STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2016AP 116 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY A. LAPP,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED DECEMBER 21, 2015 BY HON. JEFFREY A. WAGNER, AND A JUDGEMENT OF CONVICTION ENTERED ON JUNE 13, 2013, BY HON. MEL FLANAGAN, BOTH IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF DEFEDANT-APPELLANT

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Issues Presented

1. Given that Mr. Lapp had requested a substitution of Judge be filed on Judge Mel Flanagan, who had previously sentenced Mr. Lapp, did defense counsel provide ineffective assistance of counsel when he failed to file for substitution?
   The trial court ruling: No.

2. Was trial counsel ineffective in failing to properly argue, present all evidence for, or properly preserve an "other acts" motion?
   The trial court ruling: No.

3. Was trial counsel ineffective in failing to request Jury Instruction 314 and object to unnecessary security during trial, despite the unexplained appearance of armed bailiff used only during Mr. Lapp's testimony?
   The trial court ruling: No.

4. Was trial counsel ineffective when, despite noting the prejudicial nature of the existence of a bench warrant – and properly arguing to bar testimony on the warrant during a pretrial conference on Motion in Limine, counsel failed to seek preclusion of "evidence of flight" arguments from the State as the reason for Mr. Lapp's leaving the scene?
   The trial court ruling: No.

5. Was trial counsel ineffective for failing to object to testimony of pictures of a camouflage knife based on lack of proper foundation linking the knife to any offense, after the Court had ruled that admission of pictures of the knife would be admissible only after a proper foundation was established?
   The trial court ruling: No.

6. Was trial counsel ineffective for failing to adequately prepare exhibits, leaving the Jury to rely upon hastily hand-drawn diagrams?
   The trial court ruling: No.

7. Was trial counsel ineffective for failing to object to prejudicial analogies by the State during witness testimony and in closing arguments?
   The trial court ruling: No.

8. Was trial counsel ineffective for asking the Jury to find his client "guilty" during closing arguments?
   The trial court ruling: No.

9. Was trial counsel's failure to object to the State's vouching during closing arguments ineffective assistance of counsel?
   The trial court ruling: No.

Position on Oral Argument and Publication

We do not request oral argument or publication of this case because the law on cumulative error has been recently clarified, no factual issues are seemingly in dispute, and the ruling on this case will be extremely fact-specific.

Statement of the Case and Statement of Facts

On October 18, 2010, Mr. Lapp was charged with four counts: misdemeanor Battery contrary to Wis. Stat. §940.19(1), Substantial Battery-Intend Bodily Harm contrary to Wis. Stat. §940.19(2), strangulation and suffocation contrary to Wis. Stat. §940.235(1), and felony intimidation of a Victim/Use or Attempt Force contrary to Wis. Stat. §940.45, linked to an incident that had occurred on October 12, 2010. R2.

The Complaint alleged that on October 12, 2010, Mr. Lapp had an argument with D.Y. and pushed her head into a pillow, back-slapped her on the neck, and struck her in the chest with a closed fist. R2:3. The Complaint continues that D.Y.'s son was able to hold Mr. Lapp on the floor while D.Y. moved to the bathroom, then Mr. Lapp left the residence. *Id*.:3. Later that night, Mr. Lapp jumped onto D.Y., dug his knee into her chest and called her a "rat" for calling police. *Id*.:3. It states that he choked her, threatened to kill her, head-butted her in the forehead and struck her nose, which caused a nasal fracture and a concussion. *Id*:3. It then claims he grabbed a five-inch knife that he was unable to flick open, after which D.Y. ran downstairs and got the attention of a neighbor who called 911. *Id*.:3.

Mr. Lapp plead not guilty to the misdemeanor on November 15, 2010, (R77), and to the felony charges on December 16, 2010. (R79). On December 16, 2010 an Amended Information was filed by the State, (R6), and a Speedy Trial Demand was filed by the Defense. The trial was adjourned for good cause on multiple dates: February 24, 2011 due to new evidence being given to Defense, with no objection to the delay from the Defense; on March 30, 2011 due to the unavailability of a key State's witness; and on April 11, 2011 for defense counsel to file an Other Acts or *McMorris* Motion. R82, 83, 84. On the April 11, 2011 the parties were advised that Judge Flanagan had been assigned to preside over the case. R84. Mr. Lapp repeatedly asked trial counsel to file a substitution. *See* App. C:101. Mr. Lapp's

affidavit states that his attorney later told him that he had forgotten to file for substitution. *See* App. C:102-106. No substitution was made by Defense orally or in writing.

