STATE OF WISCONSIN
IN THE COURT OF APPEALS, DISTRICT III

Appeal No. 2015AP002632-CR
(Shawano County Case No. 12-CM-695)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER J. MCMAHON,

Defendant-Appellant.

Appeal from the Judgment and the Final Order Entered in the Circuit Court for Shawano County, the Honorable William F. Kussel, Jr., Circuit Judge, Presiding

BRIEF OF DEFENDANT-APPELLANT

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1. Whether Christopher J. McMahon was denied the effective assistance of counsel based on trial counsel's:

   A. Failure to shield McMahon from prior criminal conviction impeachment by the state;

   B. Failure to object to the state asking defense witness Kimberly Rushman about a non-criminal conviction;

   C. Failure to present exculpatory evidence; and

   D. Failure to object to improper burden-shifting questions and argument by the state.

Following evidentiary hearings, the circuit court denied McMahon's postconviction motions for relief based on this ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request oral argument.

The appellant does not request publication. The issues raised in this case involve no more than the application of well-settled rules of law to a recurring fact situation regarding the question of ineffective assistance of counsel. There appears to be no reason for questioning the controlling precedent in this matter. The appellant believes this case would not have significant value as precedent.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

On November 12, 2012, the state filed a single-count criminal complaint against Christopher J. McMahon alleging that he stole fencing from B. R. in Wittenberg, Wisconsin, on or about Saturday, September 29, 2012, contrary to § 943.20(1)(a) & (3)(a) and § 939.51(3)(a) of the Wisconsin Statutes (R1; App. 101). (2013-14).

On April 3, 2013, a jury convicted McMahon and the circuit court judge sentenced him to 90 days jail and ordered the payment of $711.81 in restitution (R18; App. 110).

McMahon's postconviction motions and amended postconviction motions pursuant to Wis. Stat. § 809.30(2)(h) alleged, *inter alia*, the ineffectiveness of trial counsel (R24; R36).

The Honorable William F. Kussel, Jr., denied McMahon's motions for postconviction relief after two evidentiary hearings held on August 14, 2015, and December 1, 2015 (R42; R51; R52). McMahon now appeals.

STATEMENT OF FACTS

Christopher J. McMahon is a special education teacher engaged to marry a substitute teacher,

Kimberly Rushman (R49:175, 140; App. 231, 196). In 2011, McMahon purchased a home at 899 Brilowski Road in the Town of Hull, Portage County, Wisconsin, that McMahon, Rushman, and McMahon's daughter lived in together (R49:85-86, 147-148, 186; App. 147-148, 203, 242).

McMahon had several projects going on in the backyard of the newly-purchased home, including garden patches of blueberries, zucchini, and squash, some surrounded by timbers; a playhouse that he was building for his daughter; and a swimming pool in the works (R49:130, 142, 148, 160-163, 170-172, 185-186; App. 186, 198, 204, 216-219, 226-228, 241-242). The backyard abutted a corn field (R49:160-161; App. 216-217).

McMahon installed a large fence around his house after he moved in (R49:131; App. 187). McMahon's mother, Diane Giesfeldt, gave McMahon fencing as well (R49:131; App. 187).

In the summer of 2012, sometime between three to seven weeks before September 29, 2012, McMahon testified that he found four rolls of green chain link fencing in a dumpster in Wisconsin Rapids by a construction site near 8th Street (R49:183-184; App. 239-240). McMahon was amazed at his find and told Rushman about it (R49:141,156; App. 197, 212). McMahon hauled the fencing back to his home by himself on his trailer—a trailer McMahon used during the summer for hauling dirt, leaves, and other materials for his garden (R49:199; App. 255).

McMahon planned to use the fencing for chickens, but the holes in the wire were too big (R49:156, 201;

App. 212, 257). McMahon also planned to use the fence to keep deer out of his vegetable garden (R49:143; App. 199). McMahon moved the fencing around his backyard several times over the summer (R49:185-186; App. 241-242).

On August 11, 2012, numerous guests were invited to a housewarming party at McMahon's home (R49:128, 133, 137, 142, 148, 160, 185; App. 184, 189, 193, 198, 204, 216, 241). McMahon's mother, Diane Giesfeldt, remembered the date because her husband went to a gun show in Iola that day (R49:128; App. 184). Giesfeldt came from her home in Harshaw, near Minocqua, to visit McMahon while her husband went to the gun show (R49:128, 133-134; App. 184, 189-190).

Although Giesfeldt testified that she has trouble walking, she remembered seeing green chain link fencing in the backyard (R49:129-130; App. 185-186). Giesfeldt did not go up to the fencing, but saw what she guessed was one or two rolls of fencing somewhat unraveled (R49:129-130; App. 185-186). She testified about how messy looking it was (R49:130-131; App. 186-187).

Rushman also recalled the housewarming party on August 11, 2012 (R49:142; App. 198). She saw all four rolls of fencing wound up neatly in the backyard near the playhouse (R49:142; App. 198).

Later that summer, on September 4, 2012, Rushman's son, Colton Rushman, age 20, came over to McMahon's house to cut grass (R49:153-155; App. 209-211). Although Colton lived with McMahon and Kimberly Rushman before, Colton was living in Port

Edwards at the time (R49:159; App. 215). Colton saw four rolls of green chain link fencing in McMahon's backyard (R49:155-158; App. 211-214). Colton moved the rolls to cut the grass underneath (R49:155; App. 211).

Then, on September 29, 2012, McMahon awoke early because he was having trouble sleeping (R49:146-147, 176-177; App. 202-203, 232-233). McMahon had been in two car accidents before and they affected his eyes, which, in turn, sometimes affected his ability to sleep (R49:176-177; App. 232-233).

