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COURT OF APPEALS OF WISCONSIN
DISTRICT ONE

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Appeal No.: 2016AP000633-CR

JOEL MAURICE MCNEAL,
Defendant-Appellant.

On Appeal From the Circuit Court of Milwaukee County
The Honorable Stephanie Rothstein Presiding
Circuit Court Case Nos. 2014-CF-002569 and 2014-CF-004618

REPLY BRIEF OF DEFENDANT-APPELLANT
JOEL MAURICE MCNEAL

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REPLY ARGUMENT

McNeal incorporates herein by reference all of the arguments made in his initial brief. McNeal responds to the State's arguments to the extent such arguments were not covered in his initial brief.

I. THE TRIAL COURT ERRED IN DENYING MCNEAL'S POSTCONVICTION MOTION BECAUSE MCNEAL WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND HE MET HIS THRESHOLD BURDEN NECESSITATING A *MACHNER* HEARING.

A. Defense Counsel's Ineffective Cross-Examination Prejudiced McNeal's Defense.

The State argues that the trial court properly denied McNeal's ineffective assistance claims because the chronology, timing of the assault and the text messages only relate to peripheral matters. (State's Br. at 13). Essentially, the State contends that even though M.H. could not recall the order of the strangulation and assault, the timing of the assault, when she sent the text messages, the injuries she sustained, when she last had consensual sex with McNeal, and how much she drank on the night of the Incident—none of which was exposed on cross-examination by trial counsel—that counsel was not ineffective because M.H.'s testimony, the DNA evidence, the pictures of her injuries and McNeal's prison letters were enough to sustain the verdict. At some point the amount of inconsistencies and lies in M.H. testimony, if properly exposed, would have caused the jury to question her credibility and motives for bringing the charges.

The State's global response that McNeal failed to prove the prejudice prong of his ineffectiveness claim is flawed on two fronts. First, counsel's failure to impeach M.H. regarding how the order¹ and timing of the Incident,

¹ The State notes that M.H.'s inconsistent recollection regarding the order of the assault was before the jury, but this discrepancy came out on direct examination. (R. 61, p. 178). Defense counsel did not cross-examine M.H. about how the order of events changed between the police reports, medical documents and Petition for a Temporary Restraining Order—even though she reported the

text messages, when they last had consensual sex, the injuries she sustained, and how much M.H. drank, changed several times in a twenty-four hour period goes directly to the heart of McNeal's defense: M.H. fabricated the charges. When someone lies, the smaller details change as the person repeats the story, as evidenced by M.H.'s unreliable memory when talking to police, Nurse Kleist and testifying at trial. Counsel further prejudiced McNeal's defense when he chose not to highlight the many inconsistencies in M.H.'s testimony when cross-examining Officer Nogalski and Nurse Kleist. Counsel performed deficiently on almost every aspect of cross-examination, which, when viewed cumulatively, prejudiced McNeal's defense because he never poked holes in M.H.'s account of the Incident. *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

Moreover, the State's argument that counsel's failure to expose that M.H. lied about the timing of the text messages did not prejudice McNeal's defense is flawed. The police reports evidenced that M.H. texted for help between 4:19 a.m. and 4:53 a.m. (R. 44, Exs. A, B). In contrast, M.H. testified that she texted for help around 3 a.m. and McNeal sexually assaulted her at 4 a.m. for roughly an hour. (R. 61 p. 68:6-19, 157:5-8; R. 62: p. 17:10-12). Moreover, M.H. stated in her Petition for a Temporary Restraining Order that McNeal followed her everywhere, including the bathroom, which would have made it impossible for her to text for help. (R. 44, Ex. D). The inconsistencies between the documents and her testimony were vital to McNeal's defense that she fabricated the charges. This cross-examination would have given the jury proof to process and support McNeal's defense. Counsel's ineptitude in using the relevant documents to spell out the defense for the jury should cause this Court to question whether the adversarial system has functioned properly. *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983).

Second, counsel's deficient performance prejudiced McNeal's defense because it failed to lay the foundation for McNeal's testimony. McNeal testified that he never strangled

Incident over a day—which would have been much more persuasive evidence that she fabricated the charges.

