STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2016AP001292 CR
Circuit Court Case No. 2014CF002129 , 2014CF002933

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

ERIC L. MOORE,
DEFENDANT-APPELLANT.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE MEL FLANAGAN AND REBECCA F. DALLET PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. **Was Mr. Moore Entitled to a New Trial Based on the Improper Admission of Evidence that Affected his Substantial Rights?**

The Circuit Court Answered: NO.

II. **Was Mr. Moore Entitled to a New Trial Based on Ineffective Assistance of Counsel?**

The Circuit Court Answered: NO.

III. **Was the Evidence Sufficient to Sustain the Jury's Verdict in Case Number 14CF002933?**

The Circuit Court Answered: YES.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The opportunity for oral argument is welcomed, but not requested because the briefs will adequately address the issues presented. Neither does publication appear necessary because the issues involve no more than the application of well-settled rules of law to a recurring fact situation. § 809.23(1)(b)1 stats. Further, the issues will be decided based on controlling precedent and no reason appears for questioning or qualifying the precedent. § 809.23(1)(b) 3 stats.

STATEMENT OF THE CASE

In Milwaukee County case number 2014CF002129, Mr. Moore was charged by criminal complaint (R 32; App. 101) subscribed May 20, 2014, in count one with battery as a domestic abuse repeater and a repeater contrary to §§ 940.19(1), 939.621(1)(b), (2) and 939.62(1)(a) and in count 2 of disorderly conduct as a domestic abuse repeater and a repeater, contrary to §§ 947.01(1)(b), 939.621(1)(b), (2) and 939.62(1)(a)

In Milwaukee County case number 2014CF002933, Mr. Moore was charged by criminal complaint (R 2; App. 108) subscribed July 7, 2014, in count one with battery as a domestic

abuse repeater and a repeater contrary to §§ 940.19(1), 939.621(1)(b), (2) and 939.62(1)(a) and in count 2 of disorderly conduct as a domestic abuse repeater and a repeater, contrary to §§ 947.01(1)(b), 939.621(1)(b), (2) and 939.62(1)(a)

These cases were joined for trial on July 17, 2014 and tried together on and between September 29, 2014 and October 1, 2014.

Mr. Moore was convicted following jury trial in case number 2014CF002129 of count one alleging battery as a repeater contrary to §§ 940.19(1) and 939.62(1)(a) and in count 2 of disorderly conduct as a repeater, contrary to §§ 947.01(1)(b) and 939.62(1)(a) and in case number 2014CF002933 of count one alleging battery as a repeater contrary to §§ 940.19(1) and 939.62(1)(a) and in count 2 of disorderly conduct as a repeater, contrary to §§ 947.01(1)(b) and 939.62(1)(a).

On January 12, 2015, the court, the Honorable Rebecca F. Dallet, sentenced Mr. Moore to twenty-four (24) months in the Wisconsin Prison System, twelve (12) months of initial confinement, twelve (12) months extended supervision, on each count, consecutive to any other sentence in case number 2014CF002129

The court, the Honorable Rebecca F. Dallet, sentenced Mr. Moore to twenty-four (24) months in the Wisconsin Prison System, twelve (12) months of initial confinement, twelve (12) months

extended supervision, on each count, consecutive to any other sentence in case number 2014CF002933.

Notice of intent to Pursue Postconviction Relief was filed on January 27, 2015.

Counsel was appointed on February 23, 2015.

The last transcript was received on April 27, 2015.

This Court previously enlarged the time within which to file a postconviction motion or notice of appeal until August 7, 2015 by order dated June 29, 2015, until September 25, 2015, by order dated August 6, 2015 and until November 13, 2015, by order dated September 25, 2015.

Defendant's postconviction motion (R 18) was filed on November 13, 2015.

The Circuit Court set a briefing schedule by order dated November 17, 2015. (R 19)

By order dated December 3, 2015, this Court enlarged the time for the Circuit Court to decide the postconviction motion until March 14, 2016 and by further order dated March 9, 2016, enlarged the time to decide the postconviction motion until June 21, 2016.

