

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I**

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**Appeal No. 2016AP548-CR**

**Milwaukee County Circuit Court Case No. 13-CF-3404**

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**STATE OF WISCONSIN,**

Plaintiff-Appellant,

v.

**DAVID EARL HARRIS, JR.,**

Defendant-Respondent.

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**On Appeal From an Order Granting a Postconviction Motion for a New Trial  
and an Order Vacating the Defendant's Judgment of Conviction and  
Sentence, Both Entered in the Milwaukee County Circuit Court, the  
Honorable Jeffrey A. Wagner, Presiding**

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**Brief of the Defendant-Respondent**

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Basil M. Loeb  
Attorney for Defendant-Appellant  
State Bar No. 1037772

949 Glenview Avenue  
Wauwatosa, WI 53213  
(414) 259-9300 (Telephone)  
(414) 259-9303 (Facsimile)  
loeb@lawintosa.com

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## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Defendant-Respondent agrees that oral argument is not necessary. The Defendant-Respondent also agrees that publication is not necessary as the case involves the application of a specific set of facts to established law.

### **ARGUMENT**

Pursuant to Wis. Stat. § 809.19(3)(a)2 Harris elects not to present a full statement of the issues and statement of the case. Facts are presented below as necessary to respond to the State's arguments.

#### **I. HARRIS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

Contrary to the State's argument, Harris' trial counsel prejudiced his defense by not objecting to the jury seeing, during deliberations, the entire temporary restraining order exhibit, which of course included the court commissioner's judicial endorsement of the victim's statement. In fact, Harris' trial counsel should have filed a motion in limine requesting outright exclusion of the entire temporary restraining order exhibit throughout the entire trial. It logically flows then, that allowing the jury to see the actual TRO exhibit during deliberations constituted deficient performance which prejudiced Harris.

##### **A. Overview of General Legal Standards Related to Admission of Evidence**

An attorney's failure to move for exclusion of evidence may constitute ineffective assistance of counsel. *State v. Dekeyser*, 221 Wis. 2d 45, 585 N.W.2d 668 (Ct. App. 1998); *State v. Krueger*, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114.

Evidence is relevant when it is probative of any material fact. **Wis. Stat.** § 904.01. Generally, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. **Wis. Stat.** § 904.04(2). The admission of evidence is within the discretion of the trial court. *See State v.*

*Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). *State v. Sullivan*, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998), has separated the required analysis into three parts: (1) whether the evidence is offered for a permissible purpose under Wis. Stat. 904.04(2); (2) whether the evidence is relevant under Wis. Stat. 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. The other act must have relevance apart from its tendency to shed light on a defendant's character. *State v. Payano*, 2009 WI 86, ¶67, 320 Wis. 2d 348, 768 N.W.2d 832.

Evidence is unfairly prejudicial if it has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case. *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (interpreting Wis. Stat. § 904.03). The petition and the temporary restraining order did all of that and the unfair prejudice far outweighed any benefit that Harris got by being able to argue that the victim was merely fabricating her story to obtain a restraining order. Harris' counsel should have merely stipulated to the fact that (1) the victim sought a restraining order against Harris; and (2) that because of the restraining order request, the police began investigating the victim's allegations against Harris. The trial should have focused on the victim's personal knowledge of Harris' alleged criminal acts against her. The history of the restraining order request, the content of the restraining order request and the physical temporary restraining order paperwork should have had nothing to do with the case

The evidence of the restraining order was not relevant to the question of whether Harris committed the charged offenses against Danielle. Moreover, any probative value of the restraining order was outweighed by the danger of unfair prejudice, confusion of the issues and the risk of misleading the jury. In Harris' case, in fact, all of these dangers were present. The restraining order evidence was unfairly prejudicial because the jury could easily have concluded that since Danielle sought and obtained a restraining order against Harris then she must be telling the truth about Harris' alleged acts. The restraining order evidence unfairly bolstered Danielle's credibility. Moreover, the restraining order evidence likely

would have misled the jury and confused the issues by suggesting to the jury that a judge and/or court commissioner found Danielle's allegations to be true and sufficient to grant the entry of a restraining order. It created the inference in the jury's eyes that if a court found a restraining order to be appropriate in a prior proceeding, Harris is more than likely guilty of the pending criminal charges as well. This was fundamentally unfair.