M.H. nor forced her to have sex, but rather it was consensual. (R. 63, p. 49:23-50:8, 51:12-52:16). McNeal further testified that M.H. was angry because she thought he cheated on her with his ex-girlfriend. (R. 63 p. 44:21-45:16). McNeal's testimony contradicting M.H.'s version of events and explaining her motives to fabricate the charges simply didn't resonate with the jury because it had not been exposed to the multiple inconsistencies in M.H.'s testimony. The jury had no reason to question M.H.'s version and assumed McNeal was testifying in a self-serving manner.²

Finally, the State argues that M.H.'s memory problems were caused by "repeated bouts of unconsciousness." (State's Brief at 14-17). But M.H. never testified that she had problems remembering the Incident because of the strangulation. It is disingenuous of the State to argue that the inaccuracies and inconsistencies in M.H.'s testimony derived from the alleged strangulation that occurred months before when the State did not present this evidence at trial and M.H. did not testify that the Incident caused memory problems.

McNeal has satisfied his threshold burden and is entitled to a *Machner* hearing because the aggregate effect of counsel's error's kept the jury from hearing critical evidence that would have impeached M.H.'s credibility, supported McNeal's testimony, and explained away the physical evidence. *Thiel*, 2003 WI 111, ¶59. Counsel's deficiency on cross-examination prejudiced McNeal's defense and undermines the verdict.

B. Defense Counsel's Failure to Produce Norment as a Witness Prejudiced McNeal's Defense.

The State's argues that counsel's decision to not call William Norment as a witness did not prejudice McNeal's defense, because Norment did not observe the Incident and therefore his testimony would not have created a different

² The State argues that counsel was not ineffective for failing to cross-examine the State DNA expert because he was free to do so. (State's Br. at 25). *That is the point.* Counsel had opportunities throughout the trial to cross-examine and impeach the State's witnesses, here to show alternative non-violent means for the YSTR profile of M.H.'s neck, and yet chose not to. Counsel's ambivalence in presenting McNeal's defense prejudiced his entire case.

result at trial. (State's Br. at 26). The State ignores the fact that if counsel had adequately cross-examined M.H. regarding the inconsistencies she reported to the police, Nurse Kleist, and papers filed with the court, Norment's testimony would have cemented M.H.'s inability to tell the truth and led to a not-guilty verdict.

This case was a he-said, she-said credibility contest. As such, Norment's testimony creates a reasonable probability of a different result at trial because it impeaches the truthfulness of M.H.'s allegations. While Norment was not a first-hand witness, he is an uninterested witness who gains nothing by telling the jury that M.H. confessed that she lied to the police regarding the charges against McNeal. (R. 44). Norment's unbiased testimony would have solidified McNeal's defense and explained the numerous inconsistencies in M.H.'s testimony: she was lying about the Incident to exact revenge. Consequently, counsel was ineffective in failing to investigate Norment and produce him as a witness at trial. *Casey v. Frank*, 346 F. Supp. 1000, 1014 (E.D. Wis. 2004). Counsel's ineffectiveness deprived McNeal of a fair trial because it prevented the jury from hearing unbiased testimony that M.H. fabricated the charges. *State v. Jeannie M.P.*, 2005 WI App 183, ¶25, 27, 286 Wis. 2d 721, 703 N.W.2d 694.

C. Defense Counsel's Failure to Request a Pretrial Hearing to Introduce Evidence of M.H.'s Prior Sexual Relationship with McNeal to Prove Consent Prejudiced McNeal's Defense.

The State argues that evidence of McNeal's prior sexual relationship with M.H. was irrelevant because it was dissimilar to the charges deriving from the Incident. (State's Br. at 24). The State's argument glosses over the fact that evidence of prior sexual contacts is often used to show that the accuser consented at the time of the assault. *State v. Sarfraz*, 2014 WI 78, ¶24, ___ Wis. 2d ___, 851 N.W.2d 235. Such is the case here.

