STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2016AP001292-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ERIC L. MOORE,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1) Did the trial court properly deny Mr. Moore's motion for a new trial because of the improper admission of evidence?

   Brief answer: Yes

2) Did the trial court properly deny Mr. Moore's motion for a new trial due to ineffective assistance of counsel?

   Brief answer: Yes

3) Did the trial court properly deny Mr. Moore's motion for a new trial based on the sufficiency of the evidence?

Brief answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Under section 809.22(2)(b), Stats., this brief isn't eligible for publication. Furthermore, pursuant to § 809.23, Stats., publication is not requested.

STATEMENT OF THE CASE

On May 21, 2014, a complaint was filed in Milwaukee County Case Number 2014-CF-2129, charging Mr. Moore with Battery (Domestic Abuse Repeater) (Repeater) and Disorderly Conduct (Domestic Abuse Repeater) (Repeater). (R32:1-3). On July 9, 2014, a complaint was filed in Milwaukee County Case Number 2014-CF-2933, charging Mr. Moore with Battery (Domestic Abuse Repeater) (Repeater) and Disorderly Conduct (Domestic Abuse Repeater) (Repeater). (R2:1-3). On July 17, 2014, a Preliminary Examination was held in both of these cases. (R69:1-21). Upon presentation of the evidence, the trial court found probable cause and bound Mr. Moore over for trial. (R69:12-13).

On September 29, 2014, all parties were present and prepared for trial. (R72:3). Before the proceedings commenced, the trial court made some pre-trial evidentiary rulings. (R72:3-4).

First, the State sought to introduce three 911 calls. (R72:5-6). Attorney Meetz objected to the admissibility of all three calls on hearsay grounds. (R72:7). As to 2014-CF-2129, the trial court ruled that the call placed by the child on May 18, 2014, is hearsay but qualified as an excited utterance. (R72:7). In so holding, the trial court explained:

> This child is clearly upset. The call, purpose is for seeking help, and the child is crying and very upset and under the influence of the emotion of the events. So in terms of hearsay, I don't think there are any issues in terms of any confrontation clause. I think it's for the purpose of

> emergency. So there is no Crawford issue with respect to that call.

(R72:7). The trial court did not, however, allow the State to introduce the second call placed on May 18, 2014, because the caller was unclear and she was not under the stress of the event described. (R72:7-8). This person detailed what had already occurred, which was no longer an emergency. (R72:8-9). As for a 911 call placed on July 1, 2014, from case number 2014-CF-2933, the trial court ruled the first part of the call was hearsay, but that it fell within the purview of an exception. (R72:9). In discussing the portion of the call the trial court would allow the State to introduce into evidence, the Court described:

> I will allow that call in as excited utterance and certainly a Crawford exception as well. She is basically describing that she has to get off the phone or he is gonna come back. And so there is a very urgent quality of the call, which I think deals with the Crawford issue, non-testimonial, for emergency purposes. That is my ruling on that.

(R72:9-10).

Attorney Meetz sought to introduce a municipal citation issued to AQJ for Obstruction on May 23, 2014, which was issued in relation to a recantation from her statement to the police on May 18, 2014. (R72:18). Attorney Meetz sought to introduce the fact that the citation was issued as it was relevant to AQJ's credibility. (R72:17-20). Although the trial court held that AQJ's recant statement was inadmissible, AQJ's credibility was a relevant consideration. (R72:21).

On September 30, 2014, the trial court re-addressed the admissibility of the citation. (R73:7). In so doing, the trial court made the following ruling:

> My initial impression was it goes to the victim's credibility. But then I started thinking, if it goes to her credibility, it is the police officers lying or telling the truth; lying or telling the truth, we don't allow – they testify about their beliefs about truthfulness. We let the jury do that.
>
> Then I really analyzed the obstructing, which really isn't a comment about the belief or disbelief about

