STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015-AP-2638-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

VICTORIA WARD,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDERS DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE DANIEL L. KONKOL, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Trial Court's Erroneous Exclusion Of Evidence On Hearsay Grounds Was Highly Prejudicial And Not Harmless Beyond A Reasonable Doubt.

A. The State Concedes That The Trial Court Should Be Reversed By Failing To Cite Any Legal Authority In Support Of Its Argument Concerning Hearsay And By Failing To Address Ward's Showing On Harmless Error And Due Process.

Ward demonstrated in her opening brief (at 16-27) that the trial court's exclusion of key impeachment evidence on hearsay grounds was an erroneous exercise of discretion that was highly prejudicial and not harmless beyond a reasonable doubt. Ward also showed (at 27-28) that the circuit court's ruling denied her due process of law. Noticeably absent from the State's response on this point is any citation whatsoever to a relevant statute, rule, caselaw (whether from Wisconsin or any other jurisdiction), or any discussion of the relevant standard of review. Similarly, the State fails to respond to Ward's showing that the circuit court's erroneous ruling was not harmless beyond a reasonable doubt and denied her due process.[1]

It is well-settled that this Court "need not consider arguments unsupported by citation to legal authority." *Hoffman v. Economy Preferred Ins. Co.*, 232 Wis. 2d 53, 60, 606 N.W.2d 590 (Ct. App. 1999). *See also* Wis. Stat. Rule

[1] The State's only mention of these arguments is a passing, conclusory suggestion that this Court supposedly "need not address" them. (Resp. Br. at 6).

809.19(1)(e) and 809.19(3)(a)2 (requiring argument in respondent's brief to include, *inter alia*, "citations to authorities" and "statues"). Similarly, an "argument to which no response is made may be deemed conceded for purposes of appeal." *Hoffman*, 232 Wis. 2d at 60.

As such, this Court can—and indeed should—reverse the circuit court based on nothing more than the State's failure to present a properly-supported legal argument concerning the lower court's erroneous hearsay ruling, as well as the State's concession with respect to harmless error and due process. *Id*. Nonetheless, even if the Court were to consider the State's unsupported arguments, they are meritless for the reasons shown below.

B. The Trial Court Abused Its Discretion By Ruling That All Out-Of-Court Statements Are Inadmissible Hearsay Regardless Of Whether They Were Offered To Prove The Truth Of The Matter Asserted.

It is beyond any dispute—and the State does not suggest otherwise—that evidence is *never* hearsay unless it offered "to prove the truth of the matter asserted." Wis. Stat. § 908.01(3). *See also State v. Amos*, 153 Wis. 2d 257, 276-77, 450 N.W.2d 503 (Ct. App. 1989) (trial court erred in excluding evidence on hearsay grounds where evidence was not offered to prove truth of the matter asserted). Rather than discussing the legal standards applicable to the hearsay rule, the State suggests (without citation to any authority), that the proffered testimony was inadmissible because "[c]ounsel asked Corporal Zientek what *he heard Ward tell Detective Stachula* in the apartment." (Resp. Br. at 5) (emphasis added).

Yet, as shown throughout Ward's opening brief and herein, a witness may testify to what he heard another person

say, provided the testimony is not offered to prove the truth of the matter asserted. *Amos*, 153 Wis. 2d at 276-77; *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 427, 351 N.W.2d 758 (Ct. App. 1984) (testimony was not hearsay where statement about what someone heard another say was not offered for truth, but to prove statement was made).

In a clear departure from this well-settled rule of evidence, the circuit court ruled that *all* out-of-court statements are inadmissible hearsay (regardless of whether they are being used to prove the truth of the matter asserted). In excluding the evidence, the circuit court explained, "[y]ou are asserting that somebody else said something else, so that is where the problem comes in; *at that point, it is hearsay and it can't be used*." (R.68, App. 226 at 53:14-17) (emphasis added). That is not the law, and the circuit court's use of an incorrect legal standard to exclude this evidence constitutes a clear abuse of discretion. *State v. Hunt*, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434 (circuit court erroneously exercises discretion "if it applies an improper legal standard.")