A motion hearing was held before the Honorable Mary M. Kuhnmuench regarding an Other Acts Motion filed by the Defense. R85. At the motion hearing, Defense Counsel argued for permission to introduce evidence through the testimony of Mr. Lapp, and others, that D.Y. habitually carried a knife in her purse, and that Mr. Lapp's knowledge of her habit of carrying the knife in her purse was relevant to his state of mind at the time of the incident, thereby supporting his position of self-defense. R85:12-19. The Court refused to hear the testimony of proposed individuals, even from Mr. Lapp; instead, having Defense Counsel summarize the proffered testimony. *Id.*:13,15,19. The Court denied the Other Acts Motion holding that the evidence was neither *McMorris* evidence (requiring the evidence to show a victim's violent or turbulent character), nor habit evidence (showing a similar response to a repeated situation). *Id.*:22-24. The Court refused Defense Counsel's request to make a complete record, stating, "Thank you, I think you've made your record." *Id.*:25-26. Additional information known to Mr. Lapp and his counsel prior to the hearing was never presented to the Court. *See* App C:103-104.

Prior to trial, the court excluded introduction of information regarding: the existence of a bench warrant for Mr. Lapp from an unrelated case, (R86:20-21), that police had searched for Mr. Lapp at bars, *id.*, and that police found

evidence that D.Y.'s tires were slashed near the time of the charged incident. (*Id.*:22-25). Defense counsel also argued against admission of photographs showing a camouflage colored knife, because evidence in pretrial arguments had included information that the knife identified by D.Y. was black in color. R87:40. The Court allowed evidence of the knife after the District Attorney stated "… Officer Wick did speak with the victim this morning and she did state that that's the knife she was threatened with." R86.:23. No direct testimony from Officer Wick or D.Y. was presented before trial. The Court allowed introduction of the photo only if there was some reason to connect it to the trial. *Id.*:24. "If they can connect the knife in the photos by some witness, then they can use it." *Id.*:25.

On August 15, 2011, the case proceeded to jury trial before Judge Mel Flanagan. R86. At the trial the State included mention of the camouflage knife in its opening arguments. "You'll see a photograph of one of the two knives that are – that [the alleged victim] will tell you is – she's not sure which knife it is, but she'll tell you that it's a – that's a knife like it, because there's two of them, and that it could be the knife." R87:54. Defense counsel did not object. *See Id.* During cross examination of D.Y. she admitted the knife allegedly used against her was black in color. R88:40. Defense Counsel did not object to lack of foundation prior to testimony regarding the knife in the photograph.

D.Y. testified that Mr. Lapp had come home drunk and gotten angry because she was sleeping. R87:76-80. She

testified that Mr. Lapp struck her in the head two times, (*Id.*:80 & 82), and that she called for her son who was in a different room. (*Id.*:80-81). She testified that her son came into the room, grabbed Mr. Lapp, and she then moved to the bathroom and called the police. *Id.*:81. She then testified that Mr. Lapp returned to the residence at approximately 5:30 am, slapped her, and called her a "fucking rat" for calling the police. R88:10. She testified that Mr. Lapp told her he would kill her. *Id.* Then he had her pinned and he began hitting her. *Id.*:11. She testified that he head-butted her in the nose and forehead causing bleeding. *Id.*:12. She also testified that they struggled over a knife, that she stated he was trying to open, and that she fled. *Id.*:22. The Jury thereafter viewed 12 pictures of D.Y.'s injuries. *Id.*:34.

During cross examination, Defense Counsel asked questions regarding the identification of the knife allegedly used during the incident. R88:40. Defense Counsel's exhibits included a hand-drawn diagram of the interior of the apartment. *Id.*:48, 50.

Richard Beebe, a downstairs neighbor, testified about being woken up by D.Y. pounding on the door and screaming. R89:11. The witness gave a gory and graphic analogy regarding his observations including that "She looked like a dog that was beaten with a stick for hours." *Id.*:12. Defense counsel did not object to the imagery. The same quote was later repeated by the State, word for word, in closing arguments also without an objection. R91:31.

Mr. Lapp testified and presented his defense that he acted in his own self-defense. He testified that he returned home and wanted to talk to D.Y. about her need to contribute to rent and finances. R90:16-19. He testified that she didn't want to talk to him, and told Mr. Lapp and her son to "get fucked." *Id.*:19-20. He testified that the incident began when he pushed D.Y. down onto the bed, and lowered himself to be on her level. *Id.*:20. He testified that D.Y. then attacked him, scratching at his face, neck and chest. *Id.*:20. He testified that he may have scratched her neck trying to defend himself, but she might have scratched her own neck. *Id.*:21. He testified that after he gained control of D.Y., she then began to scream that he was hitting her, *id.*:22, and that when her son grabbed him he told her son "I told him, dude, I never hit your mom." *Id.*:22. He then went on to testify that D.Y.'s son knew that D.Y. was not in a relationship with Mr. Lapp, and that he didn't want to stay in that apartment with her. *Id.*:23. Mr. Lapp testified that he returned to the residence later to obtain his "debit card, checkbook, social security I.D., and some other identification materials". *Id.*:23. He testified that he didn't believe D.Y. when she told him that she had called the police, believing she was taunting him, or trying to start a fight. *Id.*:24. He testified he had returned only to get his things and then wanted to leave. *Id.* As he gathered his things he turned around and saw a look on D.Y.'s face that he described as pure hatred. *Id.*:26. He testified that it scared him and he grabbed D.Y.'s arms right away to prevent her from getting anything out of her purse. *Id.* He testified to seeing a