Harris' trial was poisoned by the recurring admission of evidence of other acts and wrongdoings by Harris including reference to a domestic violence restraining order against him. The jury was even able to review the petition for the restraining order and a temporary restraining order document which showed on its face that a judicial court commissioner had granted the victim's request for a temporary restraining order against Harris. The restraining order evidence carried with it an additional aura of impropriety: it told the jury that a court commissioner had found Harris guilty of domestic violence *in the same matter*. *See State of New Jersey v. Vallejo*, 965 A.2d 1181. This evidence not only fostered the suggestion that Harris was guilty of the criminal charges against him, it told the jury that a judicial officer believed the victim, thus substantially bolstering her credibility. In other words, the jury's knowledge of the TRO exhibit may have led them to improperly conclude that Harris must be guilty based in part on a previous judicial finding of domestic violence. The exhibit created the unfair inference that since a judicial officer found Harris guilty of domestic violence, we (the jury) should find him guilty of the criminal acts as well.

B. Harris was prejudiced by the jury being able to see the entire TRO exhibit during deliberations.

1. The jury seeing the TRO exhibit during deliberations undermines confidence in their verdict.

The state argues that the circuit court applied an incorrect standard when it concluded that Harris suffered prejudice because the court concluded it was unknown whether the TRO exhibit affected the jury. (State Br. At 11). The State is wrong. It may have been speculation as to the weight the jury gave the exhibit, but it was not speculation to conclude that the entire outcome of the trial was undermined due to the inclusion of the

TRO exhibit. The jury should have evaluated the case based on the applicable testimony and proper exhibits. It did not and this fact conclusively establishes prejudice as it undermines confidence in the jury's verdicts. Per *Strickland*, Harris can show prejudice by showing that there was a reasonable probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Allowing the jury to see the TRO exhibits during deliberations was an unprofessional error by Harris' trial counsel which undermined confidence in the outcome of the proceedings. The timing of the exhibit being given to the jury and the jury's obvious interest in the exhibit also undermines confidence in their verdicts. The fact they reached a verdict shortly after receiving the exhibit creates an inference that the TRO exhibit was improperly used and that the jury used the exhibit, rather than weighing the credibility of the witnesses as they were instructed through the jury instructions, to decide the case.

2. The fact that Harris was acquitted on two counts is irrelevant.

Moreover, the fact that the jury acquitted Harris of two of the charges is irrelevant. The guilty verdicts returned by the jury prove that Harris suffered prejudice. The fact that Harris was convicted of two crimes proves that Harris suffered prejudice. The fact that Harris' due process rights were tainted by the jury viewing the TRO exhibit proves that Harris suffered prejudice. The bottom line is that the jury knew that a judicial officer believed the victim and had found that Harris committed domestic violence *in the same set of circumstances as the criminal trial*. This knowledge prejudiced Harris' right to a fair trial and undermined confidence in the outcome of the case.

3. Whether there was sufficient evidence to support the verdict is irrelevant.

Similarly, whether there was sufficient evidence to support the guilty verdicts is irrelevant. The State argues that Harris did not suffer prejudice as there was "plenty of evidence" bolstering the victim's credibility. (State Br. At 15). The State is wrong. Furthermore, the jury must have considered the restraining order documents important because they asked to see the document and then reached their verdicts shortly after receiving the TRO exhibit. The case should not have been about the temporary restraining

order. The jury, however, was clearly interested in the exhibit and was focused on the TRO document as opposed to evaluating the testimony in the case.

