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

REPLY BRIEF OF DEFENDANT-APPELLANT

PETER J. PRUSINSKI
State Bar No. 1079351
CROOKS, LOW & CONNELL, S.C.
531 Washington Street
Wausau, Wisconsin 54403
(715) 842-2291

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

MCMAHON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Trial counsel's performance was deficient and prejudicial to the outcome of McMahon's trial.

1. Trial counsel's failure to shield McMahon from prior criminal conviction impeachment by the state was inexcusable and prejudicial.

Trial counsel's belief that McMahon's prior conviction *could not be excluded* by the court is incorrect. (State's Brief at 4). Although a criminal conviction may be admissible to impeach the defendant at trial pursuant to section 906.09(1) of the Wisconsin Statutes, the question of whether it is admissible is a threshold inquiry made by the court. ***Gyrion v. Bauer***, 132 Wis. 2d 434, 438, 393 N.W.2d 107, 109 (Ct. App. 1986). A trial court may "exclude evidence of a conviction if the probative value is substantially outweighed by the danger of unfair prejudice" ***Id.*** (citing ***State v. Pitsch***, 124 Wis.2d 628, 639, 369 N.W.2d 711, 717 (1985)).

Trial counsel's failure to even *attempt* to exclude a fourteen-year-old misdemeanor conviction for criminal damage to property is unjustified. There always exists a danger of unfair prejudice when a defendant must

testify at trial and admit to having a prior conviction. This was especially true in McMahon's trial—where McMahon's defense turned on his credibility. (McMahon's Brief at 27-33).

Moreover, there is little probative value in a fourteen-year-old misdemeanor criminal damage to property conviction—a crime that in itself does not bear on truthfulness—and from which McMahon may have been rehabilitated. ***See State v. Smith***, 203 Wis. 2d 288, 295-96, 553 N.W.2d 824, 827 (Ct. App. 1996). McMahon was not convicted for a prior theft. The theft charged in connection with McMahon's fourteen-year-old conviction was dismissed. (McMahon's Brief at 19). In addition, the fact that McMahon's conviction would be excluded in federal practice only supports and in no way hinders an argument for trial counsel to try to exclude the crime. (McMahon's Brief at 15).

Trial counsel's failure to object at all served no logical purpose. At worst, the judge would allow the conviction for impeachment purposes. At best, the judge would exclude the prior conviction—thereby dramatically increasing the credibility of McMahon before the eyes of the jury. In either event, the court's decision would be made outside the presence of the jury.

Moreover, because McMahon's counsel knew McMahon would be questioned about his prior conviction and knew McMahon had trouble answering a simple "yes" or "no" type of question (McMahon's Brief at 16), trial counsel should have exerted the strongest efforts in preparing McMahon on how to properly answer the § 906.09 question at trial. Not preparing McMahon meant almost certain disaster. (McMahon's Brief at 16).

Even so, trial counsel was never relieved of his duty to remain vigilant and to object to improper questions after McMahon testified falsely or mistakenly, and more importantly, after the court opened the door for the state. The state argues that McMahon only got into trouble when he gave the incorrect age of his prior conviction. (State's Brief at 4). Thus, the state acknowledges that McMahon did not lie about being convicted of a crime or having one prior conviction. The sole controversy over McMahon's answer to the § 906.09 question centered on the age of conviction. Yet, the state never asked one single question about the age of McMahon's prior conviction when given the opportunity of an open door. (McMahon's Brief at 18).

The state's argument that trial counsel's failure to object to "damaging facts" was "intentional" proves the merit of McMahon's appeal. (State's Brief at 4). Each question was objectionable. If the state's questions were properly and timely objected to McMahon would not have testified to *any* of the harmful facts elicited by the state. (McMahon's Brief at 18). When McMahon's counsel made no effort to rehabilitate McMahon after cross-examination, the detrimental impression created by the improper questions was left untouched. If all of this was deliberate strategy by McMahon's counsel, then it was both ineffective and wholly contrary to McMahon's best interest.

Finally, and perhaps most importantly, the state apparently concedes that McMahon's counsel did not ask for a standard, limiting, or curative jury instruction, and that the court provided no such instruction to the jury. (State's Brief at 3-5). Consequently, there can be no presumption that the jury properly followed the law

that would have been stated in those instructions, namely, that the jury should consider McMahon's prior conviction for the sole purpose of assessing McMahon's credibility, and not for determining that McMahon committed the charged offense of theft. This failure to instruct the jury was especially prejudicial after the jury heard McMahon admit to stealing, and in particular, stealing timbers—all in a case involving stolen fencing and firewood—just before jury deliberation. ***See State v. Gary M.B.***, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 86-87, 676 N.W.2d 475, 488; McMahon's Brief at 17-18.

