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COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP002632-CR
Shawano County Case No. 12/CM/695

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

CHRISTOPHER J. MCMAHON,
Defendant-Appellant.

APPEAL FROM JUDGMENT AND THE FINAL ORDER ENTERED IN THE
CIRCUIT COURT FOR SHAWANO COUNTY, THE HONORABLE
WILLIAM F. KUSSEL, JR., CIRCUIT JUDGE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED FOR REVIEW

**WAS CHRISTOPHER J. MCMAHON DENIED THE EFFECTIVE
ASSISTANCE OF COUNSEL?**

The trial court found that he was not.

The plaintiff-respondent agrees with the Statement of the Case
found in the brief of the defendant-appellant.

STATEMENT OF FACTS

B. R. works for St. Claire's Hospital located in Weston in their
Maintenance Department. R49:50. In the summer of 2012, B. R.
was given some chain link fencing by the hospital which was no
longer being used. R49:50, 51. The fencing was green vinyl
coated, 60 inches tall, and five (5) cylindrical rolls. Id. B. R.

brought the five (5) rolls of fencing to his home located in the Town of Wittenberg in Shawano County in a rural area. There are only three homes located on his dead end road. R49:62. B. R. noticed that four rolls of the green chain link fencing went missing from his property sometime between September 22, 2012, and September 26, 2012. R49:52. B. R. and his brother, M. R., left early in the morning of September 29, 2012, at approximately 5:45 a.m. to go to cut wood. R49:50. B. R.'s brother, M. R., lives a short distance from his residence. On the early morning hours of September 29, 2012, M. R. was driving to B. R.'s residence and noticed a white-in-color passenger car pulling a trailer ahead of him. He saw the white car pulling a trailer turn off State Highway 153 to County Highway M near the vicinity of B. R.'s home, but the car and trailer travelled past Norway Pine Lane. R49:79. M. R. states that he waited at B. R.'s home and when his brother got into the truck as they left the residence they saw a white car with a trailer parked on Norway Pine Lane. R49:80. M. R. stated that it was the same car he had seen earlier. R49:81. M. R. states that they then left the area heading out to make wood but as they left B. R. asked to return to check on the vehicle. R49:81. During that time the two brothers took down the license plate number of the vehicle. R49:82. M. R. states that they then left the area again, but again became nervous and turned around to return to the area. M. R. states that as they were returning they saw the car pulling the trailer. He stated that the car avoided them by speeding up, turning around three times, and turning off its lights. R49:82, 83. Deputy Eric Strike testified that he received a report from B. R. regarding the suspicious movements of the white-in-color vehicle pulling a trailer. Deputy Strike indicated that he responded to the area, found that one roll of 60 inch green-in-color chain link fence was left at the area, and helped B. R. move the last roll of fencing to try to prevent the thief from returning and stealing that roll as well. R49:74-75. Deputy Scott Wedemayer of the Shawano County Sheriff's Department states that he received a telephone call from B. R. on September 29, 2012. He states that he ran the license plate number through the Wisconsin Department of Transportation's computer and found that the vehicle was registered to Christopher McMahon. R49:100 Deputy Wedemayer states that he requested assistance from Portage County Sheriff's Department and was informed by Deputy Sheriff Matt McDonald that four rolls of green-in-color chain link fencing were found on Christopher McMahon's property. R49:100, 101. Deputy Wedemayer states that he measured the rolls found on the McMahon's property and the roll left on B. R.'s property, and that

they were all 60 inches in length and matched in all aspects. R49:102. Deputy Scott Wedemayer spoke to the defendant, Christopher McMahon, on September 29. Christopher McMahon said that he found the fencing in Wisconsin Rapids three weeks prior to September 29. R49:112.

STANDARD OF REVIEW

The issue of whether trial counsel was ineffective is a mixed question of law and fact. *State vs. Jenkins*, 355 Wis. 2d, 180 at 196. The circuit court's finding of fact will not be disturbed unless shown to be clearly erroneous. *State vs. Dillard*, 358 Wis. 2d, 543 at 570. Findings of fact include the circumstances of the case and counsel's conduct and strategy. *Id* at 570.