4. The commissioner's TRO findings were extremely prejudicial to Harris.

The State futilely argues that Harris did not suffer prejudice because the court commissioner's findings were merely boilerplate, because nobody mentioned the findings during the trial and because the court instructed the jury that they were the judges of credibility. (State Br. At 18). The language in the TRO exhibit may have been boilerplate but it still referenced the fact that a judicial officer was finding Harris guilty of domestic violence and that Harris had engaged in domestic abuse. The findings may not have been mentioned during the trial but the findings were provided to the jury at a preposterously important time: during deliberations. And since the jury asked to see the exhibit, they felt it was important and relevant even if it was not a central focus during the trial. Harris is entitled to a fair trial: not just a fair trial up until jury deliberations. Moreover, the claim that the jury instructions somehow helped eliminate any possible prejudice from the court commissioner's findings (State Br. At 19) is ridiculous. Those instructions were given prior to the jury receiving the TRO exhibit and once the jury received the TRO exhibit, there was no follow up instruction from the court as to its significance. It was just handed over. The instructions did nothing to prevent the prejudice that occurred when the actual TRO exhibit was given to the jury during deliberations. The State's arguments in this section, therefore, along with their reliance on *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988) are without merit.

Also, this court cannot lose sight of the fact that the TRO exhibit was given to the jury *during deliberations*. This provided Harris no opportunity to elicit further testimony regarding the TRO or for Harris' attorney to make further arguments regarding the TRO or for the court to even issue a cautionary instruction which specifically addressed the court commissioner's findings. Without a limiting or cautionary instruction, the jury was free to simply conclude that the statements on the TRO exhibit were the truth and that Harris must be guilty. The TRO exhibit was basically the last thing the jury looked at before rendering their verdicts and



neither the parties nor the court were able to fully explain what the TRO exhibit actually meant. The State may have a better argument had the actual exhibit not been given to the jury during their deliberations. But it was. And they were able to personally read a judicial officer's findings that Harris was a domestic abuser...based on the victim's allegations – the same allegations that were the subject of the criminal trial.

5. The cases cited by the State are distinguished from this case.

This case is distinguished from the cases cited by the State. *State v. Marcum*, for instance, was a sexual assault case which involved admission of testimony from a school counselor and whether defense counsel should have objected to the testimony. 166 Wis. 2d 908, 926. Similarly, *State v. Prineas* involved admission of nurse's testimony during the trial. 2009 WI App 28, ¶ 28. Neither *Marcum* nor *Prineas* involved admission of a TRO document or showing the TRO document to the jury during deliberations. As such, they are not applicable to the analysis of this issue.

*State v. Snider* involved whether defense counsel should have requested a jury instruction on the defense of mistake and whether defense counsel elicited prejudicial testimony from a police witness. 2003 WI App 172, ¶ 29. Again these are issues related to counsel's performance during the trial and have nothing to do with restraining order evidence. In addition, *Snider* did not involve whether or not a particular document or exhibit should be shown to the jury during deliberations like the unique situation in Harris. Also, the court in *Snider* did not even reach the prejudice prong making any commentary on prejudice by that court irrelevant dicta.

Similarly, *State v. Perkins* is not on point. That case involved whether defense counsel was ineffective for not stipulating to the defendant's prior felony convictions for purposes of a felon in possession of firearm charge. The State then introduced evidence of the actual convictions. *Perkins* involved defense strategy of limiting certain information that would be given to a jury. At the minimum, the jury would receive evidence that the defendant had prior felony convictions. In this case, there is no "minimum" negative evidence that the jury had to hear as the existence of the temporary restraining order was not an element of the criminal charges and was completely irrelevant to the case. The issue in

*Perkins* was related to the improper inferences that a jury would draw from the fact that a defendant had prior felonies versus the fact that a defendant had prior convictions for armed robbery and attempted robbery leaving the defense counsel with choosing between the lesser of two evils. Here, the bottom line is that the TRO evidence and exhibit should never have even been part of the trial. As such, Perkins is not relevant to the analysis here.

