STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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Appeal No. 2016AP1074-CR
(Milwaukee County Case No. 2015CF681)

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE STEVEN POEHLMAN,

Defendant-Appellant.

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**Appeal From the Judgment of Conviction and Order Denying Postconviction Motion, Both Entered In The Circuit Court For Milwaukee County, the Honorable Jeffrey A. Wagner Presiding**

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED FOR REVIEW

1. Whether Jesse Steven Poehlman was deprived of his state and federal constitutional rights to the effective assistance of counsel when trial counsel failed to object to the testimony of a witness for the state whose existence the state failed to disclose prior to trial and whose testimony painted the alleged victim as a battered woman.

Without holding an evidentiary hearing, the circuit court denied a postconviction motion raising this issue.

2. Whether due process of law requires a new trial based upon the newly-discovered evidence of the testimony of Daniel Neeley that he saw Poehlman outside Poehlman's residence during the time when Poehlman's wife claimed he was falsely imprisoning her inside the residence.

Without holding an evidentiary hearing, the circuit court denied a postconviction motion raising this issue.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Poehlman does not seek publication under Wis. Stat. (Rule) 809.23.

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# BRIEF OF DEFENDANT-APPELLANT

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## STATEMENT OF THE CASE

Jesse Steven Poehlman was charged with physically and sexually abusing his wife on two different occasions: December 11, 2014 and February 6-7, 2015. R2. After a two-day jury trial, R49; R51; R52; R53, he was acquitted of both a charge of misdemeanor battery and a charge of second degree sexual assault, which were alleged to have occurred in December. R11; R12. He was convicted of one count of battery, contrary to Wisconsin Statutes §940.19(1), one count of strangulation and suffocation, contrary to Wisconsin Statutes §940.235(1), and two counts of second degree sexual assault, contrary to Wisconsin Statutes §940.22(2)(a), all of which were alleged to have occurred in February. R13; R14; R15; R16; R17.

The court sentenced Poehlman to an aggregate sentence of 26 years in prison with 14 years of initial confinement and 12 years of extended supervision. R32.

Poehlman timely filed a postconviction motion seeking a new

trial on the grounds that (1) he was deprived of his state and federal constitutional rights to the effective assistance of counsel when trial counsel failed to object to the trial testimony of Lynn Kruszka, a co-worker of Poehlman's wife who claimed to have seen bruises and other injuries on the wife, based upon the state's discovery violations and (2) due process of law required a new trial based upon the newly-discovered evidence of the testimony of Daniel Neeley that he saw Poehlman outside the residence at a time when Poehlman's wife claimed he was inside the residence and falsely imprisoning her. R34.

Without holding an evidentiary hearing, the circuit court denied the postconviction motion. R40. With regard to the ineffective assistance of counsel claim, the court held that Poehlman could show no prejudice because the court believed there was no reasonable probability of a different result because no reasonable jury could have believed Poehlman's testimony. *Id.*:2. With regard to the newly-discovered evidence, the court accepted the state's reasoning in its trial brief and held that, although the evidence "satisfies a few of the first four general requirements, it is not reasonably probable that a different result would be reached in a new trial." *Id.*:3.

Notice of appeal was timely filed. R42.

## FACTS

### *The Trial*

Poehlman's pregnant wife, N., who had two children from previous relationships, alleged that Poehlman physically and sexually abused her on two different occasions: December 11, 2014 and February 6 - 7, 2015. By her own account, she did not report the December incident to anyone until February. R51:41, 43.

As to December 11th, she claimed that Poehlman had knocked over some cupcakes that she had bought for her son. *Id.*:17. She made a comment and he became upset and hit her with an open hand on the left side of her face without her consent. After she pushed him back, he pushed her into the bedroom and hit her in the arm (although she originally testified that it was the leg and then corrected

herself.) *Id*.:19,21. She claimed that she then tripped over some clothes and fell and he kicked her in the ribs with his bare feet. *Id*. She insisted that she reminded him she was pregnant and he stopped and tried to have a conversation about his feelings. *Id*.:21. She claimed that conversation lead to his telling her that he would punish her by doing things she did not like and that they then had anal sex. *Id*.:22. She claimed she agreed to it to protect her unborn child. *Id*.

Although N. claimed to have had injuries including a bruise on her arm, and "believe[d]" she took pictures, *id*.:43-44, she was not sure the pictures actually existed and claimed that Poehlman could have deleted them. *Id*.:44-45. In addition, she claimed her anus bled a little, *id*. :47 (although a police report indicated that she said she bled "extensively," *id*.)

The only potential physical evidence of this incident was found in their filthy apartment. *See* R52:13. It consisted of blood on one of the walls, *id*., which N. claimed to the evidence technician was hers from some nosebleed Poehlman caused on some unspecified date, *id.:14.* The police failed to swab the blood and did not have it tested to determine whose blood it was. *Id*.:20.

