to object to Officer Branigan's testimony was not prejudicial and reduces Mr. Klinkenberg position to an argument that the evidence was "cumulative." (State's Br. at 15). While that was a claimed issue with the evidence, the reductive treatment does not address Mr. Klinkenberg's substantive argument regarding prejudicial effect. That is, speculating about how the evidence could have been ordered differently, as the State does, fails to account for the specific nature of Mr. Klinkenberg's claim. Certainly, if the evidence had been ordered differently, as the State suggests, there may have been no prejudicial effect. However, taking the evidence as it *was* presented, trial counsel's error led to a unique prejudicial effect as it caused the jury to be told, by an authority figure, what the evidence was before they themselves were allowed to make their own identification. In the eyewitness context, it is well-settled that such identifications are inherently suspect. *See State v. Dubose*, 2005 WI 126, ¶ 35, 285 Wis.2d 143, 699 N.W.2d 582 (discussing sources of suggestiveness with respect to

eyewitness identifications).

It is Mr. Klinkenberg's position that the way the evidence was presented undermines confidence because the resulting jury identification (assuming, that the jury did conclude and base its verdict on a definitive conclusion that it was Mr. Klinkenberg on the video, which is not at all apparent from the record as juror deliberations are ipso facto unavailable for scrutiny) is tainted by the way that evidence was presented to them. Simply put, the Court cannot have confidence, in light of the social science quoted, that the jury reached their conclusion in a fashion that was freed from destructive cognitive biases. For that reason, reversal should result.

II. Sufficiency of the evidence.

Mr. Klinkenberg has attacked the sufficiency of the evidence with respect to one specific element, the taking and carrying away of property. Because the video in question does not actually show Mr. Klinkenberg taking and carrying away property, Mr. Klinkenberg has therefore attacked the alleged circumstantial evidence in this case.

The State avers that none of the issues raised by Mr. Klinkenberg are in and of themselves elements of theft. (State's Br. at 19). That is correct. Rather, they are means of circumstantially proving the element at issue. Proof that Mr. Klinkenberg pawned the laptop, that an item was discovered missing immediately after he left the store, or that there was a gap in the store's inventory may circumstantially prove a theft. No such evidence is present here.

The State has not meaningfully addressed the central issue and fails to grasp the specific nature of Mr. Klinkenberg's argument regarding insufficiency of the evidence. The State takes Mr. Klinkenberg's guilt for granted and does not meaningfully explain why the evidence, taken in a light most favorable to them, supports the jury's verdict. Instead, they assert that the evidence is sufficient apparently because Ms. Magnus says so. (State's Br. at 19).

The State's evidence, summarized on page 19 of their brief, is just not enough, to prove a "taking and carrying away" beyond a reasonable doubt. For that reason, the underlying jury verdict should be vacated by this Court.

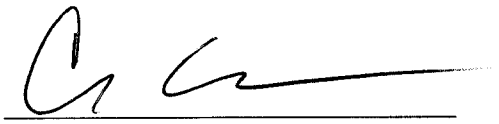
CONCLUSION

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 31st day of July 2015.

Respectfully submitted,

Mr. Daniel Klinkenberg
Defendant-Appellant



Attorney Christopher P. August
Counsel for Defendant-Appellant
SBN: 1087502
10 E. Doty St. #821
Madison, WI 53703
(608) 204-5804
augustlawofficellc@gmail.com

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 7,889 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 31 day of July, 2015.

Christopher P. August
State Bar No. 1087502

CERTIFICATION OF SERVICE

I hereby certify that on this 31st day of ~~April~~ July, 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 31st day of July, 2015.

Christopher P. August
State Bar No. 1087502