Evidence of the prior sexual relationship between McNeal and M.H. was highly relevant to the charges, because the two gave different stories to the police regarding the

Incident. McNeal testified that he never strangled M.H. nor forced her to have sex, but rather she consented to sex during the Incident and initiated sex two more times the next morning. (R. 63, p. 49:23-50:8, 51:12-52:16, 55:10-13). M.H. stated that McNeal strangled her and then forced her to have sex. (R. 61, p. 178:12). But, as discussed above, there were several discrepancies in M.H.'s testimony that counsel neglected to expose to the jury. Had counsel performed proficiently, M.H.'s credibility issues would have given the jury pause when assessing her side of the story.

McNeal's defense was that M.H. consented to sex and fabricated the Incident. Counsel's failure to request a pretrial hearing and cross-examine M.H. regarding their past sexual relationship prejudiced this defense, because McNeal was not able to fully answer the charges, thus rendering the verdict suspect. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

D. Defense Counsel was Ineffective in Failing to
Expose M.H.'s Motives to Fabricate the Charges.

The State argues that trial counsel was not ineffective for failing to cross-examine M.H. regarding her racial bias because his trial strategy of "spurned love" was reasonable even if unsuccessful. (State's Brief at 27). The State disregards that this section addresses counsel's overall failure to cross-examine M.H. regarding her motives to fabricate the charges—regardless of whether those motives derived from racism or revenge.

M.H.'s motives for lying—her racism and desire to exact revenge against McNeal for seeing his ex-girlfriend—were not only relevant, but also would likely cause a jury to believe that she fabricated the charges. *State v. Vonesh*, 135 Wis. 2d 477, 494, 401 N.W.2d 170 (Wis. App. 1986) (Gartzke, *concurring*). McNeal told counsel that M.H. had warned him against cheating, gave up her family to be with him, and was writing a book on the destructive relationships between Hmong women and African-American men. Counsel should have cross-examined M.H. regarding her background and potential motives to fabricate the charges to allow the jury to decide if she was credible. Counsel's

decision to abstain from this cross-examination prejudiced McNeal and entitles him to a new trial, because the jury had no context with which to receive and process McNeal's fabrication defense.

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE FALSE IMPRISONMENT CONVICTION.

The State's response skims over many of the arguments made in McNeal's appeal, namely that McNeal never confined M.H.'s movements and that there was a reasonable means of escape. The State asserts instead that M.H.'s testimony that McNeal choked her and forced to her have sex proved the elements of false imprisonment, but the jury did not have sufficient information to make this determination. (State's Br. at 30).

The State failed to prove every element of the false imprisonment claim, namely that McNeal legally confined M.H.'s movements. McNeal testified that he never strangled M.H. nor forced her to have sex. (R. 63, p. 49:23-50:8, 51:12-52:16). Moreover, many of the details M.H. testified to regarding the Incident were contradicted by the police reports, medical documents, and Petition for a Temporary Restraining Order, but the jury never heard this information. (*See* Appeals Brief, sec. I). Thus, the jury never made a fully informed decision regarding whether McNeal falsely imprisoned M.H. as a result of the alleged strangulation and sexual assault, because it was missing critical evidence that would have caused the jury to question M.H.'s version of events.

While this Court may not substitute its judgment for that of the jury, it may do so when "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonable, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The cumulative effect of the evidence presented to the jury—McNeal never confined M.H.'s movements, M.H. used her phone to text for help, M.H. had opportunities to escape if she desired—shows that the jury

was unreasonable in convicting McNeal of false imprisonment. This Court should also take into consideration the evidence counsel ineffectively withheld from the jury that would have impeached M.H.'s version of events. Consequently, this Court should direct the trial court to dismiss these charges with prejudice.

III. THE TRIAL COURT ERRED IN FAILING TO STRIKE HURST'S TESTIMONY REGARDING A PRIOR STRANGULATION INCIDENT BETWEEN MCNEAL AND M.H.

The State's argument that the trial court correctly permitted Hurst's testimony is two-fold: first, defense counsel opened the door and failed to make a timely objection; and second, the testimony was admissible as a prior consistent statement. (State's Br. at 31-34). Both arguments fall short.