McMahon knew of a door and some bricks that were sitting out near Highway 49, and of a dumpster in Tigerton (R49:177; App. 233). McMahon had never been out to that area before to look for salvageable items for his backyard (R49:188-189; App. 245-246).

So at approximately 5:15 a.m., McMahon set out (R49:176; App. 232). He remembered initially forgetting his wallet on the way to the gas station (R49:176; App. 232). After that, McMahon drove toward the Tigerton area. As McMahon was heading north on County M, past Highway 153, he noticed problems with his vehicle (R49:177-178; App. 233-234).

McMahon's vehicle overheated (R49:178; App. 234). McMahon saw his lights flicker, so he pulled over (R49:178; App. 234). McMahon exited his vehicle, popped the hood, and began walking southbound on County M (R49:178; App. 234). It was still dark out (R49:182; App. 238).

McMahon had walked a couple hundred feet when he saw a vehicle drive by and eventually pull up behind his car (R49:179; App. 235). Two men got out and walked toward McMahon's vehicle (R49:179; App. 235). McMahon thought they opened the doors to his car (R49:179; App. 235). McMahon did not know who they were (R49:180; App. 236). McMahon did not know why they were there (R49:180; App. 236). McMahon froze (R49:180; App. 236).

The two men in the vehicle were B.R. and his brother, M.R.. B.R. lives at W18439 Norway Pine Lane in Wittenberg (R49:49; App. 117). His brother, M.R., lived half a mile away at N5467 County Road M, Wittenberg (R49:56, 78; App. 124, 140).

On this particular morning, September 29, 2012, at approximately 5:45 a.m., B.R. woke up to make firewood with his brother M.R. (R49:55-56; App. 123-124). When M.R. drove to B.R.'s house in his Ford F-250 pickup truck, M.R. recalled seeing a white Chevy vehicle driving northbound on County M, and passing it before arriving at B.R.'s residence (R49:77-80; App. 139-142). When M.R. and B.R. rode in the truck together on their way to make firewood, they came across the same white Chevy Lumina with a trailer parked on the side of the road near the stop sign at Norway Pine Lane and the intersection of County M (R49:57, 80-81; App. 125, 142-143). No one was in the car (R49:57, 61; App. 125, 129).

B.R. and M.R. did not know who McMahon was at the time (R49:55, 83; App. 123, 145). On September 22, 2012, B.R.'s cord or a cord and a half of firewood had gone missing from his property near the intersection of County M and Norway Pine Lane where B.R. has a

small garage and some apple trees (R49:50-54, 57, 66; App. 118-122, 125, 134). The area is somewhat clear there (R49:51; App. 119). Although Norway Pine Lane has three homes, it is a dead-end road, one of the homes is a cottage, and the area is rural (R49:49, 62, 69; App. 117, 130, 137).

On September 26, 2012, B.R. also had four rolls of green chain link fencing go missing by his apple trees (R49:51-54; App. 119-122). B.R. contacted local law enforcement about the stolen fencing (R49:52; App. 120).

B.R. had originally picked up the fencing from his place of employment at St. Clare's Hospital in Weston (R49:51, 66; App. 119, 134). The hospital had removed the fencing from around a playground (R49:51; App. 119).

When B.R. and M.R. saw McMahon's vehicle they did not think someone would be out at quarter to six in the morning to steal anything (R49:57-58; App. 125-126). Both B.R. and M.R. testified that they thought the Chevy Lumina may have belonged to their cousin who might have been bow hunting (R49:57, 61, 82; App. 125, 129, 144). Moreover, it was not uncommon to have a trailer attached to a vehicle in the area (R49:69-70; App. 137-138).

B.R. testified that he approached the Chevy Lumina. B.R. said that the window was down, and he looked inside the vehicle (R49:57, 61; App. 125, 129). He did not see anyone in the vehicle (R49:57; App. 125). B.R. took down the license plate (R49:58-59; App. 126-127).

Meanwhile, McMahon remained away from his car. McMahon was afraid (R49:180; App. 236). He did not confront the two men (R49:180-181; App. 236-237).

B.R. and M.R. proceeded to get back into their truck and drive to check on B.R.'s property, including B.R.'s garage area, where with the help of law enforcement earlier, B.R. had moved his last remaining roll of green chain link fencing (R49:50, 53, 57, 61; App. 118, 121, 125, 129). Not seeing anybody there, B.R. and M.R. proceeded to drive east on Highway 153 to make firewood (R49:57-58, 82; App. 125-126, 144).

After B.R. and M.R. left, McMahon too got into his own car and started driving down Highway 153 (R49:180-181; App. 236-237).

As B.R. and M.R. were driving, B.R. said he had a bad feeling (R49:58; App. 126). So B.R. and M.R. turned around and drove back (R49:58, 82; App. 126, 144). While turning around, they saw the white Chevy Lumina with a trailer drive past them at an extreme speed (R49:58, 82-83; App. 125, 144-145).

M.R. and B.R. testified that they turned back around and pursued the Chevy Lumina in their truck, however, given the hills on Highway 153, and that they were driving in what they called a dump truck, they did not catch up to the car (R49:58, 82-83; App. 126, 144-145). M.R. said they turned around three times in the process, and he claims at some point the Lumina turned off its headlights (R49:83; App. 145). M.R. and B.R. then contacted law enforcement with the car's license plate number (R49:58-59, 83; App. 126-127, 145).

McMahon recalled driving on Highway 153 when suddenly he saw the two men from before following him (R49:181; App. 237). McMahon testified that he turned his car around and went the opposite direction, ultimately going southbound on County M (R49:181; App. 237). McMahon testified that he never turned his lights off, however, he later learned his tailgate lights were not working (R49:181; App 237). McMahon said that he was not fleeing from the men, but he had no idea why the men were in his vehicle or had stopped behind his vehicle (R49:181; App. 237).