Undaunted, the State attempts to salvage the circuit court's erroneous ruling by positing that "Corporal Zientek's answer to counsel's question [about what he heard Ward say] would not have had any bearing on whether he heard a conversation in the hallway…." (Resp. Br. at 6). The State wholly misunderstands the nature of trial counsel's question. As shown in Ward's brief (at 11), and as trial counsel explained to the circuit court, the question was asked in order to lay a foundation to impeach Corporal Zientek regarding his dramatically inconsistent trial testimony. (R.68, App. 220 at 16:16-17).

The circuit court's ruling on hearsay was plainly in error. The State does not address Ward's showing (at 21-28)

that the lower court's error was highly prejudicial and not harmless beyond a reasonable doubt.[2] Nor does the State address Ward's showing that the circuit court's error deprived her of due process of law. The State concedes both arguments. *Hoffman*, 232 Wis. 2d at 60.

II. Ward Is Entitled To Relief On Her Claim Of Ineffective Assistance Of Counsel.

The State does not dispute that the outcome of its case at trial depended on "[w]hat version of these facts is believable…." (R.61, App. 193 at 64:22-25) (circuit court below acknowledging that credibility of witnesses was key issue in this case). In fact, the State concedes (and the trial court found below), that Corporal Zientek—one of the key State witnesses—gave contradictory testimony in this case. (Resp. Br. at 9). Because it is physically impossible to be both in the hallway of an apartment building (*compare* R.56, App. 144 at 5:2-5) and at the very same time in the parking lot outside that same apartment building (*with* R.67, App. 214 at 88:2-5), at least one of these versions of Corporal Zientek's testimony is false.

Yet, trial counsel inexplicably failed to impeach Corporal Zientek, which Ward demonstrated in her supplemental postconviction motion and opening brief to constitute both deficient performance (App. Br. at 31-33; R.42, App. 117-19) and prejudice (App. Br. at 33-34; R.42, App. 120). *See also State v. Thiel*, 2003 WI 111, ¶¶ 46, 81, 264 Wis. 2d 571, 665 N.W.2d 305 (failure to impeach key State witness in a "he-said-she-said" case was deficient performance and prejudicial to the defense).

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[2] The prejudicial effect of the exclusion of this evidence is also demonstrated in the context of trial counsel's failure properly to impeach Corporal Zientek in Point II, *infra*.

In an attempt to minimize the highly prejudicial effect of trial counsel's failure to impeach Corporal Zientek, the State suggests that impeachment would not have mattered because the only inconsistency supposedly concerned "where he was when officers first made contact with Ward." (Resp. Br. at 13). The State's argument fails for at least three reasons.

First, even if the only inconsistency in Corporal Zientek's testimony concerned whether he was outside the apartment building or inside (which it did not),[3] the purpose of impeachment is not simply to clarify which version of the corporal's testimony was false. Rather, effective impeachment would have discredited the corporal's *entire testimony* by showing the jury that he was not a trustworthy witness. As the U.S. Supreme Court has recognized, cross-examination with a witness' own prior inconsistent statements is a "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Court explained:

> [T]he cross-examiner has traditionally been allowed to impeach, *i.e.,* discredit, the witness….By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony.

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[3] As shown in Ward's brief (at 18-19), Corporal Zientek testified inconsistently about *several* matters in addition to whether he was in the parking lot, including whether he personally made initial contact with Ward (R.56, App. 144 at 5:2-5), whether he knocked on Ward's door (*Id*., App. 150 at 11:3-9), whether he heard Ward purportedly give consent to search the apartment (*Id*., App. 145 at 6:3-12), or whether he heard Ward purportedly say that drugs would more than likely "be hidden in a closet." (*Id.*, App. 147 at 8:5-13).