knife in her hand in her purse; "I knew she was going to attempt to kill me, hurt me as bad as she could and it wasn't going to happen." *Id.*:27. He testified that he was afraid to let go of her arms and head-butted her. *Id.*:28. That D.Y. dropped the knife immediately after he head-butted her and he then picked up the knife, placing it in his pocket. *Id.*:29. He also testified that after backing away from D.Y., she attacked him, pushing him back into a door jam. *Id.*:32. He testified to putting the knife in the kitchen drawer before exiting the apartment. *Id.*:35-36.

The Jury found Mr. Lapp not guilty at jury trial for Count 3: Strangulation and Suffocation. He was found Guilty of the remaining counts, (R92), and sentenced by Judge Flanagan on August 24, 2011. (R93). Judge Flanagan sentenced Mr. Lapp to two years in prison on Count One (18 months initial confinement, two years extended supervision); five and a half years on Count Two (three and a half years initial confinement, two years extended supervision); *Id.* and twelve years on Count Three (seven years initial confinement, five years extended supervision). *Id.* All sentences were imposed consecutive to one another. *Id.* Judge Flanagan also ordered that Mr. Lapp provide a DNA sample and pay the surcharge. *Id.*

A post-conviction motion requesting a new trial due to the prejudicial effect of numerous errors by trial counsel resulting in ineffective assistance of counsel, removal of the DNA surcharge due to an erroneous understanding of law, a change to the percentage of the disbursement of Mr. Lapp's

prison funds, and to correct miscalculated victim witness surcharges was filed by Appellate Counsel on October 1, 2015. R67. The State's Response opposing the motion was filed on November 23, 2015. R71.

The post-conviction motion was decided by Judge Jeffrey A. Wagner, as the successor to Judge Flanagan, on December 21, 2015. R74. The deadline for the Circuit Court to decide the Motion was retroactively extended to December 21, 2015 by the Court of Appeals on March 1, 2016.

Mr. Lapp's request for a new trial was denied. A Notice of Appeal was timely filed on January 11, 2016. R.75.

Argument

I. Trial counsel was ineffective in both pre-trial and trial phases, and Mr. Lapp was prejudiced by counsel's deficient performance.

A defendant establishes ineffective assistance of counsel when he shows that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). An attorney's performance is deficient when the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To prove deficient performance, a defendant must show that specific acts or omissions of counsel were outside the "wide range of reasonable professional assistance." *Id.* at 690. Prejudice occurs if, without trial counsel's errors, there is a reasonable probability

of a different outcome. *Id.* at 694. The prejudice standard is a "non-outcome determinative test." *State v. Pitsch,* 124 Wis.2d 628, 641-2, 369 N.W.2d 711 (1985). "[T]he right to effective assistance of counsel…. May in a particular case be violated by even an isolated error… if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). If this Court finds multiple deficiencies in defense counsel's performance it does not have to only rely on the prejudicial effect of a single deficiency if, taken together, they establish cumulative prejudice. *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis.2d 571, 665 N.W.2d 305. Even when the prejudice of each error in isolation may not be sufficient to justify a new trial, the cumulative effect of those errors can be of substantial prejudice. *State v. Coleman,* 362 Wis.2d 447, 865 N.W.2d 190 (Ct. App. 2015).

A. Trial Counsel was ineffective in failing to file for substitution of Judge Flanagan despite defendant's request he do so.

Defense Counsel failed to file a substitution of Judge after the oral announcement at the April 11, 2011 final pre-trial that Judge Flanagan would be taking over the case during a judicial rotation despite multiple requests from his client. Mr. Lapp had previously been tried and sentenced by Judge Flanagan in Milwaukee Co. Case 2009CF162. Mr. Lapp, by affidavit, states that he asked his attorney to file a substitution. *See* App. C:101. (A copy of a letter written by Mr. Lapp to trial counsel asked why the substitution was not

filed). The affidavit further states that his attorney later told him he had forgotten to file. *Id.*

There is no reasonable explanation for Defense Counsel's failure to file a request for substitution upon the request of his client.

