STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2015AP000637 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL DENGSAVANG,

Defendant-Appellant.

ON REVIEW OF A JUDGMENT OF CONVICTION AND A DENIAL OF A MOTION FOR POST-CONVICTION RELIEF IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET AND STEPHANIE ROTHSETIN PRESIDING, RESPECTIVELY.

REPLY BRIEF OF DEFENDANT-APPELLANT, MICHAEL DENGSAVANG

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INTRODUCTION

Defendant Michael Dengsavang has asked this Court to overturn his conviction and grant a new trial because the Circuit Court erred when it found trial counsel effective despite the cumulative errors of opening the door to testimony on the excluded shoeprint report, failing to object to shoeprint testimony on evidentiary grounds, and failing to expose exculpatory discrepancies in descriptions of the shooter. This appeal follows this Court's reversal of the Circuit Court's initial determination that Dengsavang was not entitled to relief on his claims, and remand so that a *Machner* hearing could be held. (***State v. Michael Dengsavang***, Case No. 2013AP1573-CR, slip op. (Wis. App., Apr. 29, 2014) (per curiam); R. 80 at ¶17-18.) Following the *Machner* hearing, the Circuit Court again denied Dengsavang's claims. (R. 86 at 10.) Dengsavang filed his opening brief on September 25, 2015. On December 8, 2015, the State filed its brief in response. Dengsavang herein replies.

ARGUMENT

I. The State has constructed a strategic defense which trial counsel did not offer with regard to opening the door to the excluded shoeprint report

At the *Machner* hearing, trial counsel could give no reason why he opened the door to the excluded shoeprint report. He testified, "Um, you know, looking back on it, I really – you know, I don't – it seems to me looking back on it, if I had known about the court's order then I should have objected to everything. Yet I'm the one that started opening the door in the first place. So unfortunately at this time I can't recall [why he opened the door]. I don't know if

that was a strategic purpose or not." (R. 91 at 13:13-21.) Trial counsel additionally testified, "Thinking back on it now, can I say it was strategic? No. I can't really tell you what my motive was for asking the questions that I did about the [shoe]prints." (*Id.* at 9:8-11.)

Despite this testimony, the State argues in its responsive brief that trial counsel "***likely*** knew about the pretrial order and reasonably opened the door to the ultimately inconclusive information in the report." (Resp. Br. at 10.) It further argues that trial counsel's opening the door to the otherwise excluded shoeprint report was not inconsistent with trial strategy of showing that Dengsavang was an innocent bystander. (*Id.* at 12.) However, neither the State nor the Court can imply trial strategy where there is no evidence of one. ***State v. Jenkins***, 2014 WI 59, ¶36, 355 Wis.2d 180, 848 N.W.2d 786, 794 (Wis. 2014) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defense which counsel does not offer.") Indeed, trial counsel has admitted that he simply does not know whether he had a strategic reason for this strategy and, in fact, should not have opened the door. (R. 91 at 9:8-11, 13:13-21.)

The result of trial counsel's opening the door to the delinquently disclosed shoe-print report was that trial counsel then had to argue – without an expert of his own – that the report was inconclusive. (R. 61 at 6:5-13; R. 68 at 17:5-11.) This report was not helpful to Dengsavang's defense, as the State alleges, because it put into the jury's minds that experts determined that the shoes Dengsavang was wearing when he was arrested "could have made" the shoe-prints found at the scene. (R. 68 at 23:3-25, 24:1-2.) The State then argued at closing, "the [shoe]-prints are probably the key to the whole case." (R. 70 at 44:16-17.) Trial counsel had to refute this testimony

and, without an expert witness, the best he could do was to argue inconclusiveness. (*See,* R. 61 at 6:5-13; R. 68 at 17:5-11.)