Following briefing, the Circuit Court denied, in part, and granted an evidentiary hearing, in part, by order dated March 1,

2016. (R 27) That hearing was conducted on April 22, 2016 and June 3, 2016.

The Circuit Court entered an order denying (R 79) Mr. Moore's postconviction motion dated June 14, 2016.

Notice of Appeal was filed on June 23, 2016.

Notification of Filing of Circuit Court Record was dated September 6, 2016 and a supplemental notice was dated September 23, 2016.

By order dated October 18, 2016, this Court enlarged the tile for filing defendant-appellant's brief until November 7, 2016.

STATEMENT OF FACTS

The joined cases were scheduled for trial on September 29, 2014.

AQJ[1] did not appear at trial. The state moved for admission of out of court statements by AQJ.

The first statement was described as a statement by AQJ wherein she described the pain in her head as a 10 on a scale of 1 to 10. This statement was made to paramedics and overheard by officers. The Court allowed admission of this statement pursuant to

[1] The documents contained herein have been redacted pursuant to § 809.86 stats. if required to preserve confidentiality.

§ 908.03(4) on the ground that the statement was made for purposes of medical diagnosis or treatment. (R 72, pp. 3-5; App. 115-17)

The second grouping of statements is described as 911 calls. There are actually three 911 calls. As to the first call related to case number 2014CF002129, the Court found that this call from a child who the Court described as "clearly upset", "seeking help", "crying and very upset and under the influence of the emotion of the events" and on that basis admissible as an excited utterance exception to the hearsay rule. (R 72, p. 7, ll. 9-21; App. 7)

The Court denied admission of the second call related to case number 2014CF002129 finding the nature of that call to be testimonial. (R 72, pp. 7-9; App. 119-21)

The Court then analyzed a 911 call from case number 2014CF002933, determining in part that the call qualified as an excited utterance exception to the hearsay rule but that from the point forward after the operator is describing what she had heard that part of the call would be inadmissible. (R 72, pp. 9-10; App. 121-22)

The state moved to admit a statement by AQJ that Mr. Moore was the father of her children. The Court denied that request. (R 72, pp. 10-15; App. 122-27)

The defense moved to admit evidence of a citation issued to AQJ for obstructing an officer when she recanted her initial report to the police. The Court made a preliminary observation:

> I don't know that I can give you a ruling this minute, but right now it sounds to me like it comes in.

(R 72, p. 23; App. 135), and

> But I will reserve ruling on that one. Okay, anything else?

(R 72, p. 24; App. 136)

After consideration, the Court concluded that evidence of the citation would not be admissible unless the defense wanted to also allow admission of AQJ's initial report to police:

> So if you want it all to come in, you want her initial statement in, you want her recantation in, and you want the ticket in, I will let it all in. If you don't want any of it in, I will keep it all out. But I am not gonna just let in that she got a ticket. Because then what are we letting in? I am letting in the comment that she got a ticket.

(R 73, p. 8; App. 138)

The Court permitted counsel to discuss this with Mr. Moore:

THE COURT: Okay, we're back on the record. What is your decision?

MR. MEETZ: We decide not to enter anything about the citation.

(R 73, p. 11; App. 141)

***Machner*[2] Hearing**

Counsel acknowledged that he originally sought to introduce evidence of the citation, but ultimately did not do so. Transcript, (R 77, p. 11, ll. 15-20; App. 151)

His explanation was that he

> tried to get the recant statement and the citation into evidence. The judge made a ruling, basically, that if that would come in, then all prior statements of Ms. Johnson would come in to provide context.
>
> And based on that, you elected not to introduce the evidence of the citation?
>
> Correct.

(R 77, pp. 11-12; App. 151-52)

Counsel described discussing this with Mr. Moore:

> My recollection is that while he -- this discussion was in court while he was next to me, so he heard the whole

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

explanation from the judge. And then we had probably spoken about this I think the -- was the first day of trial. I think the second day we came back, the judge started explaining this issue. And we talked and he concurred with me that we should -- that we would decide not to enter this evidence of the citation and the recant statement because we didn't want all the prior statements to come into the trial as evidence.

