STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE STEVEN POEHLMAN,

Defendant-Appellant.

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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Both Poehlman and the State agree that a circuit court must hold a hearing on a postconviction motion if "the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief," ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433. *See* Plaintiff-Respondent's Brief at 5. Although the court may deny a hearing "if the record *conclusively demonstrates* that the defendant is not entitled to relief, ***Allen***, 2004 WI 106, ¶9 (emphasis added), the court also generally must assume that the facts alleged in the motion are true, ***id.***, ¶12. If a court generally must assume that the facts alleged are true, then the only way to rationally reconcile these two principles is that the court must accept alleged facts as true unless other evidence already in the record clearly, unambiguously, and unequivocally establishes otherwise.

Here the strength of the case against Poehlman rests primarily

on the credibility of N because the jury *acquitted* Poehlman of all charges related to events N. swore occurred in December of 2014. R11; R12. This Court therefore must assume that the jury was not convinced beyond a reasonable doubt of N.'s veracity. Thus, without some corroboration, this Court cannot hold that any of N.'s testimony, by itself, conclusively demonstrates that a fact that Poehlman alleges is untrue.

The only corroborating evidence offered, other than N.'s various repetitions of her own story to police, R51:72-92, and to a nurse, *see* R51:99, were Lynn Kruszka's account of seeing injuries on N., *see* R52:42-46, and Detective Andrew Ayala's testimony that he saw no tracks in the snow, *id.*:55-56, that would back up Poehlman's assertions that he was out for a walk for at least a portion of the time that N. alleged that Poehlman falsely imprisoned her.

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.

Both parties agree Poehlman's motion must allege facts that, if true, demonstrate: (1) trial counsel's failure to object to Kruszka's testimony based upon the state's failure to list her on the witness list and provide the police report was deficient performance and (2) trial counsel's error prejudiced Poehlman. *See* Brief of Plaintiff-Respondent at 4-5; *see also* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). The state's analysis of the first prong fails because the state presumes good cause for the discovery failure--despite an allegation otherwise and even though nothing in the record even suggests good cause. As a result, the state's legal analysis of the demands of Wisconsin Statutes §971.23(7m)(a) is misleading. The state's analysis of the second prong

fails because the assistant district attorney's contemporaneous interpretation of Kruszka's testimony belies the cramped reading of the breadth and impact that the state now argues the testimony had.

In the absence of the state demonstrating good cause, the *sole* remedy for the state's failure to list Kruszka as a witness and to turn over the police report was to exclude Kruszka as a witness under Wisconsin Statutes §971.23(7m)(a). ***State v. DeLao***, 2002 WI 49, ¶51, 252 Wis.2d 289, 643 N.W.2d 480. It may be that granting a continuance or recess is favored when good cause is shown as the state suggests, *see* Brief of Plaintiff-Respondent at 6, but neither is an available option without this showing of good cause.

Poehlman specifically alleged the state's lack of good cause in his postconviction motion, stating:

> Given that the state had known of the existence of Ms. Kruszka and the content of potential testimony within a week of the events that formed the basis for the charges of which Mr. Poehlman was convicted and failed to list her, mention her, or turn over the police report for the entire two months before trial, the state lacked good cause for failure to place her name on the witness list or to turn over the police report.

R34:11. Under ***Allen***, 2004 WI 106, ¶9, this Court therefore must assume that the state lacked good cause unless something in the record conclusively demonstrates that the state could meet its burden of establishing good cause for its conceded failure to list Kruszka as a witness.

Despite three opportunities to do so, the state has never established good cause for its failure to list Kruszka as a witness or for its failure to turn over the police report before her testimony. In fact, the state has never given any reason at all for its failure. First, at trial, the state simply denied that it had violated the discovery statute rather than establishing good cause. 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 id.*:27. Instead, the assistant district attorney advised trial counsel that there was a police report and that it had been turned over to trial counsel. *See id.*

The state was similarly silent as to its reasons and potential good cause in response to Poehlman's postconviction motion, *see* R38:12, even though a reasonable person would expected the state to assert good cause at that point if it existed. The state knew that good cause was in issue, yet remained silent.

Finally, even in its brief to this Court, the state fails to assert good cause or any reason for the failure. *See* Brief of Plaintiff-Respondent at 14-16.

Because nothing in the record conclusively demonstrates otherwise, this Court must accept as true the detailed and specific allegations that the state lacked good cause for its failure to list Kruszka as a witness and to supply trial counsel with the police report. Because there was no good cause, the Court would have had to exclude Kruszka as a witness if trial counsel had moved to exclude her. Trial counsel's performance therefore was deficient.

As for prejudice, the assistant district attorney at trial, like Poehlman in his brief-in-chief, *see* Brief of Defendant-Appellant at 16-17, interpreted Kruszka's testimony as meaning that N. showed up on multiple occasions with injuries. His cross-examination of Poehlman reflected that interpretation as he asked, "Now, you heard the testimony that N[.] had showed up at her job at the Burlington Coat Factor[y] *repeatedly* with injuries?" R52:103 (emphasis added).

The assistant district attorney's contemporaneous interpretation of the Kruszka testimony, like that of the jury, was based upon hearing her statements and, unlike that of the state on appeal, not upon some cramped parsing of a transcript. The trial interpretation of the Kruszka testimony and its impact therefore is a better gauge of its impact on the jury. With that view of the testimony, coupled with the state's closing argument that "we know that N[.] was showing up at work with injuries

back then," R53:136, it becomes clearer that Kruszka's testimony corroborated N.'s over-arching testimony that N. was an abused woman and that all of her co-workers knew it.