II. The State has provided no valid reason trial counsel could not or did not object to Detective Hudson's shoeprint testimony on hearsay and lay witness grounds

At trial, detective Hudson testified not only to the results of the excluded expert shoe-print report, but also on her own lay opinion as to whether the shoe-prints found near the crime scenes visually matched the shoes Dengsavang was wearing when he was arrested. (*See, e.g.* R. 67 at 88:18-23, 92:12-17; R. 68 at 7:9-17.) The State, in its responsive brief, fails to differentiate between these two components of objectionable testimony.

The State argues, "It is not clear how these proposed objections [to Detective Hudson's testimony as impermissible lay witness testimony] would have occurred, given that trial counsel opened the door to testimony from Hudson about the shoe-print report." (St. Resp. at 21.) First, trial counsel's opening of the door to the shoe-print report is logically irrelevant to this inquiry; he could have made multiple errors with regard to the shoeprint evidence. Further, the prosecutor first asked Detective Hudson, on direct examination, whether the shoe-prints connecting the crime scenes matched the shoes Dengsavang was wearing when he was arrested. (R. 67 at 88:18-23.)

Separate from the report, Detective Hudson testified as to her own opinion of whether the shoeprints found at the crime scenes matched the shoes Dengsavang was wearing. (R. 67 at 88:18-23; 92:12-17; R. 68 at 7:9-17.) Dengsavang argues this was objectionable, because, as a lay-witness, Detective Hudson was not qualified to offer this testimony. (R.

47 at 9-14); *See* ***York v. State***, 45 Wis. 2d 550, 558-560, 173 N.W.2d 693, 698 (Wis. 1970) (allowable fact witness opinion testimony is generally limited to descriptions of persons or things, but stops short of analysis); ***United States v. Smith***, 697 F.3d 625, 633-635 (7th Cir. 2012) (discussing an FBI examiner's testimony that "all shoes differ and that they have features which an average layperson, without training and experience, would not be able to distinguish adequately.") Because this questioning occurred on the State's direct examination of Detective Hudson, trial counsel could have – and should have – objected to this identification as outside the scope of lay witness testimony.

Rather than making either evidentiary objection and attempting to minimize the damage Detective Hudson's shoeprint testimony caused to Dengsavang's defense, trial counsel made no objection, and proceeded to elicit further testimony of Detective Hudson's "visual matching" of the shoe-prints. (R. 67:86-105, R. 68:5-14 (as to no objection); R. 68:16-20 (as to trial counsel eliciting further testimony).) As discussed in Part I, *supra*, trial counsel testified that he had no strategy for this line of questioning and, indeed, "should have objected" to it. (R. 91 at 13:13-21.)

III. The State fails to address compelling evidence that Dengsavang did not commit the three crimes

To meet the second prong of the ***Strickland*** test for ineffective assistance of counsel, the defendant must show that he suffered prejudice as a result of counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, the defendant must show that, but for these errors, there exists a reasonable probability of a different result in the case. ***Strickland***, 466 U.S. at 694.

In arguing that Dengsavang cannot establish prejudice, the State considers introduction of the shoeprint evidence (both the expert report and Detective Hudson's lay witness testimony) in a vacuum. (St. Resp. at 15-16.) It fails to address the impact of this evidence in the context of compelling exculpatory evidence. (*Id*. at 15-20.)

The State purports to offer four pages of "insurmountable evidence that Dengsavang committed all three crimes," however nothing in this bulleted list tends to prove that Dengsavang, and not anyone else, committed the three crimes. (*Id.* at 17-20.) Critically, the State's listing of "insurmountable evidence" *depends upon the shoeprints* to connect the three crime scenes. (*Id*.) The State's approach to analysis is similar to the approach the circuit court took in denying Dengsavang's motion for post-conviction relief, when it indicated that there was "ample evidence" to support Dengsavang's conviction solely because there was "a total of thirty seven witnesses . . . [and] over 300 exhibits." (R. 86 at 9.) However, neither the circuit court nor the State have considered the strength or breadth of the exculpatory evidence.