When McMahon arrived home that morning, he told his fiancé about the men approaching his car and then following him (R49:182; App. 238). Rushman told McMahon to report this to law enforcement, but McMahon could not make out who the men were so he thought it would not make any sense to report the incident (R49:182; App. 238). McMahon also realized that morning that his wallet was missing and told Rushman about it (R49:190; App. 246).

A little while later that morning, Officer McDonald of the Portage County Sheriff's Department came to McMahon's house (R49:85-86, 181-182; App. 147-148, 237-238). McMahon recalled McDonald stating that he was looking for freshly-cut firewood and green fencing (R49:183; App. 239). McDonald saw McMahon's green chain link fencing right out in the open by the garden (R49:87, 183-184; App. 149, 239-240). McMahon gave McDonald permission to look at the fencing (R49:88; App. 150). McMahon told McDonald that he found the fencing in a dumpster in Wisconsin Rapids (R49:88; App. 150).

McDonald told McMahon to contact officer Wedemayer of Shawano County (R49:189; App. 245). McMahon did that morning. (R49:189; App. 245). McMahon told Wedemayer about McMahon's encounter with the two men in the morning and his missing wallet (R49:104, 114-115, 189-190; App. 166, 176-177, 245-246). McMahon testified that Wedemayer called McMahon a liar in regards to the wallet and that Wedemayer said he would do chemical testing on the fencing (R49:190; App. 246).

Wedemayer accused McMahon of stealing the fencing (R49:191; App. 247). McMahon denied it. Wedemayer asked to come and get the fencing (R49:191; App. 247). McMahon initially told Wedemayer "no," and that he should "come and arrest me if you want," but after advice of counsel, McMahon authorized Wedemayer to come and take the fencing (R49:191; App. 247). McMahon told Wedemayer that McMahon had acquired the fencing from a dumpster in Wisconsin Rapids approximately three weeks earlier (R49:103; App. 165).

Eventually, McDonald and Officer Nicole Lukas from Portage County came out to McMahon's residence to take the fencing (R9; R49:88-89, 191; App. 150-151, 247). They then turned over the fencing to Shawano County (R49:88-89; App. 150-151).

All the fencing was measured by Wedemayer (R49:102; App. 164). All the fencing had an approximate width of 60 inches, however, B.R. initially reported his missing fencing as being only four-feet high (48 inches) (R49:63-65, 102, 109-110; App. 131-133, 164, 171-172). Also, B.R. originally said that he had

three or four rolls that went missing (R49:63-65, 111; App. 131-133, 173).

Despite the initial confusion on McDonald's CAD report regarding whether there was a match of the acquired fencing from McMahon's residence—as McDonald testified he thought he was looking for green plastic fencing at first, both McDonald and Wedemayer testified later that there was a match in the type of green fencing they were looking for, i.e., green rubberized chain link fencing (R49:90-92, 94-97, 101-102, 116-117; App. 152-154, 156-159, 163-164, 178-179). B.R. also testified that he thought the green chain link fencing confiscated from McMahon's home matched his missing fencing because, in particular, B.R. saw some leaves and grass that he identified as coming from trees in the area of his residence (R49:60; App. 128).

The next day, Sunday, September 30, 2012, McMahon had his friend, Don Werle, come over to McMahon's house and take several pictures of matted down indentations in the grassy area from where McMahon had just previously moved the four rolls of fencing in the twenty-four hours before the officers arrived (R49:165-167, 170-171, 187; App. 221-223, 226-227, 243).

In addition, McMahon called Officer Nicole Lukas out to his residence to take pictures of the grassy matted down area where the four rolls had previously been (R9; R49:193-194; App. 249-250). McMahon videotaped that encounter (R51: Exhibit No. 4). On the video, one can hear McMahon say, "Boy I wish I would have recorded this yesterday. I want [sic] to ask if they want [sic] to come up here and take a picture, but I, I know

they are out for a conviction. They are not out for what's right" (R51:31, 34; App. 287).

B.R.'s last roll of fencing was stolen the week during gun hunting season in November well after McMahon had already been charged for theft (R49:53; R1; App. 101-103, 121). McMahon has not been charged for theft for B.R.'s last roll nor his stolen firewood. Both remain missing to this day.

ARGUMENT

MCMAHON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

McMahon was denied the effective assistance of counsel as guaranteed by Article I, sections 7 and 8 of the Wisconsin Constitution and by the 6th and 14th Amendments to the United States Constitution because McMahon's trial counsel, Jared Redfield, offered no legitimate tactical reason for the failures discussed below, counsel's failures were objectively unreasonable under prevailing professional norms, and counsel's failures prejudiced the reliability and fairness of McMahon's trial.

A. Standard for Ineffectiveness of Counsel

Criminal defendants are constitutionally guaranteed the right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); ***State v. Shata***, 2015 WI 74, ¶ 32, 364 Wis. 2d 63, 82, 868 N.W.2d 93, 102. Counsel's performance is ineffective if his representation was deficient and counsel's deficient

performance prejudiced the defense. ***Strickland***, 466 U.S. at 687.

The court considers what is reasonable under prevailing professional norms to determine whether counsel's performance is deficient. ***Id.*** at 688. The court reviews all the circumstances in determining whether counsel's assistance was reasonable. ***Id.*** at 688. The standard is objective. ***State v. Jenkins***, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 195, 848 N.W.2d 786, 793 *reconsideration denied*, 2015 WI 1, 360 Wis. 2d 178, 857 N.W.2d 620.

Nominal representation is not acceptable, rather, representation must be effective. ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167 (1983). Effective representation is what an "ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973).

Counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." ***Strickland v. Washington***, 466 U.S. at 688. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." ***United States v. Cronic***, 466 U.S. 648, 657, 104 S. Ct. 2039, 2046 (1984) (*quoting* Judge Wyzanski, *internal citations omitted*).

To show counsel's deficient performance prejudiced the defendant, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** "The focus is on the reliability of the proceedings." ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711, 718 (1985).

The standard of review is a mixed question of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. The court of appeals may not reverse the circuit court's findings of fact unless they were clearly erroneous. ***Id.*** The court of appeals grants no deference to the circuit court on questions of law regarding whether trial counsel's behavior was deficient or prejudicial to the defendant. ***See id.***

B. Trial Counsel's Performance Was Deficient

1. Failure to shield McMahon from prior criminal conviction impeachment by the state.

Trial counsel failed in a number of ways to shield McMahon's testimony from an ultimately devastating impeachment by the state from a fourteen-year-old prior misdemeanor criminal conviction.

To begin, counsel did not even attempt to preclude a fourteen-year-old misdemeanor conviction from being used against McMahon pursuant to Wis. Stat. § 906.09. Next, counsel inadequately prepared McMahon's testimony regarding his prior conviction. Then, after McMahon improperly answered the § 906.09 question about his prior record, counsel declined to object to a series of character-impugning questions regarding the nature of McMahon's prior record, a fourteen-year-old

theft charge the state dismissed as part of a plea bargain, and to an admission that McMahon stole timbers. Finally, counsel did not ask for a standard, limiting, or curative jury instruction to mitigate any harm caused by the state.

Although Wis. Stat. § 906.09(1) (2013-14) generally allows a party to question any witness regarding a prior criminal conviction, it is routine practice for defense attorneys to object to old misdemeanor convictions from being used by the state to impeach any witness, most especially the defendant.

Section 906.09(2) reads in pertinent part:

> EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Wis. Stat. § 906.09(2) (2013-14).

In the case of a defendant who chooses to testify, defense counsel has every tactical reason to argue for exclusion under the statute and no reason to argue for inclusion. The fact that a defendant has a prior criminal conviction easily leads to a troubling inference that because the defendant committed a crime in the past, he must have committed the present crime.

In this case, the defense hinged on McMahon's credibility. Defense counsel agreed (R51:20-21; App. 276-277). McMahon had only one prior misdemeanor conviction for criminal damage to railroad from October 9, 1998 (R51:40-41; App. 292-293). Defense counsel should have objected to the introduction of this

crime under section 906.09(2) because the probative value of a fourteen-year-old misdemeanor conviction for criminal damage to railroad would almost certainly be substantially outweighed by the danger of unfair prejudice in a case involving the single count of misdemeanor theft.

While it is true that Wisconsin does not follow the federal rules of criminal procedure[1], most seasoned criminal defense lawyers are aware of the practical exclusion of misdemeanor crimes that are older than 10 years. Moreover, McMahon's criminal conviction for criminal damage to railroad property has nothing to do with McMahon's honesty. If McMahon was convicted of theft, that would be a different case. However, McMahon was not convicted of theft.

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[1] *See* Rule 609. Impeachment by Evidence of a Criminal Conviction, in pertinent part:

> **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
>
> **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.
>
> Fed. R. Evid. 609.

Trial counsel had every reason to attempt to block the admission of McMahon's prior record. Yet, McMahon's counsel—an attorney with 30 years of criminal practice—did not even try (R49:5; R51:7, 41-42; App. 114, 271, 293-294).

Knowing that McMahon would testify at trial and answer the § 906.09 question in the affirmative, trial counsel should have adequately prepared McMahon to answer that question. However, counsel did not.

Counsel testified that McMahon was not the type of person capable of answering a yes or no type of question (R52:11; App. 300), but McMahon was adamant about testifying (R49:124; App. 180). Although McMahon has a learning disability, trial counsel took "not more than a minute or two" to explain to McMahon his right to testify (R51:50-51; R49:124; App. 297-298, 180).

McMahon testified that trial counsel provided him with no advice in regards to the § 906.09 question (R51:49-50; App. 296-297). McMahon said he did not understand how to answer the § 906.09 question properly (R51:51; App. 298).

Given McMahon's learning disability, and apparent difficulty in answering a yes or no type of question, trial counsel should have spent substantial time preparing McMahon on the question of testifying as well as how to answer the § 906.09 question properly.

Moreover, experienced defense attorneys know that it is better to elicit harmful testimony during direct examination, rather than leaving it for the prosecutor to bring it up on cross-examination. ***See State v. Pitsch***, 124 Wis. 2d 628, 631, 369 N.W.2d 711, 713 (1985).

This is particularly true here where the state reserved the criminal conviction questioning for the very end of McMahon's testimony (R49:208-209; 264-265). McMahon was the last defense witness to testify, and the second-to-last witness heard before the jury deliberated (R49:1-2, 209; App. 112-113, 265).

Thus, shortly before the jury deliberated, the jury heard this testimony:

> Q. Have you ever been convicted of a crime?
> A. Yes, I was.
> Q. How many times?
> A. One crime about 15 or 16 years ago.

(R49:204; App. 260).

The jury also heard the immediate request for a hearing outside the presence of the jury after McMahon's answer to these questions (R49:204; App. 260). This likely contributed to the jury wondering why the court was breaking at that moment, highlighting the fact that McMahon was previously convicted of a crime. This unnecessary break and potential underlining of McMahon's criminal record would have been easily avoided had defense counsel adequately prepared and questioned McMahon about the prior conviction on direct examination.

To make matters worse, the state was allowed to open the door and ask more questions about McMahon's prior conviction (R49:204-207; App. 260-263). Although trial counsel did object to the judge opening the door, trial counsel failed to remain vigilant after the door was opened.