Poehlman, who testified in his own defense, denied that there was any sexual activity on December 11th and denied assaulting her physically that day. He admitted that there was blood on the wall of his apartment from events that day, but explained the blood was his. R51:80-81. His hand had been bleeding because she had gotten angry and hit him with a hammer. *Id*.

As for the evening of February 6, 2015, Poehlman and N. agreed that they were home together and that the children were not in the apartment. R51:24; R52:83-84. They agreed that they began arguing and that divorce was mentioned. R51:24-25; R52:85-87. They also agreed that, at some point during the evening, a friend named Adam Copus, whom neither side called as a witness, came over to the apartment. R51:28-29; R52:94-97. In addition, they agreed that they had vaginal sex, oral sex, and anal sex that night, R51:31-37; R52:87, and that Poehlman choked N., R51:31; R52:88-

90.

The key differences in their versions of events were that Poehlman testified that the sex was consensual and that N. directed him to choke her for sexual arousal, R52:88-90, while she claimed that she did not agree to the sex or choking but did not resist or say "stop" because he threatened her, R51:31. Their versions also differed in that Poehlman testified that he did not cause any injury to her eye and did not know how her eye was injured, R52:90, while she claimed that Poehlman deliberately gouged her eye, R51:26.

N. claimed that, when she asked for a divorce, Poehlman yelled for 2-3 minutes, although he did not lay hands on her then. *Id*.:24-25. As she walked to the other room to get a cigarette, she alleged that he charged up behind her, pulled her hair, and then reached around and gouged her left eye. *Id*.:26. She pushed him away and reminded him that she was pregnant. *Id*.:27. According to her, Poehlman told her she could not use pregnancy as an excuse and yelled that she was a despicable person. *Id*.

A friend, Adam, then telephoned Poehlman and Adam said he was going to come over and have a few drinks. *Id*. She insisted Adam's appearance interrupted the altercation, with Poehlman telling her to go into the bedroom and threatening to smash her face if she came out. *Id*.

The friend came over for an hour to an hour and a half, and drank in the living room with Poehlman. *Id*.:28 According to N., after Adam left, Poehlman came into the bedroom and told her that she would have to do everything he said all weekend or he would kill her. *Id*.:29. She testified that he also told her that how well the weekend went would affect her children when they returned. *Id*. She got undressed as he asked and claimed he then choked her as she was standing and said he should kill her. *Id*.:30. She did not lose consciousness, but she did not fight back because she was afraid. *Id*.:30-31.

He then had anal sex in their bed with her without her agree-

ment, although she did not resist or tell him to stop because she was afraid. *Id*.:31.They went into the living room and, as he requested, she gave him oral sex, which she usually was willing to do but which she did not want to do that night. *Id*.:32. Again, she did not resist or tell him to stop because she was afraid. *Id*.:33. After that, they again had anal sex while she was afraid. *Id*.:33. She claimed that during this time, he reminded her that he should kill her and that she was despicable. *Id.*

N. continued her story by explaining that he then made eggs and they had vaginal sex. *Id*.:34. She wanted to get dressed but was afraid to ask. *Id*.:35. He asked for the marijuana pipe, but she did not know where it was and he got upset and said that they would smoke marijuana. *Id*. He rolled a blunt and they both smoked it, although she claimed at trial that she did not want to do so that particular time (even though she had done so in the past.) *Id*.:35-36. Then they both had cigarettes and, according to N., he insisted she give him oral sex again. *Id*.:36 She testified that he then told her to bend over the couch and they had vaginal sex. *Id*.:37. She started getting cramps and he allowed her to move positions and then finished the sex. *Id*.:36-37. She said he ejaculated and then wanted to got to bed. *Id*.

N. contended that they laid down and fell asleep. *Id*. She maintained she woke at 8:00 a.m., thinking he would be asleep. *Id*.: 37, 66. Although her plan was to leave the house, he woke up. *Id*.:38. She heard him wake and go into the kitchen. *Id*.:67. She did not tell police that she monitored him, but she did and he was awake from 8:30 a.m. to 9:30 a.m. *Id*. She then just went and laid back down and ended up falling asleep again. *Id*.:38. She woke again at approximately 9:30 a.m. or 10:00 a.m. and ran out of the house while Poehlman was sleeping. *Id*. She claimed that she was wearing clothes as she had gotten dressed before they went to bed. *Id*. She also claimed that she grabbed her coat and shoes and ran out the door into the snow. *Id*.

She ran down the alley and ran into a woman she recognized on the next block, although she did not know the woman's name.

*Id*.:39, 69. She asked the woman for a ride to the police station and was dropped off there. *Id*.:39

Poehlman said that, after dropping off the children, they returned home at approximately 5:00 or so. R52:83-85. They then began arguing about how they no longer wanted to be with one another. *Id*.:85. Poehlman told her that he did not want a divorce right away but thought it was best that they separate. *Id*.:86.

