STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP000116-CR

RANDY A. LAPP,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

This reply addresses the State's main argument; specifically; 1) sufficient evidence exists to support a reversal of the circuit court's denial of Mr. Lapp's request for a *Machner*[1] hearing and a new trial due to the cumulative error of trial counsel in violation of his sixth and fourteenth amendments to the United States Constitution.

[1] *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Mr. Lapp's postconviction motion included within it the request for a *Machner* hearing and a request for a new trial. R67. On appeal the State argues that a new trial cannot be granted on an ineffective assistance of counsel claim without an evidentiary hearing. (State's Br. 1). *State v. Machner*, 92 Wis.2d 797, 804. We disagree that the *Machner* court specified a hearing was required in every case, but agree that it has generally been construed to mean that due to its instruction that the testimony of trial counsel be preserved on a claim of ineffective assistance of counsel. The Court held in *Machner* that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *Id. at* 804. *Machner* hearings are important because the hearing allows trial counsel an opportunity to explain his or her actions, and to allow the trial court, whom observed the attorney, to rule on the motion. *Id.* "[J]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Davis v. Lambert,* 388 F.3d 1052, 1064 (7th Cir. 2004) (quoting *Harris v. Reed,* 894 F.2d 871, 878); see also Kimmelman *v. Morrison*, 477 U.S. 365, 386-87 (1986) (same). *But see also State v. Kimbrough,* 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752; *State v. Koller,* 2001 WI App. 253, 248 Wis.2d 259, 635 N.W.2d 838.

Mr. Lapp agrees that a *Machner* hearing would be useful to the Court of Appeals in its review of the factually specific situations being reviewed and continues his request for such a hearing. The post conviction motion alleged sufficient material facts that, if true, would entitle Mr. Lapp to an evidentiary hearing, a determination which on appeal presents a legal issue that the Court of Appeals reviews *de novo*. *State v. Allen*, 274 Wis.2d 568, 682 N.W.2d 433. (2004). Even a single serious error may justify reversal, *Kimmelman,* 477 U.S. at 385, Mr. Lapp's motion

demonstrates multiple instances wherein counsel's representation fell below an objective standard of reasonableness. *See Strickland v. Washington,* 466 U.S. 668 (1984). The Court should review the cumulative effect of all proven errors and may not merely review the effect of each in artificial isolation. *E.g., Alvarez v. Boyd,* 225 F.3d 820, 824 (7th Cir. 2000); *State v. Thiel* 264 Wis.2d 571, 665 N.W.2d 305.

The law set out in *Strickland* has been further addressed in both the main brief and the State's reply, this reply will focus on the arguments forwarded by the State in response to the specific instances outline in our motion.

A. Failure to File for Substitution

The State argues that Mr. Lapp's "alleged" request for a substitution of Judge should be ignored because there is no evidence of how Mr. Lapp was prejudiced by the failure (State's Br. 3-5). Lapp provided by affidavit his request and reason for the desired substitution. (Def-App. Brief App. C:101). Defense Counsel's explanation to Lapp for failure to follow his client's request was that he had "forgotten." *Id.* This is not a strategic tactic, nor does it benefit Mr. Lapp in any way to be tried in front of a Judge with prior knowledge of him or his criminal history. "The deficiency prong is met where counsel's error resulted from oversight rather than a reasoned defense strategy." *See Wiggins v. Smith,* 539 U.S. 510, 534 (2003); *Kimmelman,* 477 U.S. at 385; *Dixon v. Snyder,* 266 F.3d 693, 703 (7th Cir. 2001); *State v. Moffett,* 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

In light of the fact that Mr. Lapp was facing serious felony charges, his attorney should have exercised reasonable professional judgment and ensured that Mr. Lapp was not placed before a Judge that had prior knowledge. "It is counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the

particular case." *Strickland,* 466 U.S. at 690; *see Kimmelman,* 477 U.S. at 384. The circuit court judge is responsible for a multitude of decisions throughout a case and a jury trial. Defense counsel prejudiced Mr. Lapp by failing to ensure that those decisions were made by a judge with no preconceptions of his client. In addition, defense counsel failed to preserve his client's rights and ignored or forgot to zealously protect his client's desires. Prejudice exists when counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Johnson,* 133 Wis.2d at 222, (quoting *Strickland*, 466 U.S. at 687).

The presumption that a judge is fair and impartial should not surmount the obligation of defense counsel to follow the explicit instructions of his client when failure to do so results in depriving the defendant of a fair trial and a reasonable result.