> what she is saying. And when it is about a ticket issued for the purpose of or at least with the belief or with the understanding or with whatever proof or a ticket, not talking about beyond a reasonable doubt, but that limited proof involved in a ticket is that she was obstructing investigation, which doesn't mean she's lying or not lying at some point, it means she was – this officer believed her to be obstructing investigation at the time of that ticket. I think that presents a problem. However, I can't possibly let in the fact that she's obstructing an investigation when no one knows what the heck she is obstructing, Mr. Meetz. 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. And no one is gonna understand what it's for or what the difference is in the statements are.
>
> Not the first ones, not a recantation, none of them, because it's hearsay. The only reason I would be letting them in is because the defense is asking me to have a – challenge her to her credibility based on this ticket. And I can't – I have to give a context to this ticket. I can't possibly let in a discussion about a ticket that no one understands what she said in the first place…So just so you are clear and your client's clear, Mr. Meetz, this is allowing her statements about what happened on that initial occasion in, which aren't in.

(R73:7-9). After discussing the trial court's ruling with Mr. Moore twice, Attorney Meetz said that they would not "enter anything about the citation." (R73:11).

At trial, the State's first witness was David Pawlak, a telecommunicator with the Milwaukee Police Department. (R73:30). During Mr. Pawlak's testimony, a 911 call placed on July 1, 2014 was admitted into evidence and played for the jury. (R73:36-37). The relevant part of the 911 call is as follows:

Operator:	What's going on there?
Female:	My son's father jumped on me..
Operator:	Who jumped on you?
Female:	My son's father..He don't even know I got a phone I got get off the phone before he break it.
Operator:	The father…ok what did he do to you?
Female:	(unintelligible) he punched me in the head

Operator:	Where did he punch you?
Female:	In my head, he slammed my head into the wall
Operator:	Do you need medical attention?
Female:	Yeah, I had a concussion I need to go to the hospital

The State's second witness was Nicole Sprewer, also a telecommunicator with the Milwaukee Police Department. (R73:39). During Ms. Sprewer's testimony, a 911 call placed on May 18, 2014 was admitted into evidence and played for the jury. (R73:42-44). The relevant part of the 911 call is as follows:

Caller:	My mama bofrien choking my mama; and I'm really scared
Operator:	Ok – 2032 what, what's the street?
Caller:	38th street and he hurting my mama; (inaudible) and I'm scared!
Operator:	2032 N 38th?
Caller:	Yes, and and Lloyd
Operator:	Ok, so
Caller:	He in dere fighting can you send the police? (child crying) Pleease
Operator:	What is your name?
Caller:	Marianna
Operator:	Ok, you nee (interrupted by caller)
Caller:	I'm the oldest
Operator:	Ok, you said, how old are you?
Operator:	What is his name?
Caller:	Eric Moore

The State's next witness was Officer Heather Schweitzer-Brown, a law enforcement officer with the Milwaukee Police Department, who responded to contact Mr. Moore on November 3, 2013. (R73:70-72). Officer Schweitzer-Brown spoke with Mr. Moore about the mother of his child, AQJ. (R73:72). During cross-examination, Officer Schweitzer-Brown explained that the call was made because Mr. Moore got into a verbal altercation with AQJ. (R73:73). On re-direct examination, Officer Schweitzer-Brown testified that police were initially dispatched because AQJ called the police and that "Eric shoved her head into a sink." (R73:77). The State then rested. (R73:80).

After Mr. Moore waived his right to testify, the trial court made the following record:

> The other thing I just want to put on the record, because I thought about the fact that we never made a good record of it.
>
> We had a discussion ahead of time where the State said that they were going to put in identification of Mr. Moore through another incident that this last officer testified to and the purpose of it was identification.
>
> And it was going to be essentially that the police were called to the location, and that Mr. Moore identified himself and it was at that same address and he was there, and he also identified his child and that was my understanding of where that was going to go.
>
> Now when it came in, Mr. Meetz and Mr. Schindhelm asked all kinds of other things, most of which were not objected to so I did not rule on whether or not was hearsay, whether or not that was coming in other than the limited objections I did rule on.
>
> So I assume from a trial decision that was a decision made by both of you as to what to do.
>
> It was well beyond what I understood was going to come in, but again, since there was no objection, I mean I think Mr. Meetz tried to use the situation to his advantage, which is his right.
>
> But I just want to make a record of it so that there is no -- could be no questions at a later time about why we were even there.
>
> We did talk about the limited purpose, everyone understood the limited purpose, and then I think both of you made decisions to go beyond that purpose, some of which were challenged and some of which weren't and the ones that weren't came in."