Poehlman further stated that his wife often liked sex after an argument. *Id*.:88. During their discussion, she entered the bedroom, asked him to join her, and made it apparent that she wanted sex. *Id*.:87. He complied even though he was not really in the mood for sex. *Id*.:89 The first sex act occurred at approximately 10:30 p.m. or 11:00 p.m. *Id*.:87. During that night, they had vaginal sex, anal sex, and oral sex multiple times. *Id*.:87-88. At one point she placed his left hand on her neck, which, as they had previously discussed, was her indication that she wanted him to begin to choke her for sexual arousal. *Id*.:89. He did not use a lot of pressure and she took her right hand and kept pushing on his left to get him to use more pressure, but he just felt too uncomfortable. *Id*.:89-90. He did not see bruises on her neck then, although later photographs showed bruises on her neck where he placed his fingers. *Id*.:89. Eventually, at approximately 1:30 a.m. or 2:00 a.m. on February 7, 2015, the sexual activities ended. *Id*.:91.

Poehlman explained that he then got his clothes on, told her that he needed to go for a walk to think about everything, and left the residence. *Id*.:91. He walked between the two buildings that are located east of his residence and walked through the alleys between Martin and Edgerton Streets and Packard Avenue. *Id*. He last walked around there at approximately 10:00 a.m. *Id*.:92. He walked all night and was out of the apartment for approximately 8 hours. *Id*.

The state also presented the testimony of Nina Deering, a nurse who examined N. on February 7, 2015. She documented that N. had bruising under her right eye in a half “C” shape under her eye, right on top of her bone, which was mildly swollen, R51:109,

and which Deering believed was consistent with someone having dug into N.'s eye, *id*.:110. She also documented that N. had pinpoint areas of bruising up the sides of her neck and over her jaw line, consisting of multiple linear bruises around her neck, which Nurse Deering believed were consistent with choking. *Id*.:109-110.

There were no injuries to the vaginal or anal area, but Nurse Deering testified that sexual assault results in vaginal injuries only approximately 25-30% of the time. *Id* :113-114, 116-117. She estimated that forcible anal sex results in injury less than half of the time. *Id*.:118.

As expected when both parties agree that sexual activity occurred, testing of a vaginal swab showed that Poehlman's DNA was found in N.'s vagina. R52:31.

Cudahy Police Detective Andrew Ayala claimed that, sometime on February 7, 2015, he checked the area around Edgerton Avenue and Packard Avenue, but saw little to no foot traffic in the snow and saw no footprints that matched Poehlman's shoes. *Id*.:55.

***The State's Failure to Disclose Information Relating to Lynn Kruszka Prior to Her Testimony***

On February 17, 2015, at the direction of the prosecutor, Detective Ayala interviewed Lynn M. Kruszka, the Receiving Department Supervisor at the Burlington Coat Factory where N. had worked. After this interview, Detective Ayala produced a police report.[1] R34:21-22.

Trial counsel appeared at the preliminary hearing three days later. R45. At that hearing, the state stated that it had provided trial counsel "with all the discovery in this case." *Id*.:9. The discovery that the state provided did not include any report or record referring to Lynn Kruszka or to any interview with her. *See id*.:28.

A month prior to trial, on March 24, 2015, the state filed a

[1] For some unknown reason, this police report is dated February 12, 2015. *See* R34.

witness list. R7. This list had 13 names on it, but did not include the name Lynn Kruszka. *Id.*

The trial in this case began on April 27, 2015. R49. When the prosecutor read the list of witnesses to the jury, he did not read Lynn Kruszka's name. She was not mentioned at all. *Id.*:7-8.

The second day of trial, still having provided no notice and no discovery concerning Kruszka, the prosecutor surprised the defense and called Kruszka as a witness. R52:42-46. As the postconviction motion alleged, trial counsel did not want Kruszka to testify and had no strategic reason for failing to object to the discovery violation. R34:8. This failure occurred, as trial counsel later explained in a different context (consisting of an email to the state), because he

> actually thought she might be an officer or technician whose name had slipped [his] mind. [He] was surprised to hear of her employment at Burlington Coat Factory, and had no general recollection of any citizen witness to prior bruising of N[].

*See* R34:27. Moreover, in a sidebar, the prosecutor's inaccurate statement indicating that trial counsel should have received a police report concerning Kruszka, further reinforced trial counsel's belief that it was his memory that was faulty. *See* R52:42-46. Trial counsel then allowed questioning to proceed, despite Poehlman's statements to him that there was no notification by the state of Kruszka's involvement in the case, simply to avoid being in error in his recollection or disrupt the trial for no good reason. *See Id.*:42-46.

Kruszka then testified that N. came to work with bruises on her face in early December. *Id.*:43. She said that once N. had a black eye, had cuts on her neck, and bruises on her arms, but N. never talked about the injuries. *Id.* She also insisted that she saw injuries in February. *Id.*:46.

It was not until the next day, April 29, 2015, *after* Kruszka's testimony that the state finally gave trial counsel a copy of the police

report concerning the interview with Kruszka. R34:28.