Id. Thus, by failing to demonstrate to the jury that Corporal Zientek had testified falsely at either the preliminary hearing or at trial, Ward was deprived the critical opportunity of showing that the corporal was not likely "to be truthful in his testimony." *Id*. In a case such as this in which credibility was the key issue upon which a reasonable doubt turned, trial counsel's deficient performance was highly prejudicial. *Thiel*, 2003 WI 111, ¶ 81. *See also State v. Pitsch*, 124 Wis. 2d 628, 645-46, 369 N.W.2d 711 (1985); *State v. Jeannie M.P.*, 2005 WI App 183, ¶ 11, 286 Wis. 2d 721, 703 N.W.2d 694.

Second, although the State now attempts to recast the trial as resting solely on Detective Stachula's testimony (*see* Resp. Br. at 16), at trial the State repeatedly and extensively relied on Corporal Zientek—whose propensity for testifying falsely was never pointed out to the jury. For instance, the State cited Corporal Zientek's testimony regarding photographs of the appearance of the inside of Ward's closet as "the *most important reason* why Ms. Ward knows that these drugs are there and is doing this knowingly." (R.69, App. 238-39 at 25:24-26). And, in closing arguments, the State purported to bolster Corporal Zientek's supposed credibility by citing his experience (R.69, App. 241 at 28:8-11)—while at the same time attempting to undermine Ward's credibility (*Id.*, App. 241 at 28:17-19). Given the centrality of Corporal Zientek to the State's case at trial, there can be no serious contention on appeal that his testimony was somehow unimportant. To the contrary, Corporal Zientek was one of the pillars of the State's case, and, as such, it was deficient performance and prejudicial that the corporal's propensity for testifying falsely was never demonstrated to the jury.

Third, Detective Stachula corroborated Corporal Zientek's inconsistent trial testimony that the corporal was supposedly in the parking lot outside the building, rather than

in the hallway as the corporal originally had testified. (R.67, App. 211 at 43:9-18).[4] Thus, had trial counsel shown the jury that Corporal Zientek's later, inconsistent trial testimony was false, that impeachment would have also tainted Officer Stachula (who also testified under oath that Corporal Zientek was outside the building). And, as shown in Ward's brief (at 23), Officer Stachula provided key trial testimony relating to what Ward supposedly said regarding a firearm in her apartment and whether there were drugs in the apartment. The impact of such an impeachment would be even greater given that Detective Stachula had already been impeached by his written report. (R.60, App. 169-71 at 52:14-54:7).[5]

Thus, the State's suggestions that Ward has not shown her entitlement to a *Machner* hearing (at the very least) on her claims of ineffective assistance of counsel are without merit.

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[4] Inexplicably, the State faults Ward because she supposedly "does not point to any instance of Detective Stachula 'purport[ing] to corroborate] Corporal Zientek's 'inconsistent testimony.'" (Resp. Br. at 13). Yet, Ward explained in detail in her brief (at 23) and in her supplemental postconviction motion (R.42, App. 120) that Detective Stachula corroborated Corporal Zientek's testimony (which was inconsistent with his preliminary hearing testimony) that the corporal was supposedly in the parking lot outside the apartment building.

[5] The State also erroneously suggests (at 14) that Ward "does not explain why the jury would not have believed Detective Stachula" had additional impeachment of Corporal Zientek occurred. To the contrary, Ward explained in detail in her brief (at 23) and herein that successful impeachment of Corporal Zientek also taints Detective Stachula's testimony because (1) he corroborated the corporal's inconsistent version of the events, and (2) his own testimony had already been impeached by his own written report.

III. The Circuit Court Abused Its Discretion In Admitting Evidence Of A Firearm Under Ward's Mattress.

The State argues (at 17-20)—again without citing any legal authority—that the circuit court properly admitted evidence of a firearm under Ward's mattress. *See* Resp. Br. at 17-20. As shown above in Part I(A), this Court "need not consider arguments unsupported by citation to legal authority." *Hoffman*, 232 Wis. 2d at 60.