(R74:7-9). The State explained that he remained within the parameters of the trial court's prior rulings and the understanding of the parties during direct examination. (R74:9). Only after Attorney Meetz opened the door by asking Officer Schweitzer-Brown about why she went to the residence did the State explore the specific details regarding that call on re-direct examination. (R74:9). Attorney Meetz acknowledged that it was his decision to go into these facts on cross-examination. (R74:10).

Attorney Meetz called Ericka Moore, Mr. Moore's sister, as an alibi witness. (R74:15-16). On cross-examination, Ms. Moore identified Mr. Moore as her brother. (R74:18). Ms.

Moore testified that Mr. Moore did not live with her, but rather "him and [AQJ] stayed together." (R74:22). She also testified that AQJ is also the mother of Mr. Moore's son. (R74:32).

After deliberations, the jury returned verdicts of guilty on all four counts. (R75:8). Mr. Moore was then sentenced on January 12, 2015. (R76:1-35). On November 13, 2015, Mr. Moore filed a Post-Conviction Motion seeking a new trial and in the alternative resentencing. (R18:1-2). The State responded to Mr. Moore's motion seeking post-conviction relief on January 29, 2016. (R25:1-20). Mr. Moore replied on February 15, 2016. (R26:1-12).

On March 1, 2016, the trial court filed a Decision and Order addressing Mr. Moore's Post-Conviction Motion. (R27:1-6). The trial court denied Mr. Moore's erroneously admitted evidence and sufficiency of the evidence claims without a hearing. (R27:4-5). The trial court, however, granted a limited hearing on part of Mr. Moore's ineffective assistance of counsel claim. (R27:4). On April 22, 2016, a hearing was held to determine whether Attorney Meetz's decision not to introduce AQJ's citation was strategic. (R77:1-30).

During this hearing, Attorney Meetz testified that he wanted to introduce a citation issued to AQJ as evidence that she recanted her original statement but ultimately they did not do so. (R77:9-10). The trial court held that upon admission of AQJ's citation into evidence then all of her prior statements would come in as well, which is the reason why Attorney Meetz opted not to introduce evidence of this citation. (R77:11-12). Attorney Meetz spoke with Mr. Moore about this issue. (R77:12).

Attorney Meetz explained that, after consulting with Mr. Moore, their strategy was "that the less evidence that came in against Mr. Moore, the better." (R77:13). This decision was made to keep out of evidence AQJ's prior statements about Mr. Moore battering her. (R77:13). Although AQJ's statement came in through the 911 calls, Attorney Meetz testified that these were limited versions of her original statements. (R77:15). Furthermore, the ultimate goal of introducing this citation was to attack AQJ's credibility, which Attorney Meetz

accomplished through the cross-examination of law enforcement officers and through the presentation of an alibi witness. (R77:14).

Mr. Moore testified that he initially wanted to admit AQJ's citation at trial. (R77:17). It was after discussing what would happen if the citation was admitted into evidence that Mr. Moore agreed with Attorney Meetz's assessment and suggestion. (R77:19). Mr. Moore admitted that he deferred to Attorney Meetz as his attorney. (R77:20).

In ruling on Mr. Moore's ineffective assistance of counsel claim, the trial court began by noting that the standard is highly deferential to Attorney Meetz's strategic decisions. The trial court then reiterated its prior ruling on the admissibility of AQJ's citation. It was after the trial court's ruling that Attorney Meetz and Mr. Moore jointly strategized not to admit AQJ's citation into evidence. The trial court even gave Attorney Meetz time to discuss this issue with Mr. Moore twice during the trial. This "was a strategic decision made in conjunction with Mr. Moore," who the trial court noted as an "active participant in his trial." Additionally, Attorney Meetz's described trial strategy was to attack AQJ's credibility, which was met with the conclusion that it was best to limit evidence *against* Mr. Moore.

The trial court also pointed out that Mr. Moore was most upset with the outcome of the trial. The outcome is a task left in the hands of a jury and an attorney can only make the best decisions as they proceed through trial.

