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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

For the reasons set forth in the Defendant-Appellant's brief-in-chief and this reply brief, Defendant-Appellant respectfully asks this Court to reverse the decision of the circuit court finding that Mr. Moore is not entitled to a new trial based on the improper admission of evidence that affected his substantial rights; that he was not denied his constitutional right to effective assistance of counsel; and

the evidence in case number 14CF002933 was sufficient to sustain the jury's verdict.

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

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

A. State Response

The State responds that:

"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", concluding that "the trial court afforded Mr. Moore the opportunity to impeach those statements he now challenges." (State's Brief, p. 12)

The State cites the standard of review as "[t]he question on appeal is not whether this 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 record." *State v. Pharr*, 115 Wis.2d 334, 342, 340 NW 2d 498, (1983)

B. Reply Argument

The State cites an incomplete standard of review.

While it is correct that evidentiary decisions of the circuit court are generally reviewed for erroneous exercise of discretion, whether admission of a hearsay statement violates a defendant's right to confrontation presents a question of law that this court reviews de novo. *State v. Weed*, 2003 WI 85, ¶ 10, 263 Wis.2d 434, 666 N.W.2d 485, citing *Lilly v. Virginia,* 527 U.S. 116, 136-37, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

Article I, Section 7, Wisconsin Constitution, provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face."

The sixth amendment, United States Constitution, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him".

The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the

constitutional objective of a fair trial. *Chambers v. Mississippi,* 410 U.S. 284, 294-95, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

"[A] defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at trial if those statements are `testimonial' and the defendant has not had a `prior opportunity' to cross-examine the out-of-court declarant." *State v. Rodriguez,* 2006 WI App 163, ¶12, 295 Wis. 2d 801, 722 N.W.2d 136

Mr. Moore clearly had no prior opportunity for cross-examination. He also considers the hearsay admitted as being testimonial.

As noted by the Court:

> This call from the child was so compelling, and it came in, and it came in because it was made for the purposes of getting help. It was an excited utterance, and it was so compelling.

(R 80, p. 10, ll. 22-25; App. 163)

Under these circumstances, Mr. Moore's defense was crippled by the admission of this evidence and his substantial rights affected.

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

Mr. Moore argues that trial counsel's performance fell below objective standards of reasonableness and was outside the wide range of professionally competent assistance and that he was prejudiced by counsel's deficient performance.

Trial counsel's supposed tactical decision to not introduce evidence of AQJ's recantation was deficient performance that prejudiced Mr. Moore.

A. State Response

The State responds that:

"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." (State's Brief, p. 14)

B. Reply Argument

This is not the correct standard of review.

Although the trial court's findings of fact regarding counsel's conduct are reviewed under a clearly erroneous standard, *State v. Pitsch,* 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985), whether the facts found constitute deficient performance and prejudice are questions of law that this Court reviews independently. *State v. Tulley,* 2001 WI App 236, ¶5, 248 Wis.2d 505, 635 N.W.2d 807.

The first step in the analysis of a claim of ineffective assistance of counsel is to determine what the attorney did or did not

do and the basis for the challenged conduct. *State v. Fencl,* 109 Wis. 2d 224, 247, 325 N.W.2d 703 (1982) (Abrahamson, J., concurring).

The parties agree that counsel's chosen strategy was to not introduce evidence of AQJ's recantation on the premise that this would limit the amount of evidence against Mr. Moore.

Mr. Moore contends that this strategy was beyond the wide range of professionally competent assistance, *Strickland v. Washington*, 466 U.S. 668, 690, and not the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 689.