Immediately upon the jury's return to hear testimony, the state asked McMahon the following:

> Q. Have you been convicted in the past?
> A. Correct.
> Q. What was that for?
> A. Uh, criminal damage to railroad property.
> Q. You were also stealing at the time, were you not?
> A. Yes.
> Q. And they were willing to dismiss the theft count in order for you to plead to the criminal damage to railroad property?
> A. Correct.
> Q. You were stealing railroad equipment?
> A. No.
> Q. What were you stealing?
> A. The timbers that were supporting the -- some sign, or something like that.

(R:49:208; App. 264).

Defense counsel did not object to one single question above even though he should have every single time (R:51:47; App. 295). Counsel made no attempt to rehabilitate McMahon either; counsel simply had no follow up questions for McMahon (R49:209; App. 265).

First, section 906.09 only permits an attack on credibility by evidence of a conviction of a crime. *See* Wis. Stat. § 906.09(1) (2013-14). Second, case law in Wisconsin "is well-established that in a criminal case a witness cannot be impeached by showing an arrest where there is no conviction." ***State v. Cathey***, 32 Wis. 2d 79, 89, 145 N.W.2d 100, 105 (1966). Moreover, the state cannot "inquire into the nature of prior convictions and sentences . . . absent any denial of such convictions." ***Id.*** at 89-90. This is fundamental criminal

law that every defense attorney, let alone one practicing for 30 years, should know.

The first question by the state should have regarded the true date of the crime, not the nature of the crime. McMahon did not falsely answer the number of crimes, or deny that he had been convicted of a crime at all (R49:208; App. 264). Rather, McMahon mistakenly added information about how old he thought the crime was (R49:208, R51:40-41; App. 264, 292-293). Had the state asked McMahon to clarify that the conviction was really fourteen years ago, and not fifteen or sixteen years ago, that should have ended the questioning.

Defense counsel reasoned that because the judge opened the door, counsel did not want to be "unruly" by further objecting (R51:46-47; App. 294-295). While defense counsel acknowledged that the state's questioning was improper, counsel just wanted "it to get over with," and "for us to go on with life" (R51:46-47; App. 294-295). Counsel thought that by not objecting, he would avoid highlighting the issue to the jury (R51:46-47; App. 294-295).

However, even if the court opened the door and allowed the state latitude, that latitude did not allow the state to go into the nature of McMahon's prior conviction, or the details of a fourteen-year-old plea bargain where a theft charge was dismissed, or the admission of McMahon committing a crime of stealing timbers.

The state's line of questioning went beyond even the nature of McMahon's prior conviction. The state's questioning served no legitimate purpose under § 906.09. In fact, it only served one purpose—to secure

conviction against McMahon—by showing the jury that McMahon is a thief, and more particularly, a timber thief—all in a single-count misdemeanor theft case that involved not only stolen fences, but also the report of a cord or cord and a half of stolen firewood (R49:63; App. 131).

McMahon was entitled to the effective assistance of counsel—not the proverbial potted plant. The judge's evidentiary ruling did not relieve counsel from his duty to remain a zealous advocate for his client.

After hearing McMahon admit to stealing timbers the jury could not remain unbiased in McMahon's case[2]. Defense counsel should not only have objected, he should have moved for mistrial.

Furthermore, counsel did not request a limiting or curative jury instruction to minimize the harm done. The only jury instruction read to the jury regarding the defendant testifying was Wis. J.I.—Criminal 300 (R14; R49:245; App. 109). When asked by the judge for any additional jury instructions, defense counsel commented on stricken testimony and knew to object to the instruction *falsus in uno*, however, counsel did not request Wis. J.I.—Criminal 327[3] regarding

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[2] "In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect." ***Paulson v. State***, 118 Wis. 89, 94 N.W. 771, 774 (1903).

[3] Wis. J.I.—Criminal 327 (2001) reads:

impeachment of the defendant as a witness based on a prior conviction, or any limiting instruction for that matter (R49:211-216; R51:47; App. 295).

Although the harm done by the state was arguably irreparable, there was no tactical reason for counsel to not request a jury instruction on McMahon's prior conviction. Furthermore, a curative instruction may have helped instruct the jury not to use the dismissed theft charge in its consideration of McMahon's credibility. The jury should have been told that McMahon was presumed innocent of any dismissed offense, and that just because McMahon was charged with an offense before, does not mean that he committed the present offense.

Trial counsel's numerous errors resulted in improper impeachment of McMahon. Counsel had no legitimate reason for failing to even attempt to exclude McMahon's prior record; failing to address McMahon's prior conviction on direct examination to minimize damage; failing to object to the state's inculpatory questions about the nature of McMahon's prior record, a dismissed theft charge, and an admission of stealing wood before; and failing to ask for any curative or limiting jury instructions whatsoever.

> Evidence has been received that the defendant (name) has been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the credibility of the defendant as a witness. It must not be used for any other purpose, and, particularly, you should bear in mind that a [criminal conviction] [juvenile adjudication] at some previous time is not proof of guilt of the offense now charged.

These blunders fall well outside the range of what an ordinarily prudent defense lawyer would do in a criminal misdemeanor trial for the single count of theft.

2. Failure to object to the state asking defense witness Kimberly Rushman about a non-criminal conviction.

Kimberly Rushman was called as a defense witness. Rushman lived with McMahon and saw the rolls of fencing McMahon had acquired in their backyard in July of 2012 long before B.R.'s rolls went missing on September 26, 2012 (R49:140-141, 147; App. 196-197, 203). During cross-examination, the state asked Rushman about her prior record:

> Q. Have you ever been convicted of a crime?
> A. Uh, ordinance, yes.
> Q. So, Wood County Case 08-CM-533.
> A. I don't know the case number.