As for the second prong, the trial court held that Attorney Meetz's performance was not deficient because the decision not to introduce AQJ's citation was strategic, fit with the law, and was made in consultation with Mr. Moore. Furthermore, to show prejudice Mr. Moore would have had to have shown that he was deprived of a fair trial with a reliable result. This means that he is tasked with affirmatively showing a reasonable probability that the outcome would have been different. The trial court held that all of the evidence against Mr. Moore was very strong and a recant statement is not likely to have affected the outcome.

STANDARD OF REVIEW

A person is not automatically entitled to a hearing on the two issues outlined above. First, a motion seeking post-conviction relief must, on its face, allege sufficient facts that would entitle a defendant to relief. State v. Bentley, 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion raises such facts, then the trial court must hold an evidentiary hearing. Id. at 310, 548 N.W.2d 50; Nelson v. State, 54 Wis.2d 489, 497, 195 N.W.2d 620 (1972). Should the motion, however, fail to raise facts sufficient to entitle a defendant to relief, present conclusory allegations, or if the record clearly demonstrates that the defendant is not entitled to relief, the trial court has the discretion to deny a defendant's motion without a hearing. Bentley, 201 Wis.2d at 310-11, 548 N.W.2d 50; Nelson, 54 Wis.2d at 497-98, 195 N.W.2d 629. The sufficiency of a defendant's pleadings is a question of law that is reviewed de novo. Bentley, 201 Wis.2d at 309-10, 548 N.W.2d 50. The trial court's discretionary decisions are reviewed under a deferential erroneous exercise of discretion standard. State v. Allen, 274 Wis.2d 568, 577, 682 N.W.2d 433, 438 (2004) (citing In re the Commitment of Franklin, 270 Wis.2d 271, 677 N.W.2d 276; Bentley, 201 Wis. 2d 311, 548 N.W.2d 50).

Upon review of evidentiary issues, "[t]he question on appeal is not whether the court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record. State v. Pharr, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983) (quoting State v. Wollman, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979)). The test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised. Id. This court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination. Pharr, 115 Wis.2d at 342 (citing Boodry v. Byrne, 22 Wis.2d 585, 589, 126 N.W.2d 503 (1964)). For a discretionary decision of this nature to be upheld, however, "there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." Pharr, 115 Wis.2d at 342

(quoting State v. Hutnik, 39 Wis.2d 754, 764, 159 N.W.2d 733 (1968)).

As for reviewing the sufficiency of the evidence to support a conviction, a reviewing court may not substitute its judgment for the trier of fact unless 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 reasonably, could have found guilt beyond a reasonable doubt. State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 758-59 (1990).

A claim that a person is entitled to a new trial on the grounds that trial counsel was ineffective is governed by Strickland v. Washington, 466 U.S. 668 (1984). There are two components when reviewing a defendant's claim that he was not provided with effective assistance of counsel in the trial court. A defendant must first show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. A defendant must next show that the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process rendering the result unreliable. Id. at 687. See also State v. Pitsch, 124 Wis.2d 628, 633, 369 N.W. 2d 711 (1985).

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. State v. Thiel, 264 Wis.2d 571, 665 N.W.2d 305 (2003). This court will uphold the circuit court's findings of fact, "include[ing] "the circumstances of the case and the counsel's conduct and strategy,'" unless they are clearly erroneous. Id. (quoting State v. Knight, 169 Wis.2d 509, 514 n. 2, 484 N.W.2d 540 (1992)).

ARGUMENT

I. The Trial Court Properly Denied Moore's Motion for a New Trial Based on the Claim of Improperly Admitted Evidence.

In Crawford v. Washington, 541 U.S. 36, 68 (2004), the United States Supreme Court held that a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity for cross-examination. The Supreme Court elaborated on the distinction between testimonial and non-testimonial statements in Davis v. Washington, 547 U.S. 813, 822, 826-27 (2006), which involved, in part, a recording of a 911 call. The Davis Court stated:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. In State v. Rodriguez, 295 Wis.2d 801, 722 N.W.2d 136 (2006), the Wisconsin Court of Appeals discussed the Davis decision, noting that

> [i]nsofar as a victim's excited utterances to a responding law-enforcement officer encompass injuries for which treatment may be necessary, or reveal who inflicted those injuries, which may facilitate apprehension of the offender, they serve societal goals other than adducing evidence for later use at trial.