(R 77, p. 12, ll. 8-17; App. 152)

Counsel then described this issue as a strategic decision and that he attempted to bring AQJ's credibility into dispute by his questioning of the police officers and the defense alibi witness. (R 77, p. 13, ll. 4-11, p. 14, ll. 15-25; App. 153-54)

Under cross-examination, counsel described his strategy as being "the less evidence that came in against Mr. Moore, the better". (R 77, p. 13, ll. 22-23; App. 153)

Both counsel and the State, in cross-examination, emphasized that Mr. Moore "concurred" with counsel's assessment. (R 77, p. 12, ll. 20-21, p. 14, ll. 4-7; App. 152, 153)

Further facts will be stated as necessary.

ISSUES PRESENTED

I. Mr. Moore Was Entitled to a New Trial Based on the Improper Admission of Evidence that Affected his Substantial Rights.

A. Standard of Review

A circuit court's decision to admit or refuse to admit evidence is generally reviewed for an erroneous exercise of discretion. *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis.2d 668, 816 N.W.2d 191.

If the evidence is admissible under the rules of evidence, then this Court determines whether the admission of those statements violated the right to confrontation. *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis.2d 554, 697 N.W.2d 811. Whether the admission of hearsay evidence violated a defendant's right to confrontation presents a question of law, which is reviewed de novo. *Id.* (citing *State v. Weed*, 2003 WI 85, ¶ 10, 263 Wis.2d 434, 666 N.W.2d 485).

B. The Circuit Court Improperly Found that the Hearsay Admitted at Trial Was Nontestimonial.

The Court must determine whether the absent witness' hearsay was testimonial or nontestimonial. *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177, (2004); *Davis v. Washington,* 547 U.S. 813, 126 S. Ct. 2266, 2273-74 (2006). Testimonial hearsay is admissible only when the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *State v. Deadwiller,* 2013 WI 75, ¶ 1, 834 NW 2d 362, citing *Crawford*, *supra*, U.S. 51.

For a statement to be testimonial, it must be a "...made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford, supra,* at 52.

The Court's admission of the child's 911 call deprived Mr. Moore of the fundamental right to cross-examination.

II. Mr. Moore Was Not Provided Effective Assistance of Counsel.

A. Standard of Review

The trial court's findings of fact regarding counsel's conduct under a clearly erroneous standard. *State v. Pitsch,* 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985). An erroneous exercise of discretion occurs if the record demonstrates that the facts do not support the postconviction court's decision or that the postconviction court applied the wrong legal standard. *State v. Brockett,* 2002 WI App 115, ¶ 18, 254 Wis.2d 817, 647 N.W.2d 357. Whether the facts found constitute deficient performance and prejudice are questions of law that we review independently. *State v. Tulley,* 2001 WI App 236, ¶5, 248 Wis.2d 505, 635 N.W.2d 807.

B. Citation of Authority

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to the effective

assistance of counsel. *State v. Balliette*, 2011WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984))

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test. First, he must show that his counsel's performance was deficient. Second, he must prove that the deficient performance prejudiced the defense. *State v. Griffin,* 220 Wis.2d 371, 390, 584 N.W.2d 127, 135 (Ct.App. 1998), review denied, 221 Wis.2d 654, 588 N.W.2d 631 (1998).

The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In applying this test, the inquiry is whether, under the circumstances, counsel's acts or omissions were outside the wide range of professionally competent assistance. See *id.* at 690, 104 S.Ct. 2052. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. See *id.* The court also must be careful to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. See *id.* at 689, 104 S.Ct. 2052.

As to prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Griffin,* 220 Wis.2d at 391, 584 N.W.2d at 135.

There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." *State v. Smith,* 207 Wis.2d 258, 273, 558 N.W.2d 379 (1997)

C. Counsel's Performance Was Deficient.

The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). In applying this test, the inquiry is whether, under the circumstances, counsel's acts or omissions were outside the wide range of professionally competent assistance. I*d.* at 690, 104 S.Ct. 2052. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Id.* U.S. at 689, S.Ct at 2065. The court must also eliminate the distorting effects of

hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time of the representation. *Id.* U.S. at 689, S.Ct at 2065.