B. Failure on "Other Acts" Motion

The State argues that the circuit court was right to deny Lapp's claim that his attorney's failure to include additional other acts information was ineffective, without a *Machner* hearing, because the law strongly presumes defense counsel renders effective assistance and made all significant decisions in the exercise of reasonable judgment. (State's Br. p.7). Lapp included with his motions the specific information he had provided to counsel to include in the other acts motion, including information which went to explaining D.Y.'s temper and reaction to threats in the past and facts which supported Mr. Lapp's claim of self defense. R67; (Def-App. Br. 18-20). These claims were not included in the motion or arguments of defense counsel despite a defense strategy centered on Mr. Lapp's actions being in self-defense. There is no need to prove the motion would have won with this information included, despite their absence undermining the power and reasonableness of Mr. Lapp's defense

strategy. Failure to include them would have resulted in Mr. Lapp's trial proceeding without Mr. Lapp being able to include the undisclosed information in his arguments or testimony regardless of whether he had won the motion because the arguments had not been offered as part of the offer of proof. Such failure is not reasonable as a strategy of the defense.

Defense counsel's function is to make the adversarial testing process work in their case. *Strickland,* 466 U.S. at 690. By failing to present all information and scenarios available to him at the motion hearing, defense counsel also failed to ensure that Mr. Lapp could present the defense he desired at trial. There is no strategic value to holding on to information critical to Mr. Lapp's presentation of a self-defense argument. " "[J]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Davis v. Lambert,* 388 F.3d 1052, 1064 (7th Cir. 2004) (quoting *Harris,* 894 F.2d at 878); see also Kimmelman, 477 U.S. at 386-87 (same). *But see also State v. Kimbrough,* 246 Wis.2d 648, 630 N.W.2d 752 (Ct. App. 2001); *State v. Koller,* 248 Wis.2d 259, 635 N.W.2d 838.

C. Failure to Include JI-314 or to Object to Extra Security

The State argues that any impact on the jury from the presence of extra and armed security personnel, or from shackles worn during his testimony, at key times during Mr. Lapp's trial is speculative, and that the jury's decision to acquit Mr. Lapp on a single count undermines any possibility that they believed Mr. Lapp was dangerous or untrustworthy. (State's Br. 8-9). When a courtroom's arrangement is challenged as inherently prejudicial the question is not whether the jury articulated consciousness of a 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 State does not address, and thus by omission accepts, the argument that had defense counsel challenged the extra security the circuit court would have been required to assess whether or not the extra security was necessary. *Holbrook v. Flynn,* 475 U.S. 560 (1986). The failure of objecting allowed the officers to remain standing, in uniform and visibly armed, between the jury and Mr. Lapp during his testimony, unchallenged. Such an armed presence, only made in the portion of trial during which Mr. Lapp testified, cannot help but create in the minds of the jury that Mr. Lapp is dangerous or untrustworthy. *Id.* This is the type of unacceptable risk of impermissible factors coming into play imagined by *Estelle.*

Defense counsel's objection would have required the court to make a finding on the record regarding the necessity of security. 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. *State v. 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 officers, or to ask for the curative instructions regarding noise from the shackles worn by Mr. Lapp, was created a situation in which Mr. Lapp was deprived of the opportunity to present his defense at a jury trial in which he was not visibly presumed by the court to be dangerous and violent. There is no reasonable strategy in Mr. Lapp's case to explain his defense attorney wanting additional security in the room or wanting an armed guard between his client and the jury. "[J]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Davis v.*

Lambert, 388 F.3d at 1064 (quoting *Harris,* 894 F.2d at 878); see also Kimmelman, 477 U.S. at 386-87 (same). *But see also Kimbrough,* 246 Wis.2d 648; *Koller,* 248 Wis.2d 259. The errors of counsel deprived Mr. Lapp of a fair trial limited to the facts and evidence properly before the jury.

D. Failure to Preclude Evidence of Flight

Defense counsel succeeded in suppressing information regarding Mr. Lapp's child-support warrant R86:20. Counsel failed, however, to seek to preclude the state from using evidence of flight as evidence of guilt at trial. The State argues that such failure is not prejudicial because the circuit court would have denied such a motion; "…any attempt to exclude evidence of Lapp's avoidance of police would have failed." (State's Br. 10). The State bases its argument on the circuit court's ruling that had defense counsel sought suppression of that evidence the motion would have been denied.

Failure to object to evidence of flight put Mr. Lapp in an untenable position. The warrant was "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). Mr. Lapp could not refute the evidence of flight presented by the state without putting knowledge of his child support warrant in front of the jury, information that the court had agreed was prejudicial. The State argues that the circuit court's ruling was correct because the rebuttal evidence (of Mr. Lapp's warrant) in fact would not have been prejudicial. (State's Br. 10). This goes against the circuit court's own ruling that the child support warrant was prejudicial.

Defense counsel failed twice in this matter, once in failing to anticipate the state using evidence of flight and thus requesting a motion in limine, the second in failing to object to the state using the consciousness

of guilt argument during the trial. The deficiency prong is met where error is a result of oversight rather than a reasoned defense strategy. *Kimmelman,* 477 U.S. at 385; *Dixon v. Snyder*, 266 F.3d at 703; *Moffett,* 147 Wis.2d 343. It was defense counsel's job to ensure that the adversarial testing of evidence works in the particular case. It does not work when the defendant cannot fully explain his own position without giving prejudicial information about himself.