Notably, this evidence includes:

- Victim X.Z. testified that she was acquainted with Dengsavang and did not recognize him as one of the suspects either visually or vocally. (R. 64 at 23:16-19 (failure to identify Dengsavang visually); *Id.* at 22:20-23 (failure to identify Dengsavang vocally));

- X.Z's husband, also a victim and eyewitness to the Happy Wok robbery, testified that the robbers spoke Spanish – a language Dengsavang does not speak. (R. 63 at 81: 2-4 (testimony that the robbers spoke Spanish); R.

47 at Ex. C: ¶6 (Dengsavang's averment that he does not speak Spanish));

- Officer A.P. described a suspect who was a different race and build, and was wearing different clothes than Dengsavang when he was arrested. (R. 47 at Exh. B, G, H; R. 66 at 36:10-20); and

- DNA analysis *excluded* Dengsavang as the source of the DNA found on the gun that shot Officer A.P. (R. 47 at Exh. A.)

The State's response to this exculpatory evidence consists of a single footnote wherein it argues that A.P.'s initial description of the shooter is "not that different from the defendant's true physical characteristics." (St. Resp. at 24, n. 5.) The State does not respond to the remaining components of exculpatory evidence. (*See generally* St. Resp.)

IV. To date, no court has meaningfully considered Dengsavang's argument that trial counsel rendered ineffective assistance of counsel by failing to expose exculpatory inconsistencies in descriptions of the shooter

In relevant part, Dengsavang's motion for post-conviction relief argued that trial counsel failed to adequately represent him at trial because counsel did not bring to the jury's attention exculpatory descriptions of the shooter. (R. 47 at 16-19.) Dengsavang argued that trial counsel should have elicited testimony from Officer A.P. concerning her initial description of the shooter, which differed from the description she gave at trial, and described the shooter as "black male, five eight, or unknown race, all black clothing, hood up, five foot eight, thin." (*Id.* at 16.) In contrast, Dengsavang is an Asian male who

stands 5 feet 10 inches tall, weighs approximately 180 pounds, and was wearing blue jeans at the time he was arrested. (*Id*.)

In its order dated June 24, 2013, the Circuit Court denied this motion without a hearing. (R. 53 at 5.) Dengsavang appealed to this Court, which reversed the postconviction order and remanded, finding that Dengsavang satisfied his burden entitling him to a *Machner* hearing. (***State v. Michael Dengsavang***, Case No. 2013AP1573-CR, slip op. (Wis. App., Apr. 29, 2014) (per curiam); R. 80 at ¶17-18.) The Circuit Court then held a ***Machner*** hearing, but refused to take testimony concerning this argument because the Court of Appeals order did not explicitly instruct it to do so. (R. 91 at 17:1-15; R. 92.)

The Circuit Court has no discretion and must hold a *Machner* hearing where "the motion on its face alleges facts which would entitle the defendant to relief." ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (Wis. 1996); *See also* ***State v. Washington***, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Wis. App. 1993). A defendant is entitled to a *Machner* hearing under these circumstances because a *Machner* hearing "is a prerequisite to a claim of ineffective representation." ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Wis. App. 1979.)

Dengsavang's allegation that trial counsel failed to adequately represent him at trial because counsel did not bring to the jury's attention exculpatory descriptions of the shooter is sufficient to entitle him to a *Machner* hearing. Following the Circuit Court's refusal to take testimony on this issue, undersigned counsel submitted an offer of proof indicating that, given her discussions with trial counsel, she reasonably believes he would have given testimony in support of Dengsavang's argument of ineffective assistance. (R. 82.)

Dengsavang alleged sufficient facts to support his claim that he was denied effective assistance of trial counsel for failure to expose for the jury exculpatory descriptions of the shooter. Therefore, evidence should have been taken on this issue at a *Machner* hearing. ***Bentley***, 201 Wis.2d at 309-10. Despite Dengsavang's clamoring for consideration of this argument in both the lower and higher courts, it has still not been meaningfully considered at either level.

CONCLUSION

For the foregoing reasons, Michael Dengsavang respectfully requests that this Court reverse his conviction and grant a new trial or any other relief that the court deems appropriate.

Dated this __ day of December, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM & LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,057 words.

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ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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