The postconviction court agreed that the failure to file resulted in Mr. Lapp losing his chance to request a different judge. R74:4. The court, however, found a lack of information to support a finding that the proceedings were unfair. *Id.*

This Court should reject this finding. There is simply no reasonable strategic reason to ignore your client's request to file for substitution, in particular, when a defense attorney is aware that the presiding Judge has previously sentenced your client in a felony proceeding. Because a defendant is, naturally, only sentenced before a single judge in a case we cannot compare Mr. Lapp's ultimate sentence to one he would have received in front of a different judge. The court's decision underestimates the damaging nature of counsel's failure and overestimates the presumption of fairness and impartialness of Judges.

Absent Defense Counsel's deficient performance, there is a reasonable probability of a different sentencing outcome. The Judge's impression of Mr. Lapp was damaged by knowledge of his earlier sentence, making it more difficult to believe the defense presented. Counsel's failure was therefore prejudicial to Mr. Lapp's case,.

B. Trial Counsel was ineffective in improperly arguing and preserving an "Other Acts" motion.

Defense Counsel filed a motion to admit *McMorris* evidence and evidence of D.Y.'s habit to support a claim of self-defense. R9-10. In the motion, the defense asserted that Mr. Lapp head-butted D.Y. after he saw her reach into her purse to grab a knife. *Id.* He asked the court to allow evidence that D.Y. carried the knife and that he had seen it in her purse on multiple specific times. *Id.* The Court did not allow Defense Counsel to present additional evidence available through testimony from Mr. Lapp and an additional witness, who was present, about the knife or D.Y.'s temper or reaction to threats or situations in the past. R85:24.

Judge Kuhnmuench found that the offer of proof from Defense Counsel did not allege prior bad acts to qualify admission of the above information as *McMorris* evidence. *Id*.:6-7. The Court held that Mr. Lapp's knowledge that D.Y. carried a painter's knife in her purse, due to her occupation, was not sufficient to suggest that D.Y. would use that knife on Mr. Lapp – such as to require Mr. Lapp to take the actions he did in self-defense. *Id.* Nor did the court believe the explanation was admissible under Wis. Stat. §904.04, or under Wis. Stat. §904.06 as habit evidence. *Id.*:22-24. The court refused Defense Counsel's request to make an additional record. *Id.*

Defense Counsel had failed, or was refused the opportunity, to present additional information regarding four

different incidents Mr. Lapp and he had spoken about prior to the motion hearing. R67. The combination of information from these scenarios gives better insight into Mr. Lapp's mind at the time of this incident. Each of the four incidents involved D.Y. and gave evidence as to her violent temper:

1. At Grant Park, Mr. Lapp asked D.Y. why she carried a knife in her purse, and she replied "for cutting a motherfucker's balls off" and said that she would not allow any man to hit her again. *See* App. C:103-104.
2. When asked why D.Y. left a man in Pennsylvania leaving behind her personal belongings, she said, "It got violent, I left." *Id.*
3. That D.Y. frequently verbally abused her adult son "in a disproportionate, aggressive and antagonistic manner." *Id.*
4. After D.Y. moved into the defendant's apartment, she said she was concerned about an ex-boyfriend who was recently released from prison and that he might stalk her or beat her because she had some of his property. *Id.*

Defense Counsel was deficient in not including the above information in his brief, or in his presentation of proof. The majority of the above information was not presented to the trial court prior to the Judge denying Defense Counsel's *McMorris* motion. *None* of the information was allowed in Mr. Lapp's trial. The Jury could not consider the information when determining Mr. Lapp's state of mind at the time of the

alleged incident, and thus it was not considered when the Jury decided whether Mr. Lapp or D.Y. was more credible.

Post-conviction, the court adopted the State's argument that the additional information "was not evidence of violent or turbulent nature under *McMorris* and do not constitute a consistent response to any repeated situation." R74:7, R71;11. The court stated that there is "nothing about the facts in any of these scenarios that show the victim was physically violent, responded with physical violence with a knife, or that it was she who was the violent one." R74:7.

This Court should reject this holding. The circuit court rejected the possibility that any of the above scenarios suggest D.Y. had been or could be violent. The scenarios as presented show only a part of the conversation, Mr. Lapp was available at the motion hearing to clarify the scenarios, to testify as to tone of voice, to the gestures and actions of D.Y. while speaking, all information readily available at the motion hearing but never considered by the trial court. The trial court refused to permit testimony at the motion hearing, limiting the record. After conviction, the court relied upon the limited record and refused a *Machner* hearing at which a full record of the circumstances surrounding them could have been presented to answer the court's questions regarding "who was the violent one." R74:7.

These four incidents provided information that Mr. Lapp considered while reacting on the day of the alleged incident. The above information, taken together, bolstered Mr. Lapp's explanation that he believed that D.Y. was

grabbing a knife in her purse to stab or kill him. Mr. Lapp's primary strategy at trial was that he had acted in self-defense. By failing to provide the trial court with this information, and failing to present the testimony available consistent with the theory of defense, Defense Counsel undermined his client's ability to obtain a Not Guilty Verdict. It also deprived the Jury of the opportunity to determine whether it found Mr. Lapp credible.