ARGUMENT

Christopher McMahon was not denied the effect of assistance of counsel. The defendant, in order to prevail on his claim must show that his attorney's representation was deficient and that those deficiencies resulted in prejudice to him by denying him a fair trial with a reliable result. *Strickland vs. Washington*, 107 Supreme Court 2052 (1984). *State vs. Mayo*, 301 Wis. 2d 642.

The judicial scrutiny of attorneys performances is highly differential and should avoid determinations of effectiveness based on hindsight. It is the burden of the defense to overcome a strong presumption that counsel acted reasonably within professional norms. *State vs. Maloney*, 281 Wis. 2d, 595. In this case the defense must affirmatively show a reasonable probability that but for counsel's unprofessional errors the result or proceedings would have been different. *State vs. Hunt*, 360 Wis. 2d, 576. Appellate counsel has alleged four basis for finding that trial counsel was deficient. Trial counsel failed to shield McMahon from prior criminal conviction impeachment by the state.

1. Trial counsel failed to shield McMahon from impeachment through his prior criminal conviction.

Section 906.09(1) of the Wisconsin Statutes allows impeachment by prior criminal conviction of defendants who choose to testify at trial.

Appellate counsel has cited no case law or statutes prohibiting the impeachment of McMahon by 906.09(1) evidence. McMahon's prior crime was substantially similar to the offense alleged at trial and trial counsel believed that the facts of the defendant's prior conviction were so significant it could not be excluded. R51:42. However, counsel goes on to claim that trial counsel failed to adequately instruct the defendant how to answer the 906.09(1) question. Trial counsel has stated that he told Christopher McMahon that the question regarding his prior criminal record was a yes or a no question. R51:37. Further, counsel recommended the defendant not testify **in the strongest terms**. R51:36. The defendant's answer got him in trouble only when the defendant provided false testimony regarding the age of his prior conviction. There is no duty of defense counsel to instruct the defendant not to provide false testimony. That instruction comes when the defendant is sworn in. Once the defendant's false testimony "opened the door" to further cross-examination by the state, trial counsel stated that his failure to object to the questions regarding the defendant's prior record was intentional. He testified that the door was opened, and felt objections would highlight damaging facts. R51:46, 47. Trial counsel, therefore, indicated his actions were deliberate trial strategy and in the best interest of his client. *State vs. Bonds*, 161 Wis. 2d 605.

2. Appellate counsel claims that failure to object to the state asking defense witness, Kimberly Rushman, about a non-criminal conviction caused an ineffective assistance of counsel. However, trial evidence was ever presented that Kimberly Rushman was convicted of a crime. Her admission to an ordinance conviction was diminimus and unlikely to affect the outcome of the trial. *State vs. Lyndell*, 245 Wis. 2d, 689.
3. Appellate counsel alleges that trial counsel was ineffective because he failed to present

exculpatory evidence. However, trial counsel testified that he did not believe the photos and videos of matted turf were valuable to the defense of his client. R52:32. Counsel explained that he did not get anything of value out of watching the video.

4. Appellate counsel claims that trial counsel's failure to object to improper burden shifting questions and argument by the state prejudiced his client. At the Machner Hearing trial counsel stated that he did not believe that there was any improper burden shifting argument made by the state. Further, counsel claimed that he did not want to place any further emphasis on the subject and did not want to anger the jury by objecting during a closing argument. R52:24, 25.

CONCLUSION

The trial court was correct when it concluded that the conduct of trial counsel did not undermine the proper functioning of the adversarial process, and that the trial produced a just result.

Dated this 1st day of June, 2016

RESPECTFULLY SUBMITTED:

Catharine D. White
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional spaced font. The length of the brief is 6 pages containing 1,584 words.

**CERTIFICATE OF COMPLIANCE
WITH WIS. STATS. §(RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief and appendix, if any, which complies with the requirements of Wis. Stats. §(Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of June, 2016.

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