***New Evidence From Daniel Neeley***

The state public defender's office appointed Attorney Ellen Henak to represent Poehlman for postconviction purposes on July 29, 2015. *See* R34:29. During multiple contacts between Poehlman and Attorney Henak, Poehlman requested that Attorney Henak contact his downstairs neighbor, Tymeshia Ward as part of postconviction investigation, but Poehlman never mentioned the name Daniel Neeley to Attorney Henak because he apparently had no knowledge that Neeley knew anything about the case. *Id*.:30.

With approval of the state public defender's office Attorney Ellen Henak hired an investigator, Amanda Bates, and on or about December 22, 2015, Attorney Henak requested that Bates interview Poehlman's downstairs neighbor, Tymeshia Ward. *See id*.:30; 32. Investigator Bates initially contacted Ward on January 7, 2015. *Id*. 32. At Attorney Henak's request, Investigator Bates later attempted additional contact with Ward. *See id.*

On January 28, 2016, Investigator Bates attempted to contact Ward by visiting Ward's apartment. *See id*.:32-33. As she was parking, she saw a man walking down the driveway. She then jumped out and asked if he lived with Ward and he said that he did not. *See id*. After Investigator Bates unsuccessfully knocked on the doors and left her card, she returned to her car. *Id*. The man then approached her car with his cell phone, said he was Ward's nephew, and that he had Ward on the phone. *Id*.

After Investigator Bates spoke on the man's phone with Ward, she had a conversation with the man who identified himself as Daniel Neeley. *Id*.:33-35. He said that he had some knowledge of the events of February 7, 2015 and that neither the police nor anyone on behalf of Poehlman had questioned him. *See id.* Neeley lived just behind where Poehlman and his wife lived *See id*.

In his initial information, he said that he left his apartment that morning at approximately 6:45 a.m. or 6:50 a.m. to get his niece

off to school. *See id*. Subsequently, after learning that February 7th was a Saturday, he clarified in a conversation with Attorney Henak that, although he remembers driving his niece somewhere, he is not sure where he was driving her to. R39:11.

He saw Poehlman just outside Poehlman's residence and assumed Poehlman was coming out of it. R34:34; R39:12 Neeley and Poehlman nodded to each other. Poehlman then walked south on Packard Avenue. *See* R34:34; R39:12 .

Neeley returned to his residence at approximately 7:10 a.m. and laid on his couch watching television. *See* R34:35. At approximately 9:30 a.m., he heard N. yelling and he looked out the window. *See* R34:35; R39:12 . He saw her run down the alley screaming "help me," but no one was chasing her and no one was outside with her. *See* R34:35; R39:12 He saw her run down the alley and speak to a woman. *See* R34:35; R39:12 .

Nothing seemed to be wrong with N. other than the yelling, although he did not see her close up. *See* R34:35 He did not see Poehlman return to the residence at any time that morning. *See id*.

## ARGUMENT

### I.

### The Circuit Court Erred in Refusing to Grant an Evidentiary Hearing on Poehlman's Claim that Trial Counsel was Ineffective for Failing to Object to Lynn Kruszka's Testimony, Based Upon the State's Discovery Violation in Failing to Place Her on Its Witness List and Failing to Turn Over Police Reports Related to Her Interview.

Poehlman alleged in his postconviction motion that: (1) the state filed to comply with Wisconsin Statutes §971.23(7m)(a) when it failed to list Lynn Kruszka on its witness list and failed to provide police reports of an interview with her that occurred months before trial; (2) the state lacked good cause for its failure as demonstrated by its early knowledge of Kruszka and her information; (3)

§971.23(7m)(a) would have required exclusion of the testimony on the basis of the failures; (4) trial counsel had no reasonable strategic reason for his failure; and (5) Kruszka's testimony prejudiced Poehlman specifically because it bolstered N.'s credibility by painting her as a battered woman who was afraid of her husband. R34:11-16. Nevertheless, the trial court erroneously held that Poehlman was not entitled to an evidentiary hearing on this issue on the ground that there was no reasonable probability of a different result because no reasonable jury could have believed Poehlman's testimony and therefore was no prejudice. *Id*.:2.

Because the circuit court erroneously denied the motion without a hearing, *id.*, this Court should vacate the order denying the postconviction motion and remand for a full *Machner* hearing on his claim.[2]

When a postconviction motion alleging ineffective assistance of counsel "on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996). Postconviction motions sufficient to meet the standard require that a defendant "allege the five 'w's' and one 'h'; that is who, what, where, when, why, and how." ***State v. Allen***, 2004 WI 106 ¶23, 274 Wis.2d 568, 682 N.W.2d 433. Whether a postconviction motion meets this standard is a question of law which this Court reviews *de novo*. ***Bentley***, 201 Wis. 2d at 310.