In summary, all the case law provided by the State involves different grounds for ineffective assistance of trial counsel than the grounds argued by Harris and relied on by the circuit court in their order granting Harris a new trial. As there is no Wisconsin case directly on point, the Court of Appeals should look at the *Vallejo* case as persuasive authority for affirming the circuit court's order for a new trial.

C. Trial counsel's failure to object to the jury seeing the TRO exhibit constituted deficient performance.

The State's alternative argument is that Harris' trial counsel's decision to not object to the entire TRO exhibit being given to the jury did not constitute deficient performance. (State Br. At 20). This alternative argument fails for several reasons. First, Harris' trial counsel admitted that she did not notice the court commissioner's findings when the parties discussed the jury's request to see the exhibit during deliberations. (73:17). Trial counsel's failure to be fully aware of the content of an exhibit, including potentially prejudicial portions of it, constitutes deficient performance as it is not reasonable professional assistance. It is not reasonable for an attorney to not be fully aware of an exhibit when a jury asks to see an exhibit. Harris' trial counsel had ample time to review the document before determining whether to allow the jury to see it. She should have noticed the court commissioner's findings and should have objected to it. She did not and this was clearly deficient performance. So Harris' own attorney admitted under oath that she made a mistake. Second, the omission was not made for strategic reasons. While it is true that Harris' trial counsel's strategy was to argue that the victim's petition for a restraining order obligated her to continue telling the false allegations contained therein, it was not reasonable trial strategy to allow the jury to see the entire TRO exhibit. Harris' attorney could have requested that only a portion of the exhibit be shown to the jury. Counsel could have simply told the court

to tell the jury to rely on their collective recollection of the testimony. Or Harris' counsel could have requested the court to issue a cautionary jury instruction explaining the purpose of the TRO so that the jury could better understand the exhibit. Harris' trial counsel did none of these. It was not reasonable trial strategy to simply allow the jury to view the entire exhibit.

Finally, the State argues that the court commissioner's findings and issuance of the TRO perhaps strengthened Harris' defense in that the issuance of the TRO made the victim more obligated to stay consistent with the allegations she made in the petition. (State Br. at 23).

This argument is speculative at best and can potentially act as a gross miscarriage of justice if followed. The State's contention that a petitioning party is somehow under further scrutiny to maintain a consistent story when multiple pleadings are filed is contrary to the principals of a fair trial. Each allegation and each pleading is to speak for itself. The petitioning party should not be supported nor hindered by the idea of trying to keep her stories straight. What would otherwise constitute unfair prejudice cannot be dismissed simply because it may come in multiple forms. The argument that petitioner's potential difficulty in maintaining consistency with her pleadings should outweigh any presumed unfair prejudice is without merit.

## **CONCLUSION**

Harris was denied his constitutional right to effective assistance of trial counsel. The TRO exhibit should never even have been entered into evidence let alone given to the jury during their deliberations. Harris' trial counsel's failure to stop this from happening was deficient performance which prejudiced Harris. As such, the circuit court's order vacating the judgments of conviction and sentence and granting Harris a new trial must be affirmed.

Dated this \_\_\_\_ day of August, 2016.

SCHMIDLKOFER, TOTH, LOEB & DROSEN, LLC

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Basil M. Loeb  
Attorney for Defendant-Respondent  
State Bar No. 1037772

949 Glenview Avenue  
Wauwatosa, WI 53213  
(414) 259-9300 (Telephone)  
(414) 259-9303 (Facsimile)  
loeb@lawintosa.com

## **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief produced with a proportional serif font. The length of this brief is 2,984 words.

I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

Dated this \_\_\_\_ day of August, 2016.

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Basil M. Loeb

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