(R49:152; App. 208).

Once again, Wis. Stat. § 906.09(1) allows questioning regarding a witness's prior criminal convictions. Only evidence of a conviction of a crime or an adjudication of delinquency may be used to impeach a witness. *See* Wis. Stat. § 906.09(1) (2013-14).

Here, trial counsel had a duty to investigate the prior convictions of defense witness Rushman. In ***State v. Pitsch***, the Court stated that trial counsel "should have had reliable information regarding the defendant's prior convictions" because it was possible that the defendant would testify. 124 Wis. 2d 628, 638, 369 N.W.2d 711 (1985). The Court explained that

"defense counsel had nothing to lose and everything to gain by obtaining a complete and accurate record of the defendant's prior convictions. Getting this information would not have been difficult." ***Id.*** This reasoning applies with equal force to a defense witness. Moreover, "[o]rdinance violations may not be used to impeach the credibility of a witness." ***Massen v. State***, 41 Wis. 2d 245, 256, 163 N.W.2d 616, 622 (1969).

If trial counsel knew Rushman did not have a criminal record before trial, then he should have objected before trial to a § 906.09 question being directed at her during trial. If counsel discovered Rushman did not have a criminal record during trial, then he should have raised an objection to Rushman being asked a § 906.09 question as soon as he could be heard by the court.

Although it is unclear from counsel's responses when exactly he learned of Rushman's ordinance violation conviction (R51:14-17; App. 272-275), it is crystal clear that counsel did not object at the outset of trial (R49:6; App. 115), and that counsel did not object to the state's questioning during trial (R49:152; App. 208). The failure to object in either event is objectively deficient.

3. Failure to present exculpatory evidence.

McMahon and his witnesses testified on direct examination about fencing that had been on McMahon's property long before B.R.'s fencing was ever stolen (R49:127-133, 140-147, 154-158, 164-173; 175-196; App. 183-189, 196-203, 210-214, 220-229, 231-252). However, McMahon's witnesses were cross-examined about the lack of grass growing through the

fencing or the fencing location itself based on photographs in trial exhibit six—which were the only photographs of the fencing taken at McMahon's residence that were introduced at trial (R13; R49:85-88; 136-137; 150-152; 161-162, 174; App. 104-107, 147-150, 192-193, 206-208, 217-218, 230).

McMahon's attorney failed to disclose to the state and introduce at trial photographs and a video recording that showed the previous location of the fencing: an area with matted down, grassy indentations consistent with four rolls of fencing in McMahon's backyard in accordance with the testimony of McMahon and his defense witnesses. Counsel knew of this evidence (R51:26-35; App. 282-291). Counsel needed only to reasonably disclose the evidence to the district attorney's office before trial and present the evidence at trial. Counsel did not do either.

Defense counsel did not believe the video or photographic evidence were valuable (R51:32; App. 288). Counsel's thought process for not using the evidence was this—he thought it would be more effective to have witnesses testify that they had seen fencing before it was stolen (R51:32; App.288). This reasoning is illogical because McMahon's witnesses did testify to seeing the fencing before it was stolen—that was not the issue. The issue was the state's impeachment of defense witnesses by use of the only photographs admitted into evidence in the trial.

Because the state impeached McMahon's witnesses over and over again with exhibit six—even arguing in closing that "a picture is worth a thousand words"—trial counsel had not only a reason but a duty to use photographic and video evidence in defense possession

that might bolster McMahon's witnesses' testimony and counter the state's impeachment (R49:223; App. 266). However, trial counsel did nothing of the sort, most likely because counsel had not reasonably disclosed the evidence before trial (R51:33-34; App. 289-290), and therefore could not use it. Counsel failed here in two ways: first by not using available exculpatory evidence at trial, and second, by not diligently preparing for trial.

Even if counsel did not choose to use the photographic or video evidence, he could have called law enforcement officer Nicole Lukas to testify. Lukas was on the defense witness list (R9). Lukas came to take the four rolls of fencing from McMahon's backyard and also photographed the area (R49:191-194; App. 247-250). Failure to call a witness by itself may be deficient performance. ***State v. Jenkins***, 2014 WI 59, ¶ 41, 355 Wis. 2d 180, 197, 848 N.W.2d 786, 794 *reconsideration denied*, 2015 WI 1, ¶ 41, 360 Wis. 2d 178, 857 N.W.2d 620.

4. Failure to object to improper burden-shifting questions and argument by the state.

During cross-examination of McMahon, the state asked McMahon the following in regards to McMahon finding four rolls of fencing in a dumpster in Wisconsin Rapids:

> Q. Did you ever go back to the dumpster where you got it from to see if you could find somebody who would give you a statement saying they had thrown away fencing?
> A. After that long of period, no.

> Q. You went to your mother and to your girlfriend and to your buddy to get statements. Why not try to get a statement from the owners of the dumpster?
> A. I tried -- figuring out which house, or not house, which dumpster it was or which area, and I wasn't a hundred percent sure which one. I don't pay attention when I do that. I got tons of stuff I got in dumpsters.

(R49:201; App. 257).

Also, in closing argument, the state revisited this theme and shifted the burden of proof onto McMahon with the following:

> And yet, he would have you believe that, in spite of the fact that he knows how to subpoena and bring in witnesses, his mother, his girlfriend, his girlfriend's son, and his friend, to come here to court, he doesn't bother to try to find out whose fence this was, and have them testify that they came in or that they threw it away and that was the fence.

(R49:225; App. 267).