2. Trial counsel's failure to object to the state asking defense witness Kimberly Rushman about a non-criminal conviction affected the trial outcome.

The state's argument that no evidence was presented that Ms. Rushman was convicted of a crime is not accurate. The state asked Ms. Rushman if she had ever been convicted of a crime at trial, and even though Ms. Rushman added the word "ordinance" to her answer, she affirmed the question by ending with a "yes". (McMahon's Brief at 22). At best, Ms. Rushman's answer was ambiguous. At worst, she appeared to a lay jury, albeit wrongly, to admit to have been convicted of a crime. The state's follow up question, "So, Wood County Case 08-CM-533" affirmed the criminal case number assigned and further bolstered a prejudicial false impression. (McMahon's Brief at 22).

The state does not seem to deny that, at the outset of trial, trial counsel should have investigated and objected to Ms. Rushman being asked any § 906.09

question regarding a criminal conviction. (State's Brief at 4). If McMahon's counsel would have properly investigated, the state would never have had the opportunity to taint Rushman's character with a § 906.09 question.

That the state did and could ask Rushman a § 906.09 question mattered because Rushman was a key witness for McMahon's defense. She supported the fact that McMahon had fencing in his backyard long before the victim's fencing went missing. She lived with McMahon. (McMahon's Brief at 2). She corroborated McMahon's testimony as to how he originally acquired his four rolls of fencing. (McMahon's Brief at 2). She testified to seeing four rolls of fencing in McMahon's backyard neatly wound up near a playhouse on August 11, 2012, during McMahon's housewarming party. (McMahon's Brief at 3). She testified about McMahon's startling encounter with the victim in this matter. (McMahon's Brief at 8).

Therefore, the impeachment of Rushman with a criminal conviction was not *de minimus*; it affected the outcome of McMahon's trial. The jury could hardly believe McMahon after hearing that both McMahon and his fiancé are criminals—or at the very least, the type of people who have criminal case numbers assigned to them.

3. Trial counsel's failure to present exculpatory evidence was detrimental.

A picture is worth a thousand words. The state made that very point in closing arguments at trial. (McMahon's Brief at 24). Just because trial counsel testified he found no value in McMahon's video or

photographs presented at the postconviction motion relief hearings, does not mean that a jury would not have derived value from that evidence. The state used its own photographs and even provided the jury with a view of the fencing, while McMahon was deprived of the opportunity to provide his own such evidence. Visual evidence is almost always useful at trial.

There is nothing in the photographs and video evidence that McMahon sought to use at trial that would have contradicted the testimony of McMahon's witnesses. On the contrary, the evidence could only support their testimony. The video showed matted down grassy indentations where the fencing had laid—directly in support of McMahon's witnesses' testimony of where they saw the fencing. The video contradicted the state's impeachment attacks against McMahon's witnesses. (McMahon's Brief at 24-25). The value of the photographic and video evidence is self-evident, but because trial counsel could not use the evidence at trial due to his failure to disclose it to the state, counsel explained after-the-fact that he found no value in the evidence. (McMahon's Brief at 23-25). Thus, trial counsel's failure to introduce McMahon's photographs and video evidence sabotaged McMahon's defense.

4. Trial counsel's failure to object to improper burden-shifting questions was indefensible.

Finally, the state makes no defense against the state's burden shifting other than arguing that trial counsel *believed* there was not an improper burden shift made by the state. (State's Brief at 5). Improper burden shifting is plain from the record. (McMahon's Brief at 25-26). One solitary objection to the state's burden shifting would not have so angered the jury as to

prejudice the outcome of trial against McMahon; rather, the lack of any objection by trial counsel to the state's burden shifting comments left the jury with the perception that McMahon could not even prove where he got his fencing from—despite his knowing how to subpoena and bring in witnesses. Trial counsel's failure here unfairly prejudiced McMahon.

CONCLUSION

Trial counsel's performance suffered from deficiency in multiple ways, and that deficient performance individually, but also cumulatively, prejudiced the outcome McMahon's trial. As a result, McMahon was denied justice.

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

Dated this 17th day of June, 2016, in Wausau, Wisconsin.

Respectfully submitted,

CHRISTOPHER J. MCMAHON
Defendant-appellant.

CROOKS, LOW & CONNELL, S.C.

Peter J. Prusinski
State Bar No. 1079351

POST OFFICE ADDRESS:

531 Washington Street
Wausau, Wisconsin 54403
(715) 842-2291

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 produced with a proportional serif font. The length of this brief is 1,594 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 17th day of June, 2016, I caused 10 copies of the Reply Brief 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