C. Trial Counsel was ineffective for failing to request Jury Instruction 314 or object to unnecessary security during the trial.

During Mr. Lapp's trial, conspicuous and armed security bailiffs were positioned around Mr. Lapp at key moments and within full view of the Jury. At no point did Defense Counsel object to their presence. During *voir dire* between three and five Milwaukee County Sheriff's Deputies were seated four feet directly behind Mr. Lapp and dressed in standard black paramilitary style uniforms. *See* App. C:104-105. When these men stood to allow the Jury to enter and leave the room, they towered over Mr. Lapp, creating the impression that Mr. Lapp was so dangerous it takes four armed men to stop him even while Mr. Lapp is unarmed in a courtroom. In addition, during Mr. Lapp's testimony, and only during his testimony, a visibly armed and uniformed deputy remained standing, placed between Mr. Lapp and the jury. *Id.*104-105, & 117-120.

The presence of the officers in both situations is the type of inherently prejudicial situation in which a specific determination of necessity is required to prove that a trial court has properly exercised its discretion. Whenever a courtroom arrangement is challenged as inherently prejudicial the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," *Estelle v. Williams*, 425 U.S. 501 at 505 (1976). The risk that the Jury perceived the presence of the armed uniformed officers as directly relating to Mr. Lapp and that they judged him dangerous based upon the bailiff's presence rather than upon the evidence presented by the court deprived Mr. Lapp of the opportunity for a fair trial.

In addition, by also failing to challenge the presence and necessity of sheriff positioned next to Mr. Lapp during his own testimony, Defense Counsel allowed the Jury to believe that Mr. Lapp was dangerous enough that additional safety measures needed to be taken to protect them from him during his testimony. The Jury made this determination, rather than Defense Counsel obtaining the trial court's own assessment, on a case-specific basis, of courtroom security and its possible prejudicial affect prior to the trial commencing. *Holbrook v. Flynn*, 475 U.S. 560, 206 S.Ct. 1340 (1986). There is no evidence on the record that the trial court evaluated Mr. Lapp's risk for flight or violence, or made any determination on the record that the security deployed in the courtroom was necessary. Nor did counsel

request a curative instruction regarding the presence or number of officers in the courtroom, or the presence of the sheriff that stood next to Mr. Lapp during his testimony. The Jury was left with no explanation other than that Mr. Lapp was dangerous and that they required protection from him.

Despite Mr. Lapp's wearing shackles while testifying Defense Counsel also failed to ask for Jury Instruction 314. While not mandatory in cases where the physical restraints are not visible to the jury, *State v. Miller,* 331 Wis.2d 732, 797 N.W.2d 528, at footnote 2, citing *State v. Grinder*, 190 Wis.2d 541, 552, 527 N.W.2d 326 (1995) the instruction should have been requested to prevent possible prejudice resulting from observations of Mr. Lapp's restraints whether visual or auditory.

The post conviction court rejects this argument, holding that any potential observations of Mr. Lapp's restraints "speculative", and that giving a jury instruction would only have called attention to the restraints. R74:7.

The Court should reject this position, which ignores the fact that the curative Jury Instruction would have been read only at the end of the trial, only after Mr. Lapp's testimony, and thus could not "call attention" to the restraints. If the post conviction court's belief was true, reasoning follows that all curative instructions regarding evidence presented to a jury but then objected to, should not be given as the instructions would call additional attention to the evidence.

The post conviction court also held that the presence of the armed deputies behind Mr. Lapp, as well as next to him during his testimony does not show prejudice should be rejected. While not a *per se* violation of Mr. Lapp's due process rights, the presence of these extra officers directly behind Mr. Lapp in the courtroom and their positioning between the jury and Mr. Lapp during Mr. Lapp's testimony – and only during his testimony – could not help but create in the minds of the jury the highly prejudicial idea that Mr. Lapp was dangerous or untrustworthy. *Holbrook*, 475 U.S. 560, 570. It is an erroneous exercise of discretion to rely primarily upon law enforcement department procedures instead of considering the risk a particular defendant poses for violence or escape. *Grinder*, 190 Wis.2d 541, 551 (1995); *see also Sparkman v. State*, 27 Wis.2d 92, 133 N.W.2d 776 (1965). Defense Counsel's failure to object to the presence of the officers, or to ask the court for curative instructions, was ineffective assistance of counsel and it deprived Mr. Lapp of the opportunity of a presenting his defense at a jury trial at which he was not visibly presumed by the Court to be dangerous and violent.

D. Trial Counsel was ineffective for failing to seek preclusion of the State's use of evidence of flight in a Motion in limine.