E. Failure to Object to Foundation for Knife Photo

The State's argument, suggesting simplistically that because D.Y. asserted during trial that she "believed that the knife depicted in the photograph was the knife that Lapp 'was trying to get after' from 'on top of the TV'." (State's Br. 10-11, quoting R88:33), that a proper foundation had been laid. This is an incorrect record of what D.Y. actually testified. First it should be noted that the knife described by D.Y. to police on the day of the alleged incidents was black in color, not camouflage. Secondly, D.Y.'s actual testimony was: "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." R87:40. The State ignores completely that the identification was not because of color or description but because of location: "…because that was on top of the TV." *Id,* and that D.Y.'s testimony of the location of the knife was inconsistent with her other statements regarding the location of the knife, (Def-App. Br. 27-28), and that D.Y. admitted that the knife used against her was black. R86:40. Defense counsel, clearly aware that the camouflage knife in the photo was not the one described in discovery, should have objected to the photo being admitted only based upon the above shaky identification. The photo had been predetermined by the court as prejudicial without proper foundation. R86:24. The foundation laid by D.Y. was not proper and

defense counsel should have vigorously objected. No strategic explanation explains why defense counsel would have objected prior to trial and not during trial to a prejudicial photo.

F. Failure to Prepare Exhibits

Failure to prepare professional exhibits for a jury trial with multiple counts, multiple alleged incidents, and different versions of events being argued before the jury is a clear example of an ill-prepared defense attorney. During his testimony Mr. Lapp tried to explain his version of events to the jury and was hindered by the lack of appropriate exhibits. R89:24-27, 30, 32-35. The State argues the circuit court was correct in summarily dismissing this as an example of ineffective assistance of counsel. Taken along with the multiple other errors presented the cumulative effect is sufficient to establish ineffective representation of Mr. Lapp during his trial.

G. Failure to Object to Prejudicial Analogies

Defense counsel failed to object, or properly cross-examine a key witness that testified regarding his observation of D.Y. on the day of the alleged incident. The State later repeated that same gory metaphorical description to the jury. The defense attorney did not object in either instance leaving a prejudicial and visual image unchallenged with the jury. The State argues the circuit court was correct in summarily dismissing this as an example of ineffective assistance of counsel. Taken along with the multiple other errors the cumulative effect of defense counsel's errors is sufficient to establish ineffective representation of Mr. Lapp.

H. Telling Jury to Find His Client "Guilty"

This Court should evaluate the effect of a defense attorney advising the jury to find his client guilty alongside the multiple errors already outlined for the Court. The Court should assess the cumulative effect of all of defense counsel's errors and not merely review each in artificial isolation. *E.g., Alvarez v. Boyd,* 225 F.3d at 824; *Thiel,* 264 Wis.2d 571. There is no individual who could do more harm to Mr. Lapp with this simple "mistake" than his own counselor.

I. Failure to Object to State's Vouching for Victim

The state crossed a line from drawing a conclusion based upon evidence to vouching for a state's witness. Defense counsel never objected. This court should reject the trial court's statement that the vouching was inartfully phrased, and that the jury's decision to acquit Mr. Lapp on one count showed that they were not swayed by the state's argument. This position ignores that evidence was presented at trial by the state's expert Dr. Rickburg who testified that there were no complaints of airway injury. R87:66-67. This information alone, provided by an expert, could explain the Jury's acquittal. In addition, the single count of acquittal does not cure the multiple deficiencies that prejudiced Mr. Lapp throughout and prior to his jury trial.

J. Cumulative Error

While there is a presumption that trial counsel has performed reasonably, counsel's performance should be evaluated from counsel's perspective at the time of the errors and in light of all of the circumstances. *Kimmelman,* 477 U.S. at 384 (citing *Strickland,* 466 U.S. at 689).The test for prejudice is whether "defense counsel's errors undermine confidence in the reliability of the results. The question on review is whether there is a

reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Moffett,* 147 Wis.2d at 357. "The defendant is not required [under *Strickland]* to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Id.* at 354 (quoting *Strickland,* 466 U.S. at 693). Taken together, the cumulative effect of the errors undermines the integrity of his trial, and were "so serious a to deprive the defendant of a fair trial, a trial whose result is reliable." *Johnson,* 133 Wis.2d at 222 (Quoting *Strickland,* 466 U.S. at 687).

Conclusion

For the above reasons the Court should reverse the decision of the circuit court in denying the postconviction motion and Mr. Lapp's request for a *Machner* hearing and a new trial as a result of the ineffective assistance of his trial counsel.

Dated at Pewaukee, Wisconsin this 4th day of August, 2016.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a brief produced with a proportional serif font, minimum printing resolution of 300 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. The length of this brief is 2,996 words.

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Kathleen A. Lindgren

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

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

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Kathleen A. Lindgren

CERTIFICATE OF MAILING – RULE 809.80(4)

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 4th day of August, 2016, I caused 10 copies of the Brief and Appendix of Defendant-Appellant, Randy A. Lapp, to be delivered by Mail to the Wisconsin Court of Appeals, 110 E. Main Street, Suite 215, Madison, Wisconsin 53703.

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Kathleen A. Lindgren