Poehlman's motion met this standard. When alleging ineffective assistance of counsel, a defendant first must show that counsel's performance was deficient and then must show that the deficient performance prejudiced the defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). An ineffectiveness claim is not an assault on the general competence of trial counsel nor is it a moral judgment on counsel's abilities or conduct, despite what some

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

attorneys believe. Everyone, defense counsel, prosecutors, and judges included, make mistakes. A finding of ineffectiveness is simply a recognition that, for whatever reason, this particular human attorney made one or more mistakes in this case, the result of which was to deprive the defendant of a fair trial. *See* ***State v. Felton***, 110 Wis.2d 485, 499, 329 N.W.2d 161 (1983) ("judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise" (citation omitted)).

The court below never questioned that Poehlman's motion met this standard with regard to the deficiency prong, *see* 40:2, and, indeed, it could not. Showing deficient performance requires showing "that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986) (quoting ***Strickland***, 466 U.S. at 688). In analyzing this issue, the Court "should keep in mind that 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 v. Morrison***, 477 U.S. 365, 384 (1986). Although the Court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," ***Strickland***, 466 U.S. at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." ***Kimmelman***, 477 U.S. at 384 (citing ***Strickland***, 466 U.S. at 688-89). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." ***Id***. (citing ***Strickland***, 466 U.S. at 689). Moreover, "'just 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 (7th Cir. 1990)); *see also* ***Kimmelman***, 477 U.S. at 386-87 (same).

But a defendant need not show total incompetence of counsel, and Poehlman made no such claim here. Instead, a single serious error may justify reversal. ***Kimmelman***, 477 U.S. at 383; *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). "[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).

In this case, Poehlman specifically alleged the who, what, when, where, why, and how of deficient performance. *See* ***Allen,*** 2004 WI 106 ¶23. He alleged that trial counsel unreasonably failed to object to the state calling Lynn Kruszka as a witness at trial, despite the state's failures to place her on their witness list or to provide trial counsel with a copy of the police report dated February 12, 2015,[3] which detailed the police interview of her. R34:10-16. Instead, her testimony was a total surprise. He further alleged that, although the police produced a report of an interview with Kruszka early in February and the state claimed on February 20, 2015 to have provided "all the discovery in this case," *see* R45:9, trial counsel did not receive the report of this interview prior to trial. *See* R34:10-16. Nor was Kruszka's name on the witness list the state provided on March 24, 2015. *See* R7; *see also* R34:25-26.

Wisconsin Statutes §971.23(1)(d) requires a district attorney to disclose upon demand and within a reasonable time before trial "[a] list of all witnesses and their addresses whom the district attorney intends to call at the trial." Similarly, § 971.23(1)(e) requires a district attorney to disclose "[a]ny relevant written...statements of a witness named on a list under par. (d)."

In the absence of a showing of good cause, the *sole* remedy for the state's discovery violations–its failure to list Kruszka on its witness list and to turn over the police reports of the interview with her before she testified–was to exclude Kruszka as a witness. ***State v.***

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[3] This date appears to be incorrect as the interview detailed in the report allegedly occurred on February 17, 2015. *See* R34:21-22.

***DeLao***, 2002 WI 49, ¶51, 252 Wis. 2d 289, 643 N.W.2d 480. The burden of establishing that good cause is on the state. ***DeLao***, 2002 WI 49, ¶51. Even if the state erred in good faith, a showing of good faith itself is not sufficient. *See* ***id***., ¶53 (although "good faith is an important factor in a determination of good cause," the existence of good faith "is not by itself dispositive").Yet, although Poehlman clearly alleged that "the state lacked good cause for failure to place [Kruszka's] name on the witness list or to turn over the police report [concerning her]," *see* R34:11, the state never gave *any* cause for its failures, let alone *good* cause.

At trial, rather than establishing good cause, the state simply denied that it had violated the discovery statute. Although the resulting sidebar was unrecorded, *see* R52:44, the email from trial counsel to the state on the day immediately after that testimony relates that the state did not give a reason for the failure. *See* R34:27. Instead, the state erroneously advised trial counsel that there was a police report and that it had been turned over to trial counsel. *Id*. Trial counsel's next-day request for that report is corroboration that it had not been turned over. *Id*.

Nor did the state supply good cause in response to Poehlman's post-conviction motion, *see* R38:12-13, even though the state would have been expected to assert good cause if it existed. This silence itself demonstrates the absence of good cause. It cannot have resulted from the state's failure to know that good cause was an issue because Poehlman clearly alleged that "the state lacked good cause for failure to place [ Kruszka's] name on the witness list or to turn over the police report." *See* R34:11.

Yet, as the postconviction motion alleged, trial counsel failed to make any objection, even though he did not want Kruszka to testify and had no strategic reason for failing to object to the discovery violation. He did not object due to confusion and "thought she might be an officer or technician whose name had slipped his mind." R34:27. Even after he discovered that she was a co-worker of N.'s, he failed to object because the state incorrectly assured him that trial

counsel simply did not remember receiving the information and trial counsel was afraid his memory was faulty. *Id*. In other words, trial counsel's failure to object resulted from fear of being wrong and unwillingness to check it out. No reasonable attorney would fail to take the time to check his recollection in this circumstance.