Defense Counsel successfully sought suppression of evidence concerning a bench warrant for Mr. Lapp from another county for child support. R86:20. Counsel, however,

did not seek to control the State's use of Mr. Lapp's absence from the residence as "evidence of flight". At trial the State argued that Mr. Lapp had left the residence to avoid the police because he was guilty of the alleged crimes and wished to avoid being caught.

The post conviction court held that any attempt to preclude the State's use of flight as evidence of guilt would have been denied. R74:8. The court held that because Mr. Lapp testified at trial that D.Y. was the aggressor, rather than himself, and that he was trying to "escape from the house", that Mr. Lapp's reason for leaving was heard by the jury allowing the State to present its own interpretation of the evidence. *Id.* This does not properly interpret Mr. Lapp's testimony or the State's use of evidence of guilt.

The post conviction court ignores that the State's use of the evidence of flight did not center on Mr. Lapp's reason for leaving the scene, but also why Mr. Lapp did not call police *himself* after the original incident. During closing arguments the State used Mr. Lapp's not calling police, as well as his not waiting for police, as evidence of guilt. "You heard there was one call that came in? It came in from [D.Y.]? This wasn't a double phone call situation, where two people called. And that's significant. The defendant didn't call the police. The victim did." R91:56, 61. The State continued: "Wouldn't the first thing be to call the police? Wouldn't the first thing be to run out the door? Get out of there? Go to the neighbors? Call the police? Grab the phone? Run, call the police?" *Id.*:56. The State then concluded that

the reason why Mr. Lapp didn't call the police was because "he knew he had done something wrong, and he didn't want the cops involved." *Id.*:62.

Defense Counsel was clearly aware that Mr. Lapp had a bench warrant out for his arrest at the time of the incident. Any call made by Mr. Lapp to police would have resulted in Mr. Lapp's being taken into custody on that warrant. This is a valid reason for Mr. Lapp's deciding not to call police that could not be placed in front of the jury without also exposing the prejudicial fact that Mr. Lapp had an open warrant.

Counsel's success in suppressing information regarding the warrant was useless because he failed to seek suppression of the evidence of flight. Because of this error defense counsel could not challenge the State's argument that Mr. Lapp's flight was evidence of his guilt – without mentioning the bench warrant. "[W]hen a defendant points to an unrelated crime to explain flight, the trial court must, as it must with all evidence, determine whether to admit the flight by weighing the risk of unfair prejudice with its probative value." *State v. Quiroz,* 320 Wis.2d 706, 722, 772 N.W.2d 710 (Ct. App. 2009). When "there is an independent reason for the flight known by the court which cannot be explained to the jury because of its prejudicial effect upon the defendant." *State v. Miller,* 231 Wis.2d 447, at 460, 605 N.W.2d 567 (Ct. App. 1999).

This Court should reject the post conviction court's holding. Had Defense Counsel properly moved to prevent the State from using evidence of flight arguments the Court

would have, as with all evidence, determine whether to admit the flight evidence by weighing the risk of unfair prejudice with its probative value. *Quiroz*, 320 Wis.2d 706 at 722 (2009). Despite the post conviction court's assertion that such a request would have been overruled, the argument would have been held prior to the trial, to Mr. Lapp's testimony and prior to evidence of flight being argued to a Jury. By not objecting, or requesting a Motion in Limine, the State unfairly placed a prejudicial explanation for events in front of the Jury.

E. Trial Counsel was ineffective for failing to object to testimony and pictures of a camouflage knife based on lack of proper foundation linking the knife to any offense.

Defense Counsel failed to object when the state improperly introduced photo evidence of a camouflage colored knife after the Court ruled, prior to trial, that the photo would only be introduced if there was "some reason to connect it to this trial." R.86:24. Pretrial arguments had included that the knife described to police by D.Y. was black in color. During the Trial the State discussed the knife without first obtaining any foundation from D.Y. solidifying that it was in fact used in the alleged incident. During opening arguments that State brought up the knife. "You'll see a photograph of one of the two knives that are – that [D.Y.] will tell you is – she's not sure which knife it is, but she'll tell you that it's a – that's a knife like it, because there's two of them,

and that it could be the knife." R.87:54. Defense Counsel did not object.

The prejudicial nature of the information had already been determined by the court, which had required a foundation prior to introduction. Defense Counsel's failure to object deprived Mr. Lapp of a proper verdict derived from only proper evidence.