It is fundamental in criminal law that the state has the burden to prove its case beyond a reasonable doubt. ***State v. Schulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151, 154 (1981). "This burden of persuasion remains with the state throughout the trial." ***Id.*** The burden cannot be shifted. ***Id.*** McMahon's counsel never objected to the state's burden-shifting questions or remarks in closing argument.

Counsel's rationale for not objecting was to simply let this matter pass so as not to draw jury attention (R51:21-26; App. 277-282). This rationale missed the mark. Counsel's failure to object based on a

fundamental principle in criminal law—that the state always has the burden of proof—is simply unprofessional.

C. Trial counsel's deficient performance prejudiced McMahon's defense and rendered the trial outcome unreliable.

Counsel's errors prejudiced McMahon's defense because the errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***See Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984).

In McMahon's case, as in ***State v. Pitsch***, the "sole issue in the case was the defendant's credibility." 124 Wis. 2d 628, 644, 369 N.W.2d 711, 720 (1985). ***Pitsch*** involved the theft of jewelry taken during a birthday party where over 30 people including the defendant and his girlfriend were present at the home of the jewelry-owner, Mrs. Richert. ***Id.*** at 629-630. The defendant and his girlfriend were seen by Mrs. Richert outside Mrs. Richert's bedroom. ***Id.*** at 630. She told them to come downstairs, which they did. ***Id.*** Later, Mrs. Richert's jewelry was purchased by a jewelry store where the defendant was seen seated in the car parked outside the shop while a Mr. Staehler went in with the jewelry. ***Id.***

At trial when the defendant was later charged with theft of Mrs. Richert's jewelry, the defendant's girlfriend testified that she gave the defendant jewelry to sell that she had found while cleaning her own jewelry box, and that was why the defendant was seen at the jewelry store where Mrs. Richert's jewelry was eventually sold. ***See Pitsch***, 124 Wis. 2d at 630-631. The

girlfriend, a minor, admitted that she stole Mrs. Richert's jewelry without the defendant's knowledge. Consequently, she was adjudicated delinquent as a juvenile. ***See id.*** at 631.

The defendant denied stealing the jewelry. ***Pitsch***, 124 Wis. 2d at 630. At trial, he testified against counsel's advice. ***Id.*** at 631. The defendant said that a Mr. Staehler came with the defendant to get a good deal at the shop, but the defendant never went into the shop. ***Id.*** The defendant denied receiving the stolen jewelry from his girlfriend. ***See id.***

On direct examination, the defendant testified that he had only two prior convictions, when in fact he had nine prior convictions. ***Pitsch***, 124 Wis. 2d at 631. As a result, the state introduced evidence regarding the nature of his criminal convictions, specifically one attempted theft, two thefts, one entry into a locked vehicle with intent to steal, a criminal damage to property, and four burglaries. ***Id.*** at 632.

The defense in ***Pitsch*** was "*I* did not do it," while the question for the jury was "Whom do you believe?" 124 Wis. 2d at 643. The state could not produce any witnesses that saw the defendant take the jewelry. ***Id.*** at 642. The victim herself only saw the defendant in the proximity of where the jewelry was stolen, she never saw him take it. ***See id.*** at 642-643. The defendant's testimony "was substantially consistent with that of his girlfriend and was not directly contradicted by any of the state's witnesses." ***Id.*** at 643. Thus, the "defendant's credibility was dealt a significant blow when the prosecutor questioned defendant about his convictions." ***Id.***

McMahon's case is analogous to the case in ***Pitsch***. The defense for McMahon was also "I did not do it." The question for the jury was likewise "whom do you believe?" McMahon's testimony was substantially consistent with that of his witnesses regarding when he acquired the four rolls of fencing—every witness backed up the fact that McMahon acquired his fencing well before September 26, 2012, the date B.R.'s fencing went missing.

The state's victim, B.R., and his brother did not even know McMahon. They never saw McMahon steal any fencing, neither did any law enforcement officer. There was no scientific, chemical, or forensic analysis to support the state's case. Thus, the state presented no evidence to contradict McMahon's theory of defense that he had acquired fencing before B.R.'s fencing disappeared.

The state's case relied at its core upon two mere coincidences. The two coincidences—that McMahon had four rolls of fencing and that McMahon was in the area of Norway Pine Lane a few days after B.R.'s fencing went missing—proves nothing beyond a reasonable doubt.

To begin, fencing is a mundane item. The fencing that B.R. obtained was in the process of being discarded like the fencing McMahon obtained. If B.R. had not taken the fencing it may very well have ended up in a dumpster near Saint Clare's hospital in Weston, Wisconsin—which ironically increases the credibility of McMahon's own testimony that he found fencing in a dumpster near a construction site in Wisconsin Rapids—as this type of chain link fencing is apparently not hard to come by for free. Indeed, the fact of

McMahon having four rolls of green chain link fencing in his backyard does not make him one out of a million. Anyone can buy chain link fencing from a department store selling building or home materials, or by chance acquire it when it is unwanted.

Moreover, McMahon's mother, Diane Giesfeldt, McMahon's fiancé, Kimberly Rushman, and Rushman's son, Colton Rushman, and the friend of McMahon's, Don Werle, all established that McMahon acquired his own four rolls of green chain link fencing in the summer of 2012 long before September 26, 2012. Kimberly Rushman remembered McMahon finding the fencing toward the end of July (R49:141; App. 197). Both Giesfeldt and Kimberly Rushman saw the fencing at the housewarming party on August 11, 2012 (R49:142, 128-130; App. 198, 184-186). Colton Rushman saw it as early as September 4, 2012 (R49:157; App. 213).

Second, the encounter of McMahon and B.R. and M.R. on the morning of September 29, 2012, is completely reasonable—if a jury chooses to believe McMahon's explanation.