An out-of-court declaration must be evaluated to determine whether it is overtly or covertly intended by the speaker to implicate the accused at a later judicial proceeding or is a burst of stress-generated words whose main purpose is to get help or to secure safety, and are thus devoid of the "possibility of fabrication, coaching, or confabulation." Id. at ¶26 (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990).

The Davis Court held that the Sixth Amendment of the U.S. Constitution does not apply to non-testimonial statements. Davis, 547 U.S. at 826. In State v. Manuel, which was decided before Davis, the Wisconsin Supreme Court adopted Ohio v.

Roberts, 448 U.S. 56 (1980), for determining the admissibility of non-testimonial statements under the Wisconsin Constitution. Manuel, 281 Wis.2d 554, 584, 697 N.W.2d 811 (2005). The Roberts Court established the following two-part test to determine the admissibility of out-of-court statements under the Confrontation Clause:

> When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception. Roberts, 448 U.S. 56, 66 (1980).

Mr. Moore argues that the trial court improperly admitted into evidence the 911 call placed on May 18, 2015. The actual issue on appeal is whether the trial court improperly denied Mr. Moore's motion for a new trial on the grounds that the trial court improperly admitted evidence that affected his substantial right. The evidence at issue on appeal was the 911 call placed on May 18, 2015. The substantial right thus affected was Mr. Moore's 6th Amendment Right of Confrontation.

During the evidentiary portion of the trial, the trial court made specific findings about the testimonial component of each out-of-court statement the parties sought to introduce and whether or not a hearsay exception applied. The trial court held that both 911 calls were non-testimonial as they were placed for the purpose of seeking assistance from law enforcement. In so ruling, the trial court pointed to the caller's emotions, tone of voice, and urgency in the calls. The trial court also ruled that the statements were excited utterances. With those factual findings, Mr. Moore's right to confrontation was not violated. Furthermore, the trial court afforded Mr. Moore with the opportunity to impeach these statements he now challenges.

In ruling on this issue, the trial court stood by its factual findings and by this ruling and denied Mr. Moore's motion for a new trial on the grounds that evidence was improperly admitted. The record outlines a reasonable basis for the admissibility of the 911 call in question. The basis is reasonable because the trial court provided a detailed factual

explanation for her ruling and that explanation was consistent with controlling legal standards.

II. The Trial Court Properly Denied Moore's Motion for a New Trial Based on Ineffective Assistance of Counsel.

The United States Supreme Court set forth the standards to be applied to a claim of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. at 698 (1984). The Strickland court outlined those standards in the following terms:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. See also State v. Pitsch, 124 Wis.2d 628, 633, 369 N.W. 2d 711 (1985).

The degree of deference to be given to counsel's decision is important in determining whether an attorney was functioning as constitutionally guaranteed counsel, and the reviewing court is to afford counsel's behavior a high degree of deference. Strickland, 466 U.S. at 698; Pitsch, 124 Wis.2d at 637.

Thus, a reviewing court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. The trial court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. At the same time, counsel is strongly presumed to have rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 590. With regard to the choice of trial strategy, the Supreme Court stated,

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, apply a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

Finally, the court observed that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. at 691. Thus, inquiry into counsel's conversations with the defendant is important in determining effective performance. Id.

Mr. Moore argues that Attorney Meetz's decision not to introduce evidence of AQJ's recantation (by way of the citation she was issued) was deficient performance that was prejudicial because it undermines the confidence in the outcome of this trial. The actual issue on appeal is whether trial court erroneously denied Mr. Moore's Post-Conviction Motion in light of the circumstances of the case and Attorney Meetz's strategy.