Defense Counsel also failed to object when the photograph of the camouflage knife was introduced during direct examination and D.Y. was asked, "Are you sure it's this knife and not the other knife?" D.Y. answers: "They're both very similar so to me, I am not – I can't really recall what that – Yes, I believe that's the knife he was trying to get after because that was on top of the TV." During cross examination the alleged victim even answered the question of the defense identifying the knife allegedly used against her as black in color. *Id.:*40. D.Y.'s identification of the knife was based upon the location of the knife in the photograph rather than its identifications as "the" knife used against her. At no point prior had the victim testified that during the altercation there had been a knife sitting on the TV, nor did she testify that the knife she observed during the incident was placed on or near the TV. In fact, on cross-examination D.Y. admitted the knife in question was black. R86:40. D.Y. also admitted the knife used in the incident was within inches of her face suggesting she must have had a good look at the knife. R.87:19.

The post conviction court argues that a proper foundation was presented through officer Wick's out of court information and the shaky identification of the knife by the victim. This court should reject this interpretation, because Officer Wick never provided direct confirmation or testimony, and because the photograph of the knife was discussed in the opening statement, prior to any testimony regarding the knives from D.Y. Defense Counsel's failure to object resulted in the admission of the photograph and it's identification without a proper foundation. The admission of the photograph, previously determined to be prejudicial unless a proper foundation was laid, was thus improperly placed before the Jury.

F. Trial Counsel was ineffective for failing to properly prepare exhibits for display to the jury.

Defense Counsel failed to prepare professional diagrams for the jury to assist them in understanding Mr. Lapps testimony despite Mr. Lapp's request for diagrams that would have showed the impossibility of D.Y.'s explanation of events. During the trial Mr. Lapp attempted to describe the physical layout of the apartment, of his possessions, his actions in respect to his surroundings and the paths that he and the alleged victim took during the interaction. R.89:24-27, 30, 32-35. On cross-examination he attempted to describe his location and that of the alleged victim during the interaction. *Id.* at p 40-41. In both of these instances well drafted diagrams would have been of great assistance to the

defense's case by providing the Jury with a clear picture of the scene of the event. Instead, a sloppy and confusing direct examination occurred, leaving jurors with only the State's exhibits to rely upon for clarification, and prejudicing Mr. Lapp by reducing the power and potency of his defense and his description of events.

The post conviction court rejected the argument ruling that the focus of the trial was on "the victim's injuries, what happened in the bedroom when the injuries were caused, and how those injuries were caused." R.74:9. The court held that more professional diagrams would not have altered the verdict in any way. *Id.*

This court should reject this argument, which presumes to know the questions on the mind of the Jury during the trial and deliberations. The credibility of both D.Y. and Mr. Lapp were before the Jury and thus their explanation of the events of the evening, including those outside of the bedroom, fall within the Jury's consideration. Mr. Lapp's ability to present a proper defense was adversely affected by Defense Counsel's failure to adequately prepare. The degree to which this failure to prepare affected the verdict is unknown, but the impact, when considered cumulatively amongst the other failures is sufficient to establish that Defense Counsel was ineffective in representing Mr. Lapp.

G. Trial Counsel was ineffective for failing to object to prejudicial analogies by the State during witness testimony.

Defense Counsel failed to object to Witness Beebe's overly graphic analogy regarding D.Y.'s injuries allowing a gory metaphor to be presented to the jury as if it were fact. Beebe testified that "She looked like a dog that was beaten with a stick for hours." R.90:12. There was no cross examination to suggest he had actually seen a dog in such a situation, and the presumption is that he was trying to create a graphic and gory image in the minds of the Jury. It was a gory and disturbing image that the State later repeated in closing arguments word for word. R91:31. Defense Counsel's failure to object to the statement allowed that image to remain in the minds of the jury throughout the remainder of testimony and again at closing arguments. There is no strategic decision to allow such an analogy to stand unchallenged. The prejudice created by allowing a gory, graphic, and potentially misleading statement to be considered by a jury creates an unreasonable risk of prejudice to Mr. Lapp.

The post conviction court believed held that because the Jury heard about D.Y.'s injuries from other witnesses and saw pictures of those injuries, it was able to make its own independent assessment based on the evidence before it and that the gory metaphor presented does not entitle Mr. Lapp to a new trial.

This Court should reject that holding, because no legal basis has been presented supporting the court's decision. Mr. Lapp has not objected to the photographs or the description of injuries made by D.Y. or the medical professionals that

testified at trial because proper foundation and presentation of that evidence was made. Mr. Lapp does object to the gory metaphor which was without foundation, and overly graphic and prejudicial. Defense Counsel did not object, and thus the Jury received improper and prejudicial information without a proper foundation.

H. Trial Counsel was ineffective for telling the Jury during closing arguments that they should find Mr. Lapp Guilty.

During closing argument Defense Counsel argued against the State's interpretation of events but concluded his statement with "Return a verdict of guilty…". R91:98. The statement, even quickly corrected, is clearly prejudicial. The mistake could be seen by a Jury as a functional equivalent to a guilty plea, which is a constitutional prerogative of the defendant, not his attorney. *State v. Gordon,* 250 Wis.2d 702, 641 N.W.2d 183 (Ct. App. 2002). Defense Counsel should have asked the court for a curative instruction reminding the Jury that the misstatement was not evidence and should not have been used against Mr. Lapp during the course of deliberation. The mistake was unprofessional, improper, and should be presumed prejudicial.