The deficiency prong of the ***Strickland*** test is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis.2d 571, 665 N.W.2d 305; ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989). Moreover, even an attorney's intentional decisions must meet the standard of reasonableness based upon the information at hand. *E.g.*, ***Kellogg v. Scurr***, 741 F.2d 1099, 1102 (8th Cir. 1984) (even tactics "must stand the scrutiny of common sense"); *see* ***Felton***, 110 Wis.2d at 502-03 (a reviewing court "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment").

Thus, Poehlma's assertions in his motion that trial counsel's performance was deficient because he had an opportunity, through timely objection, to achieve his goal of keeping Kruszka's testimony out of the trial and did not take it simply because he was confused and was afraid he might look foolish, *id*.:13-14, were sufficient on this point to warrant a hearing.

Poehlman also made sufficient assertions to establish that this deficient performance prejudiced his defense and, contrary to the circuit court's belief, *see* R40, the record did not conclusively demonstrate otherwise. *See* ***Allen***, 2004 WI 106 ¶12.

The test for whether there is prejudice is objective, not subjective. "[A] counsel's performance prejudices the defense when the '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 defendant is not required [under

***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 147 Wis.2d at 354 (quoting ***Strickland***, 466 U.S. at 693). Rather, under the constitutional standard,

> [t]he test 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 (citation omitted).

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 694). If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

The judge who evaluates an ineffective assistance of counsel claim should not answer whether *the judge* believes certain testimony. Instead, the question is whether the evidence, excluding the erroneously admitted testimony and viewed most favorably to the defendant, supports his theory of the case such that the *jury*, not the judge, can believe it. ***Neder v. United States***, 527 U.S. 1, 19 (1999). The judge is not to act as some sort of "super-jury," ***id***., and, ultimately, the jury is the sole arbiter of a witness's credibility. *See* ***State v. Serebin,*** 119 Wis.2d 837, 842, 350 N.W.2d 65 (1984).

Because it was only the testimony of N. that established lack of consent, the deficient performance prejudiced Poehlman because Kruszka's testimony improperly bolstered N.'s testimony. The jury's reluctance to simply take N.'s testimony at face value, as established by its acquittal of Poehlman on the charges relating to the December allegations, *see* R11; R12, demonstrates the state's need to bolster N.'s testimony, especially as to consent.

Even if the state primarily intended that Kruszka corroborate the allegations in the December charges, her allegations colored the February charges as well. Kruszka was the only witness who spoke of unexplained bruises on N. R52:43-44. She insisted that these injuries included a black eye, cuts, and bruises on N.'s arms that looked like fingers. *Id*.:43, 45. The state used this testimony as corroboration in closing argument, summing up the impact of it by saying, "So we know that N[.] P[.] was showing up

at work with injuries back then. *So you're not just relying on her statement."* R53:136. The state further argued that N.'s statements were "corroborated, backed up by Lynn Kruszka, her supervisor at Burlington Coat Factory, the place she works[,] with no interest in this case, her observations, what she saw." *Id.*

Moreover, Kruszka's testimony went beyond the injuries on February 6-7, 2015. Her testimony corroborated N.'s over-arching testimony that she was an abused woman and suggested that all N.'s co-workers knew it. Her testimony suggested that there were times, in addition to December 11, 2014 and February 7, 2015, when N. had been abused:

> Q. Now, was there a time when you were working with Miss P[.] where she came into Burlington Coat Factory with bruises to her face?
> A. Yes.
> Q. Do you recall when that was?
> A. I know it was *as early as* December.
> Q. And was there more than one occasion where she reported to work with bruises to her face?
> A. On one occasion she did have a black eye, actually two. She had a black eye, *and then she's had like cuts on her neck and bruises on her arm and stuff like that.*
> ***
> Q. She never said anything to you about what these were from?
> A. Not on those *indications.*

R52:43-44 (emphasis added). Given the plural words "indications,"[4] the suggestion that there were black eyes and then other little cuts and bruises at other times, and the statement that she saw injuries not *on* December 11, 2014, but "*as early as* December," the clear implication of her words is that N. showed up on multiple occasions with injuries. This interpretation is consistent with her later testimony, which was elicited by trial counsel who was questioning without knowledge of her statement to police and without any other information about her:

> Q. ...Did they look like – Sometimes you can see bruises that actually look like fingers where someone grabbed really

[4] This word may have been the similar-sounding "occasions" or may be a mis-speaking.

hard and held on. Was it like those?
A. On some *occasions*, yes.
Q. *More than one occasion?*
A. *Yes*.

*Id*.:45 (emphasis added).

Because Poehlman has alleged sufficient facts that, if true, would entitle him to relief on his claim of ineffective assistance of counsel, this Court must hold an evidentiary hearing on his motion. *See* ***State v. Allen,*** 2004 WI 106, ¶14, 274 Wis.2d 568, 682 N.W.2d 433 (setting forth standard).