Mr. Moore's argument is flawed in that not only did Attorney Meetz consult with him regarding the admission of this evidence but Attorney Meetz then proceeded with his strategy of attacking AQJ's credibility by other means. Not only is this strategy outlined in the trial court record, but it was also confirmed by Attorney Meetz *and* Mr. Moore during the *Machner* hearing. In listening to Attorney Meetz explain his strategy during this hearing, the trial court was satisfied that in order to limit the amount of evidence *against* Mr. Moore, Attorney Meetz and Mr. Moore decided not to introduce the citation into evidence.

As for the second prong, Mr. Moore was not prejudiced by any arguable deficiency. That the State's case was primarily based on admissible hearsay statements does not render Attorney Meetz's strategic decision prejudicial. Two facts must be assumed in order to reach this conclusion. First, the trial outcome would have been different had this evidence not been introduced. Second, Mr. Moore was effectively left without a defense strategy. As the trial court pointed out, there is no affirmative evidence from Mr. Moore that could lead to the conclusion that the outcome of his trial would have been different with the admission of this citation. With the evidence as presented to the trial court, there is no way to reach that conclusion. Furthermore, Mr. Moore did present a defense. Not only was AQJ's credibility attacked through other witnesses, which was the intended purpose of introducing the citation, but Mr. Moore also presented an alibi witness, which also attacked AQJ's credibility.

These factual findings are to be upheld unless they are clearly erroneous. The specific rulings from the trial court coupled with the lack of any evidence from Mr. Moore on appeal fails to bridge the gap to the conclusion that the trial court was clearly erroneous.

III. The Trial Court Properly Denied Moore's Motion for a New Trial Based on the Sufficiency of the Evidence.

The burden of proof is upon the State to prove every essential element of the crime charged beyond reasonable doubt. A criminal conviction can stand based in whole or in part upon circumstantial evidence. The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding with such a review being limited by these rules. Johnson v. State, 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972) (quoting Bautista v. State, 53 Wis.2d 218, 223, 191 N.W.2d 725 (1971)). "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Poellinger, 153 Wis.2d at 506, 451 N.W.2d at

757 citing Jackson v. Virginia, 443 U.S. 307, 319 (1979). The reviewing court should only substitute its judgment when the trier of fact relied upon evidence "that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." State v. Tarantino, 157 Wis.2d 199, 218, 458 N.W.2d 582 (1990) citing State v. Daniels, 117 Wis.2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983).

Mr. Moore does not challenge the sufficiency of the State's evidence insofar as there was insufficient evidence to prove the elements of each crime beyond a reasonable doubt. Mr. Moore's argument (the argument is identical in both Mr. Moore's Post-Conviction Motion as well as his Appeal) is that there was insufficient evidence to prove identity beyond a reasonable doubt. As the State argued in its response to Mr. Moore's Post-Conviction Motion, the evidence in the record was sufficient to substantiate the allegation that Mr. Moore is not only the father of AQJ's child but also the same person from all of the incidents submitted to the jury. Furthermore, Mr. Moore's alibi witness identified him as her brother, also that Mr. Moore lived with AQJ, and that he shared a child in common with AQJ. Additionally, AQJ identifies Mr. Moore as the father of her son and also as the individual who assaulted her. Lastly, Officer Schweitzer-Brown testified that Mr. Moore made a report about the mother of his child, AQJ.

In addressing Mr. Moore's claim that there was not enough evidence to establish identity, the trial court found that the 911 call placed on July 1, 2014, in and of itself, was "sufficient evidence to sustain the jury's verdict on the charges issued in 14CF2933." (R27:5). As evidenced above, this 911 call was not so lacking in probative value and force that no reasonable trier of fact could not have found that Mr. Moore is the person who committed the acts described. AQJ clearly identifies the father of her child as the person who harmed her. Standing alone, the trial court held that this piece of evidence was sufficient to establish identity. Additionally, the 911 call that was placed on May 18, 2014, specifically identifies the Defendant as hitting the caller's mother at the exact same location as the other incident. The combination of these 911 calls in conjunction with the testimony is more than sufficient to identify Mr. Moore as the accused.

CONCLUSION

For all of the reasons stated above, the State of Wisconsin respectfully asks this Court to affirm the decision of the trial court.

Dated this _____ day of January, 2017.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

_____
Sarra M. Kiaie
Assistant District Attorney
State Bar No. 1089336

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 5,376.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

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Date

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