Even if the Court were to consider the State's unsupported arguments, the State's position fails. As shown in Ward's opening brief (at 36-37), the applicable evidentiary standard is whether any possible relevance is "substantially outweighed by the danger of *unfair prejudice*…." Wis. Stat. § 904.03 (emphasis added). In this case, as Ward explained in her opening brief (at 36), the risk of unfair prejudice arises from the possibility that the jury might be inclined to convict her based on the assumption that she was supposedly engaged in violent or unlawful activity arising merely from the fact of her (then lawful and constitutionally-protected) possession of a firearm. In *State v. Albright*, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980)—a case from this Court not mentioned by the State in its responsive brief—the Court of Appeals recognized precisely this type of risk.

Rather than discussing (let alone mentioning) *Albright*, Wis. Stat. § 904.03, or any other legal authority, the State instead repeatedly claims that Ward supposedly acknowledged the "relevance" of the firearm. (Resp. Br. at 18-19). But, "relevance" is not the correct standard. Even the State concedes (at 19-20) that the circuit court "did not explicitly conclude that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence…"

The circuit court merely concluded that "evidence of the weapon was *relevant*…." (R.52, App. 130) (emphasis added). Because *all* evidence must be at least relevant to be admissible, *see* Wis. Stat. § 904.02, the circuit court's admission of evidence of the firearm because it may have been "relevant" was both unremarkable and erroneous. Importantly, the circuit court failed to consider the key issue of unfair prejudice—as the State concedes (at 19-20) and as required under Wis. Stat. § 904.03.

Because the circuit court failed to apply the correct standard, it abused its discretion in excluding the evidence. *State v. Daniels*, 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991) (appellate court will reverse circuit court if lower court applied an incorrect legal standard).[6]

IV. Ward Is Entitled To Reversal In The Interest Of Justice

In response to Ward's showing that this Court should reverse in the interest of justice, the State complains that Ward is supposedly just "repackaging her ineffective assistance claim…." (Resp. Br. at 20). Yet, in the next paragraph of its brief, the State cites *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115 to argue that the ineffective assistance

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[6] The State also fails to address Ward's showing that the erroneous admission of evidence of the firearm was not harmless beyond a reasonable doubt, thereby conceding the point. *Hoffman*, 232 Wis. 2d at 60. Even had the State addressed this argument, it could not meet its burden of showing that the evidence played no part in the jury's conviction in light of the State's reliance on the evidence at trial. *State v. Poh*, 116 Wis. 2d 510, 529, 343 N.W.2d 108 (1984); *State v. Echols*, 2013 WI App 58, ¶ 15, 348 Wis. 2d 81, 831 N.W.2d 768.

of counsel standard under *Strickland*[7] is the very standard the Court should apply in this case.

For the reasons explained in her opening brief and herein, Ward has more than satisfied the *Strickland* standard for alleging an ineffective assistance of counsel claim. Ward has also shown her entitlement to discretionary reversal under Wis. Stat. § 732.35 because the real controversy has not been fully tried and because justice has miscarried. *See, e.g., State v. Culyer*, 110 Wis. 2d 133, 137, 327 N.W.2d 662 (1983) (exercising power of discretionary reversal in case that was a "credibility battle" where erroneous exclusion of evidence resulted in loss of testimony favorable to the defendant on credibility).

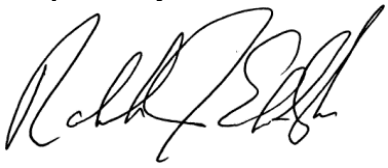
[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

For all the reasons herein and in Ward's opening brief, this Court should reverse the judgment of conviction and the orders denying postconviction relief and remand this matter for a new trial. Alternatively, this Court should reverse and remand with instructions to hold a *Machner* hearing on Ward's claims of ineffective assistance of counsel.

Dated this 31st day of August, 2016.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,767 words.

Dated this 31st day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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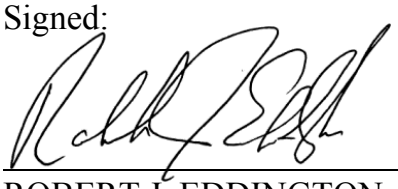

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