The State argues that Mr. Moore's argument is flawed because trial counsel consulted with Mr. Moore "...regarding the admission of this evidence but Attorney Meetz then proceeded with his strategy of attacking AQJ's credibility by other means" concluding that "...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." (State's Brief, p. 14)

The circuit court also considered Mr. Moore's participation:

> "We talked, and he concurred" -- and that's Mr. Moore -- "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 80, p. 6, ll. 9-14; App. 159)

And so it was a strategic decision made in conjunction with Mr. Moore, who I will also note was an active participant in his trial. He discussed things with Mr. Meetz at times, including at this time; and he was certainly an active participant

(R 80, p. 6, ll. 16-20; App. 159)

I think he understood fully and that he participated in the choice to not have it come in -- that it was his discussions with Mr. Meetz, that they agreed, and that that was the trial strategy

(R 80, p. 8, ll. 20-23; App. 161)

He was not a wallflower in this case. He was absolutely a participant

(R 80, p. 10, ll. 2-3; App. 163)

Both the state's argument and the court's ruling seem to create either a hybrid representation standard or a different standard for ineffective assistance of counsel claims if the defendant actively participates in his or her defense.

Wisconsin has not recognized a right to hybrid representation on either trial or appellate level proceedings. To the contrary, Wisconsin has concluded that such a right does not exist. *Moore v. State,* 83 Wis. 2d 285, 297-302, 265 N.W.2d 540 (1978), *cert. den.* 439 U.S. 956 (1978); *State v. DEBRA AE*, 188 Wis.2d 111, 137-39, 523 NW 2d 727 (1994).

A client's participation in discussions with counsel, does not somehow relieve the attorney of exercising reasonable professional judgment.

"While the defendant should be consulted concerning pleas of guilty and the general defense of his case, he need not be consulted in every detail. The accused has no more right to control his attorney and the conduct of the trial than he has to dictate to his surgeon how to perform the operation." *State v. Harper,* 57 Wis. 2d 543, 549-50, 205 N.W.2d 1 (1973). "[N]ot every objection of a client to his counsel during the course of trial as to conduct of the defense is effective to vitiate what would otherwise be a tactical waiver. Such an objection is only effective within the area of and in reference to those matters in which the ultimate decision is reserved to the client." *State v. Harper, supra*, 550, 205 N.W.2d 1 (1973)

When the legal conclusions of the circuit court are reviewed under the correct standard, counsel's performance to not attempt to

impeach the alleged victim was not a reasonable professional judgment based on the law and facts.

To show prejudice, a defendant 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. *State v. Griffin,* 220 Wis.2d 371, 391, 584 N.W.2d 127, 135 (Ct.App. 1998), review denied, 221 Wis.2d 654, 588 N.W.2d 631 (1998).

In addressing this issue, the circuit court observed:

> Mr. Moore is upset about is the outcome -- "like, what would be the outcome if it didn't come in."
>
> There's no way Mr. Meetz, nor any attorney, is ever charged with being able to tell a client what the outcome is going to be.

(R 80, pp. 8-9; App. 161-62)

The court is correct that no one can precisely predict an outcome on retrial, but that is not Mr. Moore's burden. He must show only "a probability sufficient to undermine confidence in the outcome." *State v. Griffin, supra,* 220 Wis.2d 371, 391

Trial counsel's performance was deficient and Mr. Moore was prejudiced by that deficiency.

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

Mr. Moore argues that the evidence in case number 14CF002933 was insufficient to sustain the jury's verdict, as to identity.

A. State Response

The State responds that:

"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." (State's Brief, p. 16)

B. Reply Argument

"The identity of the defendant was among the other elements that the state had to prove." *State v. Hammer*, 2000 WI 92, ¶ 25, 236 Wis.2d 686, 613 NW 2d 629.

While Mr. Moore concedes that "...in reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of 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 NW 2d 752, (1990)

But, 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

For the reasons offered in this reply brief and in Mr. Moore's principal brief, Mr. Moore respectfully 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. 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.

The evidence in case number 14CF002933 was insufficient to sustain the jury's verdict. This Court should vacate that judgment and remand with instructions to dismiss that case.

Dated: September 5, 2017.

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CERTIFICATIONS

I certify that this brief meets the form and length requirements of Rule 809.19 (8)(b) and (c) on that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2,186 words and 14 pages.

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).

A copy of this certificate has been served with the paper copies of this brief and served on all parties.

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