First, while counsel may have unwittingly opened the door, he made a timely objection when he realized that Hurst's testimony was irrelevant, non-responsive, and unduly prejudicial. Hurst was an adverse witness. Counsel had no idea she would testify regarding hallucinations and angels due to the alleged past abuse. As counsel told the court, "I was surprised by her answer and I had to go with it and play it off the best I could." (R. 62, p. 39:25-40:1). When the State further questioned Hurst, defense counsel objected and moved to strike her testimony as non-responsive and irrelevant. (R. 62 p. 40:22-25). Consequently, counsel made a timely objection and the court should have excluded this testimony.

Second, the State's argument that this testimony qualifies as a prior consistent statement also fails because Hurst was unable to give the jury details or a time frame for the abuse. (R. 62 p. 47:7-11). Her testimony was too vague to corroborate M.H.'s allegations, because she was incapable of substantiating it when the State elicited more information. (R. 62, 46:16-47:11). Therefore, the court should have struck her testimony as irrelevant and unduly prejudicial.

This error was not harmless because it unduly prejudiced McNeal's defense by allowing the jury to believe

he repeatedly abused M.H. and that the Incident was an extension of this abuse. Given the lack of evidence to support Hurst's testimony, this Court should remand the case for a new trial because her testimony unfairly contributed to McNeal's conviction. *Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis. 2d 96, 108, 522 N.W.2d 542 (Ct. App. 1994).

**IV. THIS COURT SHOULD USE ITS
DISCRETIONARY REVERSAL POWER AND
REMAND THIS CASE FOR A NEW TRIAL
BECAUSE COUNSEL'S INEFFECTIVE
REPRESENTATION PREVENTED THE JURY
FROM DECIDING THE CASE BASED ON ALL
THE ADMISSIBLE EVIDENCE.**

The State argues that a new trial is not necessary because the controversy was fully tried and counsel was not ineffective, but the fact that the jury never heard about the multiple inconsistencies and lies in M.H.'s testimony invalidates this argument. M.H.'s credibility played a huge role in this case. Counsel never adequately exposed to the jury that M.H. could not remember the order and timing of the assault over a twenty-four hour period, when she sent the text messages, the injuries she allegedly sustained, when she last had consensual sex with McNeal, and how much she drank on the night of the Incident, which went to the crux of McNeal's defense: M.H. fabricated the charges to exact revenge. Had counsel investigated this case and properly cross-examined the witnesses, the jury would've found McNeal innocent.

The State further targets McNeal's letters to M.H., wherein it argues McNeal admitted to sexually assaulting and strangling M.H., as evidence to support the convictions. (State's Brief at pp. 36-37). The letters do not support this conclusion. The State argues throughout its brief that McNeal's apology to M.H. for "the pain that I caused you" and stating that "I never meant to hurt you" proved his guilt. (State's Br. at 17, 19, 20, 27, 37). Nothing in the letters discusses or admits to any physical or sexual abuse. Rather McNeal uses the vague term of "hurt," which referred to the emotional pain McNeal caused M.H. by seeing his ex-

girlfriend—not any physical pain. (R. 63, p. 60:12-15, 69:15-16, 24). These letters only prove that McNeal and M.H. had an argument, not that he strangled and sexually assaulted her.

Because both persuasive and material evidence was not introduced by defense counsel at trial, justice requires a new trial. *State v. Harp*, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991).

CONCLUSION

Based on the above argument and authorities, McNeal respectfully requests this Court to vacate the conviction for false imprisonment due to a lack of sufficient evidence and direct the trial court to dismiss these charges with prejudice. McNeal further requests this Court reverse the trial court's judgment and remand the case with directions to enter an order vacating the judgment of conviction and ordering a new trial in the interests of justice. Alternatively, McNeal respectfully requests this Court remand the matter to the trial court for a *Machner* hearing in order to allow the trial court to properly evaluate McNeal's ineffective assistance of counsel claim.

Dated this 19th day of September, 2016.

/s/ Marisa R. Dondlinger
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Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2,993 words.

I hereby certify that an electronic copy of this reply brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Dated this 19th day of September, 2016.

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/s/ Marisa R. Dondlinger
Marisa R. Dondlinger

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Reply Brief of the Defendant-Appellant Joel Maurice McNeal have been served via U.S. mail to the following on September 19, 2016:

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