Trial counsel did not present evidence of AQJ's recantation or AQJ's having received a citation.

Failure to present this evidence falls well below *Strickland's* objective standard of reasonableness.

Trial counsel's assertions under cross-examination is simply insufficient:

> I believe I asked some questions that would have reflected on her credibility through the other witnesses.
>
> Q Through your cross-examination of law enforcement officers and then calling your alibi witness?
>
> A Correct.

(R 77, p. 14, ll. 15-20: App. 154)

D. Counsel's Performance Was Prejudicial.

"A defendant does not show the element of deficient performance "simply by demonstrating that his counsel was imperfect or less than ideal." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, "the proper standard for attorney performance is that of reasonably effective assistance" by a

"reasonably competent attorney." *Strickland*, 466 U.S. at 687. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. When a court considers this issue, "counsel is strongly presumed to have rendered adequate assistance" to the defendant, *id.* at 690; thus, "the law affords counsel the benefit of the doubt." *Balliette*, 336 Wis. 2d 358, ¶ 27."

"As a general rule, a defendant who shows deficient performance of counsel cannot presume prejudice. *Strickland*, 466 U.S. at 692-93.[fn17] Instead, a defendant must affirmatively prove prejudice by "show[ing] that particular errors of counsel were unreasonable" and that those errors "had an adverse effect on the defense." *Id.* at 693. Therefore, the proper test for prejudice in the context of ineffective assistance of counsel is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Balliette*, 336 Wis. 2d 358, ¶ 24." *State v. Burton*, 2013 WI 61, ¶¶ 48-49, 349 Wis.2d 1, 832 N.W.2d 611.

In a case based on hearsay, counsel's failure to admit evidence of AQJ's recantation or AQJ's having received a citation undermines one's confidence in the outcome of this trial.

III. The Evidence Was Insufficient to Sustain the Jury's Verdict in Case Number 14CF002933.

A. Standard of Review

The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to de novo review. *State v. Booker,* 2006 WI 79, ¶ 12, 292 Wis.2d 43, 717 N.W.2d 676. In such a review, the evidence is considered in the light most favorable to the State and reverse the conviction only where the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger,* 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). This court will uphold the conviction if there is any reasonable hypothesis that supports it. *State v. Blair,* 164 Wis.2d 64, 68 n. 1, 473 N.W.2d 566 (Ct. App.1991).

B. The Evidence Was Insufficient to Sustain the Jury's Verdict in Case Number 14CF002933.

The only evidence presented in support of identification in case number 14CF002933 was a vague statement about AQJ's stating that it was her child's father who had done this.

Even the state noted the paucity of evidence in this regard:

> I know in this case the only proof of identity in the second file was the victim stating that it was her child's father who had done this -- her son's

(R 76, p. 4)

Granted, "...unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt" *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530, the verdict will be upheld.

In this instance, however, considering that the Court denied the state's motion to admit a statement by AQJ that Mr. Moore was the father of her children, (R 72, pp. 10-15; App. 122-27) and the generality of the statement, no reasonable fact-finder could have found identity beyond a reasonable doubt.

CONCLUSION

Mr. Moore requests that this Court find that he is entitled to a new trial based on the improper admission of evidence that affected his substantial rights.

Additionally, trial counsel's performance clearly fell below objective standards of reasonableness and was outside the wide range

of professionally competent assistance. Mr. Moore was prejudiced by counsel's deficient performance.

For the reasons stated above, this Court should find that Mr. Moore is entitled to a new trial in case numbers 2014CF002129 and 2014CF002933 on the ground that he was denied his constitutional right to effective assistance of counsel

Lastly, this Court should find that the evidence in case number 14CF002933 was insufficient to sustain the jury's verdict and vacate that judgment, remanding with instructions to dismiss that case.

Dated: November 2, 2016.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 20 pages and 3,254 words.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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ELECTRONIC CERTIFICATION

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief pursuant to § 809.19(12).

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