Post conviction, the circuit court holds that Defense Counsel's "slip of the tongue" cannot have been misunderstood, because it would be unreasonable for any

juror to believe an attorney would ask a jury to find his or her client guilty. R74:10.

This Court should reject the trial court's argument because it presents only one possible jury reaction. Another is that the Jury would believe that even the Defense Attorney believed his client was guilty. Another, that the Defense Attorney had a "Freudian slip" and admitted his client's guilt. We do not know the effect the mistake had on the Jury deciding Mr. Lapp's fate, but we do know that Defense Counsel did not properly protect Mr. Lapp from the potential hazards created by the statement.

I. Trial Counsel was ineffective for failing to object to the State's vouching for the victim during closing arguments.

Defense Counsel failed to object during the State's closing arguments when it was argued: "That's [D.Y.'s] testimony. You heard from the court that you can find her believable and credible and find the defendant guilty of all those charges, just based upon that[.]" R91:51. This statement improperly bolstered the credibility and vouched for the credibility of the alleged victim in the case. The improper violation is plain error and violated Mr. Lapp's right to a fair trial.

Whether or not such a statement is plain error depends upon the facts of a particular case, the amount of evidence properly admitted, and the seriousness of the error involved.

Virgil v. State, 84 Wis.2d 166, 190-91, 267 N.W.2d 852 (1978). The State's vouching for D.Y. removed the question of her credibility from the Jury's consideration and improperly instructed the Jury that the court itself had seemingly approved of the Jury finding D.Y. credible. While prosecutors may comment on evidence, argue conclusions based upon the evidence, or state it convinces the prosecutor and thus should convince the jury, *State v. Adams,* 221 Wis.2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998), and though the state is obliged to prosecute with "earnestness and vigor" the State should refrain from using improper methods. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629 (1935).

The State's vouching stepped over a line from drawing a conclusion based upon evidence to vouching for a State's witness. The credibility of the victim and that of Mr. Lapp was the center issue in the case before the jury and the statement of the prosecutor improperly removed that question from the jury. Defense Counsel's failure to object removed any possible opportunity to cleanse the mistake from the jury's mind prior to deliberations.

Post conviction, the trial court believes that though the closing statement of the State was "inartfully phrased" the court did not believe the statement affected the outcome because the Jury did not believe D.Y. as to the Strangulation and Suffocation Count, for which they found Mr. Lapp not guilty. R74:10.

This Court should reject this reasoning. The Jury is asked to weigh the evidence put before it. An acquittal shows

that the Jury did not believe that the State had proven the case beyond a reasonable doubt. In Mr. Lapp's trial, the State produced evidence through a variety of witnesses. The Jury's decision to acquit Mr. Lapp on the Strangulation charge is not traceable solely to the Jury's determination of the credibility of D.Y.'s testimony. In fact, the acquittal could be the result of the Jury's reacting to Dr. Rickburg's testimony about D.Y.'s injuries, who noted on cross-examination that there were no complaints of airway injury. R87:66-67. A single Count's acquittal does not establish that Defense Counsel was effective, nor does it cure all errors by counsel during the preparation or presentation of case as seems to be suggested by the court.

Defense Counsel's performance was deficient in failing to object to the vouching of the State. Counsel's deficient performance prejudiced Mr. Lapp because of the importance in letting the credibility of witnesses rely upon the Jury's observations of their testimony and the presentation of evidence.

J. The multiple deficiencies of counsel establishes cumulative prejudice.

If this Court finds multiple deficiencies in Mr. Lapp's Defense Counsel's performance, it need not rely upon the prejudicial effect of any single deficiency if, taken together, the deficiencies establish cumulative prejudice. *Thiel,* 264 Wis.2d 571 (2003). Here, Mr. Lapp's attorney was deficient

in multiple respects. Each of these deficiencies is prejudicial, but should the Court not find any single error sufficient to establish prejudice it may find the combined effect of those errors prejudicial. *Id.* The circuit court erred in denying Mr. Lapp's request for a new trial.

Conclusion

For the above reasons, Mr. Lapp is entitled to a new trial.

Respectfully submitted this 6th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM

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 the brief is 6,919 words.

_____
Kathleen A. Lindgren

ELECTRONIC CERTIFICATION

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

_____
Kathleen A. Lindgren

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) relevant trial court record entries including the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including

juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Kathleen A. Lindgren

TABLE OF APPENDICES

App. A: Decision and Order Denying Postconviction Motion

App. B: State's Response to Postconviction Motion

App. C: Defendant's PostconvictionMotion