Thus, the case turned on McMahon's testimony. If the jury believed McMahon, the jury would also believe the positive evidence that they heard from McMahon's witnesses. On the other hand, if the jury did not believe McMahon when he explained the encounter that occurred at Norway Pine Lane on September 29, 2012, then the jury would likely not believe McMahon's defense witnesses either. McMahon's testimony was an all or nothing for the defense.

This is especially true because only McMahon could testify about what he did on September 29, 2012. No other defense witnesses were present with McMahon when McMahon encountered B.R. and M.R. at Norway Pine Lane. McMahon himself would have to testify and clarify the events that unfolded that morning.

At the outset, there is nothing illegal about taking an early morning drive on a Saturday morning to find items. Although not the norm for most people, there is nothing wrong in re-using that which is left out on the curb or thrown into a trash receptacle.

Driving a car with a trailer can serve a number of lawful purposes. Even B.R. admitted that a car pulling a trailer is not suspicious by itself (*See* R49:69-70; App. 137-138). McMahon testified he always had his trailer hooked up to his car to haul dirt, leaves and everything else for his garden (R49:199; App. 255).

If McMahon is believable, there is nothing incredible about McMahon's car breakdown. McMahon noticed the car overheating, so he pulled over onto Norway Pine Lane off of Highway M to put the hood up and began walking around to let the car cool down (R49:177-178, 204; App. 233-234, 260).

Although most people have a cell phone today, not everyone does. McMahon did not have a phone (R49:204; App. 260). There is nothing criminal in that.

McMahon's reaction to the approach of a large truck pulling up behind his car, two men exiting the vehicle and coming up to McMahon's car and opening his doors is well within the scope of reasonable human behavior and experience (R49:179-181; App. 235-237). It was

dark outside (R49:61; App. 129). McMahon could not see that well what the men were doing; he did not know who they were; he did not know why they were going through his car (R49:180-181; App. 236-237).

There was no testimony about the men calling out to see if anybody was there. B.R. testified that he came up and approached the car and looked into the window (R49:61; App. 129). B.R. did not want to "disturb the woods too much" either in the event his cousin was bow hunting (R49:61; App. 129). One can draw a reasonable inference, then, that B.R. and M.R. did not communicate that they were there to try to help McMahon.

Just because McMahon considered himself to be physically strong (R49:199; App. 255), does not mean he had an obligation to confront two men he did not know in the dark. McMahon testified that he had heard that the carrying a concealed weapon law had recently passed in Wisconsin (R49:180; App. 236). There was no testimony that McMahon had a firearm to defend himself if something went awry. There is nothing imprudent about using caution in such a situation—and thus, McMahon's decision to keep distant was not unreasonable, even if McMahon was more paranoid than B.R. and M.R. about the encounter.

To add to this, after McMahon got into his vehicle and began to drive away he noticed the men driving behind him on the road—and he had no idea why they were driving behind him—and, from B.R. and M.R.'s own account, chasing him (R49:181, 58, 82-83; App. 237, 126, 144-145). This pursuit by B.R. and M.R. lends more credibility to McMahon's version of events. What

did B.R. and M.R. plan on doing once they caught up to McMahon?

The end result is that McMahon's account of this encounter is not unusual or bizarre, but rather it is reconcilable with B.R. and M.R.'s account, if a jury would choose to believe McMahon is telling the truth.

However, because McMahon's counsel was more concerned with getting the trial over with and going on with life than being a zealous advocate for McMahon, the state seized an opportunity to deal a crushing blow to McMahon's credibility with its criminal record interrogation strategically calculated to sound the death knell of any hope of the jury ever believing the reasonableness of a word McMahon said.

One concludes that counsel's failure to safeguard McMahon's credibility had a "pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." ***See Strickland v. Washington***, 466 U.S. 668, 695-96, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984). There is a reasonable probability that but for counsel's unprofessional errors here, the trial outcome would have been different. It cannot be said that McMahon's conviction is a product of a fair adversarial system after the egregious and unimpeded attacks by the state on McMahon's credibility.

While one mistake alone "may be so serious as to impugn the integrity of a proceeding," the "cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding." ***See State v. Thiel***, 2003 WI 111, ¶ 60, 264 Wis. 2d 571, 605, 665

N.W.2d 305, 322. Each deficient act need not be considered "in isolation," but rather the court may find that "the cumulative effect undermines [its] confidence in the outcome of the trial." ***State v. Thiel***, 2003 WI 111, ¶ 63, 264 Wis. 2d 571, 608, 665 N.W.2d 305, 323.

Thus, this Court need not take trial counsel's errors regarding the handling of McMahon's prior record in isolation. This Court may also conclude that the cumulative effect of the other errors—the failure to object to Rushman's ordinance violation being used to impeach her in like manner as a criminal conviction, the failure to present exculpatory photographic and video evidence or a law enforcement officer to testify to the same, and the failure to object to impermissible burden shifting by the state—the sum of all these errors combined with counsel's chief error leads to a complete and total collapse of any confidence in the outcome of this trial.

The Constitution entitled McMahon to the effective assistance of counsel. Defense counsel's deficient performance prejudiced the trial's outcome to such an extent that McMahon's trial was not even close to a fair fight. Instead, it was more akin to the sacrifice of unarmed prisoners to gladiators.

CONCLUSION

For the above reasons, Christopher J. McMahon respectfully requests that the Court reverse the judgment of conviction and direct that a new trial be granted.

Dated this 5th day of March, 2016, in Wausau, Wisconsin.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,560 words.

/s/
Peter J. Prusinski

RULE 809.19(12)(f) CERTIFICATION

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

/s/ _____
Peter J. Prusinski

CERITIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 5th day of March, 2016, I caused 10 copies of the Brief and Appendix of Defendant-Appellant to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

/s/
Peter J. Prusinski