## II.

**The Circuit Court Erred in Refusing to Grant an Evidentiary Hearing on Poehlman's Claim of Newly-Discovered Evidence Consisting of Daniel Neeley's Testimony that He Saw Poehlman Outside During the Time Poehlman was Alleged to Have Falsely Imprisoned His Wife.**

Poehlman alleged in his postconviction motion, the accompanying affidavit of Daniel Neeley, and the supplemental motion of Attorney Ellen Henak that, after conviction, while an investigator was trying to speak with a known witness, she unexpectedly came across Neeley. The documents further alleged that Neeley would have testified that he saw Poehlman outside Poehlman's apartment at approximately 7:00 a.m. on February 7, 2015, during a time when, according to the testimony of N., she and Poehlman were sleeping in the apartment and he was falsely imprisoning her there. In addition, Neeley did not see him return to the apartment, which undercut N.'s testimony that he was in the apartment at 8:00 a.m. and that his awakening prevented her from leaving. Finally, Neeley's testimony undercut the implication from Detective Ayala that his inability to find footprints meant Poehlman was lying about having been outside.

Both the state and Poehlman agreed below that the evidence was discovered after conviction and was not merely cumulative. *See* R38:16-17. Because the allegations in the motion, when viewed in the light most favorable to them, establish Poehlman was not negli-

gent in seeking the evidence, it was material, and it created a reasonable probability of a different result, the court below erred in not holding an evidentiary hearing.

Newly discovered evidence is a matter of due process. *E.g.*, ***State v. Love***, 2005 WI 116, ¶43, n.18, 284 Wis.2d 111, 700 N.W.2d 62. The Court of Appeals has explained the requirements for a newly-discovered evidence claim:

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." [***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis.2d 639, 700 N.W.2d 98] (citation omitted). Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof. *Id.*, ¶¶160-62 (abrogating ***State v. Avery***, 213 Wis.2d 228, 234-37, 570 N.W.2d 573 (Ct. App. 1997)).

***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590.

Poehlman's failure to remember his brief encounter with Neeley was reasonable and was not negligent, contrary to the circuit court's belief, *see* R40:3 (adopting the state's reasoning); *see also* R38:15-19. Being unable to remember that he encountered Neeley very briefly that morning does not make Poehlman negligent in failing to procure Neeley's testimony. Negligence is a failure to exercise the ordinary care that a reasonable person would use in similar circumstances. *Cf.* WIS JI-CIVIL 1005 (defining negligence for civil law purposes). What a reasonable person who was defending himself in Poehlman's circumstances would do is to try to remember someone he saw while on his walk.

But attempting to remember and remembering are different things. The failure to remember a fairly insignificant nod of the head to a particular neighbor at one point in a very long walk which occurred after drinking and smoking marijuana is not unreasonable. Poehlman's testimony was that he left the apartment at 2:00 a.m. and was out of the apartment for approximately 8 hours. R52:91-92. Moreover, by all accounts, Poehlman had been drinking alcohol, specifically vodka, earlier in the evening and had smoked marijuana after that. *Id*.:96-97 (Poehlman); *see also* R51:28, 36 (N.)

In addition, the evidence is material to the central issues of the case–whether N. was lying about the lack of consent to the sexual activity and whether Poehlman was in the residence unlawfully preventing N. from leaving that residence. A jury that credited Neeley's testimony could have had reasonable doubts about. Poehlman's guilt. Whatever the court below believed, *the jury* did not find N. entirely credible. Had it done so, the jury would have convicted Poehlman of the charges based on the events she claimed happened on December 11, 2014. Yet the jury did not do so. R11: R12..

Most important, and contrary to the circuit court's holding, *see* R40:3, Neeley's testimony creates a probability of a different result. "A reasonable probability of a different result exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Love***, 2005 WI 116, ¶44 (citation omitted). Poehlman need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors. ***Kyles v. Whitley***, 514 U.S. 419, 434-35 (1995).

As the Wisconsin Supreme Court recently recognized, this Court cannot reject the testimony of witnesses not presented at the original trial merely because the Court may choose to disbelieve them or because the Court may find the witnesses at the trial more believable. ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. concurring). Rather, the

only question for the Court is whether witness testimony creating a reasonable probability of a different result *could* be credited by a reasonable jury enough to create a reasonable doubt. So long as the evidence is not incredible as a matter of law, i.e., "in conflict with ... nature or with fully established or conceded facts," ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974), it is the jury that must resolve credibility disputes, not the Court. ***Id.***; *see* ***Jenkins***, 2014 WI 59, ¶83.

Neeley's testimony was not incredible as a matter of law. Evidence is incredible as a matter of law only if in conflict with the laws of nature or in conflict with fully established or conceded facts. ***State v. King***, 187 Wis.2d 548, 562, 523 N.W.2d 159 (1994). Alleged inconsistencies alone do not render testimony incredible as a matter of law, *see* ***Estate of Neumann ex rel Rodli v. Neumann***, 2001 WI App 61, ¶31, 242 Wis.2d 205, 626 N.W.2d 821, just as bias or motive to lie would not do so, *see* ***State v. CVC***, 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989).