Other than N., only Kruszka could suggest that N.'s version of the events of February 2015 was more likely to be true because the events were part of a larger pattern. Neither Officer Scott nor Nurse Deering saw N. prior to February. They could not make the state's allegations against Poehlman part of a pattern.

Nor did Poehlman, as the state seems to suggest, acknowledge that N. showed up to work with injuries before February. When he was asked, immediately after being asked about Kruszka's testimony, where the injuries Kruszka spoke of could have come from, his response was, "I have no idea." R52:104. Still, at the time of his testimony, he knew that the state, based on Kruszka's testimony was going to ask him to account for those injuries. As a result, he explicitly denied that he ever "laid any violent hand on her," but he did note that she had an "extreme temper" and that she would throw things. R52:77. Throwing things is unlikely to create injuries. He also said that she would "assault herself," *id.*, but with no further explanation, assuming he was admitting to causing the injuries Kruszka claimed to see or even necessarily admitting they existed is a stretch.

In any event, the state's case was mainly as strong as the credibility of N., and that credibility was suspect with the jury or the jury would not have acquitted Poehlman of any of the charges. *See* R11; R12. The only corroborating evidence offered for her false imprisonment and sexual assault claims, other than N.'s various repetitions of her story to the police, R51:77-79, and to a nurse, *id.*:99, were pictures of eye and neck injuries, *e.g., id.*:126, and testimony about a lack of tracks in the snow, R52:54-55.

The failure to exclude Kruszka as a witness therefore prejudiced Poehlman.

Because Poehlman has alleged sufficient facts that, if true,

would entitle him to relief on his claim of ineffective assistance of counsel and because the record does not conclusively demonstrate otherwise, this Court should vacate the order denying the postconviction motion and remand the matter for an evidentiary hearing.

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.

Just as the basic law of ineffective assistance of counsel is not at issue in this case, neither is the basic law of newly discovered evidence. Both parties agree Poehlman must first show that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590. In addition, the parties agree that, if he meets those criteria, Mr. Poehlman also must show that "a reasonable probability exists that a different result would be reached in a trial." *See* ***id.*** (quoting ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis.2d 639, 700 N.W.2d 98). The state concedes that Neeley's statement was discovered after conviction, *see* Brief of Plaintiff-Respondent at 23, and was not cumulative, *see id.* at 24.

Failing to remember a brief encounter with a neighbor, which did not even involve the exchange of words and which had no particular significance at the time, is no more negligent than a witness failing to remember that an attacker was wearing blue jeans. None of us remembers every routine detail of our days or exactly who we passed on a walk. When that memory is impaired, as Poehlman's was, *see* R51:28 (N. testifies that Poehlman was getting high on marijuana),

omission of a few details from memory is to be expected. Poehlman's recent discovery of the evidence therefore was not negligent.

As for materiality, testimony need not totally undermine every single factual allegation of the complaining witness to be material. In a case in which the state had to prove that Poehlman had intentionally confined or restrained N. and the state's only proof of this particular fact was N.'s testimony, information from others that directly contradicted portions of N.'s testimony on this point were material. It is not just that Neeley's statement undercuts her claim that she woke at 8:00 a.m. and Poehlman was still there, holding her hostage, because Neeley placed Poehlman out of the apartment after 7:00 p.m. It is not just that he undercuts her claim that she closely monitored Poehlman in the apartment between 8:30 a.m. and 9:30 a.m because Neeley placed Poehlman out of the apartment after 7:00 p.m. It is also that Neeley's testimony calls the testimony of a witness into more question on a crucial point about which the jury already had significant questions. Neeley's testimony need not specifically call each point into question.

Moreover, as the affidavit submitted with Poehlman's trial court response demonstrates, Neeley's testimony will not contradict that of Poehlman. As Neeley clarified, when he said that he saw Poehlman leaving, he did not see Poehlman come out of his house. R39:12. Instead, he simply saw Poehlman outside and *assumed* that Poehlman was leaving. R39:12. Thus, Neeley bolsters Poehlman's testimony that he was wandering around for hours after 2:00 a.m.

In addition, it undercuts Detective Ayala and the footprints. Poehlman explained to the detective that he had left his house and wandered around the gangways in the area. Detective Ayala was not asked exactly where he looked for footprints. Instead, although he noted that there was "little to no foot traffic in the snow in between these buildings," R52:55, he never said he did not look near where Poehlman came out of his house. His testimony about where he went was:

> Q. So did you go and try determine, you know, if there was any evidence where he had been?
>
> A. Yes.

Id. Moreover, on cross-examination, he indicated that Poehlman told him that his walk was "just between the areas of his residence." *Id.*:61-62. The area just outside Poehlman's residence would have been between the areas of his residence.

In addition, Neeley will testify that he heard no yelling or commotion from Poehlman's unit on the night in question. R39:11. With all of the physical activity, he might have been expected to have heard something. This statement also undercuts N.'s testimony.

Neeley's statement therefore is material and, given the weakness of the state's case previously discussed, *see* pages 1-2 and 5 of this brief, a jury that credited Neeley's statement could have had reasonable doubts about Poehlman's guilt. It therefore also creates a reasonable probability that the jury would have reached a different result with this new evidence.

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, November 7, 2016.

Respectfully submitted,

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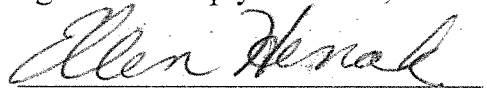
WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2,430 words.



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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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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 7th day of November, 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.

Ellen Henak

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