Thus, it does not matter to this analysis that the state asserted that Neeley has been previously convicted of a misdemeanor. Witnesses who testify in criminal cases frequently have criminal records. If having a criminal record made a witness incredible as a matter of law, then no defendant could ever be convicted based upon the testimony of a jailhouse snitch. Indeed, if even the testimony of jailhouse snitches, who certainly have motive to lie, is not inherently incredible, Neeley's testimony is not. Any other result is absurd.

Nor does it matter that the allegations concerning Neeley's testimony initially contained some minor errors. Neeley would concede that his initial recollection that he was driving his niece to school on February 7, 2015, was in error, but he holds to his recollection that he was driving her even if he cannot remember the destination. *See* R39:11-12. That small error is explicable because he drove her to school so often. *Id*. Similarly, his initial assertion in his affidavit that he saw Poehlman leave his house was based upon an assumption. What he actually saw was Poehlman just outside his

house and he assumed that he had just left. *Id*. None of these points go to the main substance of his testimony, which could be credited by a reasonable jury and is sufficient to create reasonable doubt.

This case was essentially a he said/she said case. The jury's refusal to convict on counts 1 and 2 indicate that the jury already had some doubt about N.'s overall credibility and, more specifically, about her testimony concerning the events of December 11, 2014. Neeley's testimony creates doubt regarding her credibility about the events of February 6 and 7, 2015, upon which the convictions on counts 3-7 are based.

Neeley's testimony creates doubt in two ways. First, and most important, it undercuts N.'s claim that she was essentially held hostage for hours because Poehlman was in the apartment and was threatening her. Neeley's testimony that Poehlman was outside his residence at approximately 7:00 a.m. and did not return directly undercuts N.'s claim he was there when she awoke at 8:00 a.m. Contrast R34:34-35 with R51:37,66. It casts doubt on her testimony that she closely monitored him in the apartment between 8:30 a.m. and 9:30 a.m. *See id*.:67. Moreover, by creating such doubt, Neeley's testimony also raises questions not only about Count 4, the false imprisonment charge, but also about whether N. was setting Poehlman up after consensual sex or whether she actually did not consent to the sexual activity.

In addition, Neeley's testimony creates reasonable doubt by corroborating parts of Poehlman's testimony. Poehlman testified that he walked around outside the residence after consensual sex, from approximately 2:00 a.m. until 10:00 a.m. R52:91-92. Neeley puts him walking outside during the middle of that time period.

Moreover, Neeley's testimony directly discredits the inference from Detective Ayala's testimony. Detective Ayala stated that he could not find any of Poehlman's footprints in the snow several hours later, *id*.:55, and that testimony was used to create the inference that Poehlman was lying about having walked around. Yet, Neeley places Poehlman in the area that the detective supposedly

later checked during the hours that Poehlman said he was there. Compare R34:35-36 (Neeley) with R52:55 (Ayala).

Ultimately, it is the job of the jury, not a judge, to sort out what to believe and how much to believe of it. ***Estate of Neumann,*** 2001 WI App 61, ¶31. Because the state has not and cannot establish that Neeley's testimony is incredible as a matter of law, the lower court cannot reject the testimony because the court disbelieves it or because the court finds other witnesses more credible. ***State v. Jenkins,*** 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786. Nor is it the job of the circuit court to reject it because the court disbelieves Poehlman. The jury, not the judge, is the ultimate arbiter of a witness's credibility. *See* ***Serebin,*** 119 Wis.2d at 842.

The allegations in the motion and the accompanying documents therefore are sufficient to establish that, if true, Poehlman is entitled to a new trial. The circuit court therefore erred in failing to grant an evidentiary hearing on this issue.

## CONCLUSION

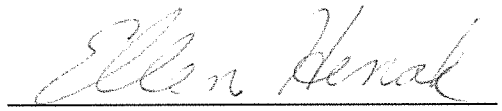
For these reasons, Jesse Steven Poehlman respectfully asks that this Court vacate the order denying his postconviction motion and remand the matter with directions to hold an evidentiary hearing on both his claim of ineffective assistance of counsel and his claim of newly-discovered evidence.

Dated at Milwaukee, Wisconsin, August 18, 2016.

Respectfully submitted,

JESSE STEVEN POEHLMAN,
Defendant-Appellant

HENAK LAW OFFICE, S.C.



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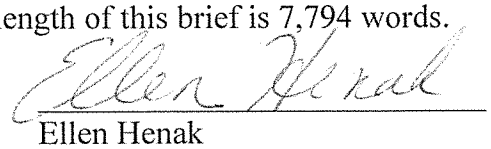

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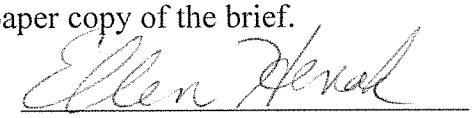

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I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 22nd day of August, 2016 I caused 10 copies of the Brief and Appendix of Defendant-Appellant Jesse Steven Poehlman to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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