STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1371-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICAH NATHANIEL RENO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A POSTCONVICTION MOTION FOR A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE J. D. WATTS, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

This Court first needs to determine whether the no-contact rule's application here was settled or unsettled.

If the law is settled and it is clear that the no-contact rule did not bar the contact with Abby, as Reno argues (Reno's Br. 4–5), then Attorney Eichenlaub may have been deficient in failing to contact Abby, absent another strategic reason for doing so. *State v. Maloney*, 2005 WI 74, ¶ 23, 281 Wis. 2d 595, 698 N.W.2d 583 (ignorance of well-defined legal principles is nearly inexcusable).

In contrast, if the law is unsettled and it is unclear whether the rule barred the contact with Abby, as the State argues (State's Br. 24–28), then this Court does not assess the correctness of Attorney Eichenlaub's decision, but rather, its *reasonableness* under the prevailing professional norms of Wisconsin. *Maloney*, 281 Wis. 2d 595, ¶¶ 24–25.

This Court should find that the law is unsettled, because the rule is subject to different interpretations, and can reasonably be analyzed two different ways. *Maloney*, 281 Wis. 2d 595, ¶¶ 26–29. Accordingly, Reno's defense counsel was not ineffective in failing to contact Abby based on that unsettled legal principle, because he reasonably concluded that he could not contact Abby. *Id.* ¶ 30.

ARGUMENT

I. Attorney Eichenlaub was not deficient in failing to contact Abby, because his decision not to contact her, based on his interpretation of the no-contact rule, was reasonable.

A. In Wisconsin, the application of the no-contact rule in this context is unsettled.

Both the circuit court's decision (43:7, A-App. 192) and Reno's threshold argument on appeal (Reno's Br. 4–5)[1] are predicated on the belief that the law is clear in Wisconsin, and that Reno's counsel had an obligation to contact Abby, despite her counsel's express prohibition. But this Court should reject that legally untenable position, for two reasons.

1. The Wisconsin Supreme Court has expressly declined to decide if SCR 20:4.2 prohibits contact with represented witnesses in the context of pre-trial criminal investigations, and has explicitly stated that the law is unclear and unsettled.

First and foremost, the law is unclear in Wisconsin because the Wisconsin Supreme Court in *Maloney*, 281 Wis. 2d 595, ¶¶ 19–30, expressly stated that it was not going to settle the point, thereby intentionally leaving the law unsettled. *See* State's Br. 25–28.

The *Maloney* court recognized the split of authorities, and then expressly declined to resolve the issue, noting, "We need not determine which line of cases Wisconsin will

[1] The State will address Reno's arguments under *Kinast/Jennifer M.* (Reno's Br. 7–10) and *Jenkins* (*Id.* 3–4, 10–14) in Sections I(C) and II(B), respectively.

ultimately follow regarding the applicability of SCR 20:4.2 to the pre-charging criminal investigative setting." *Maloney*, 281 Wis. 2d 595, ¶¶ 19–22, 24. *Maloney* then explicitly characterized the application of SCR 20:4.2 in this context as "unclear and unsettled." *Id.* ¶ 30.

Reno ignores the Wisconsin Supreme Court's express pronouncement in *Maloney* that the law is unsettled, and instead tries to distinguish *Maloney* by arguing that *Maloney* only applies to "pre-charging criminal investigations," whereas his case involves "an eyewitness in [an already-charged] criminal proceeding." (Reno's Br. 6.)

The applicability of *Maloney*, however, does not depend on whether the *defendant* has been charged in the criminal proceeding. Instead, *Maloney* recognized a split of authorities over whether any pre-charging contact with *any* represented witness occurs before the *witness* had been charged. *Maloney*, 281 Wis. 2d 595, ¶¶ 19–22.

More importantly, in 1995 the ABA model rule replaced "party" with "person," such that the rule's application during a criminal investigation is no longer tied to the filing of an indictment against the represented person. Wisconsin's SCR 20:4.2 also uses the term "represented person," not "represented party." *See* State's Br. 29–30.

Therefore, *Maloney* is directly on point, and explicitly holds that the law is unclear in Wisconsin as to whether the no-contact rule should apply in this context.

2. The Wisconsin courts have not yet construed the meaning of the phrase "the subject of the representation."

Second, the law is unsettled because the Wisconsin courts have never construed the phrase "the subject of the representation." *See* State's Br. 28–29.

Reno does not address the dearth of authority in Wisconsin, but instead argues that the plain language of the rule is clear, and the prohibition only applies if the "matters" are the same. (Reno's Br. 5.) He concludes that the rule does not apply here, because these "matters" were separate and distinct under the facts of each charged case, and Abby was a represented "person" in a different "matter." (*Id.* 5–7.)

Under a plain language interpretation of SCR 20:4.2, however, the rule's application does not depend on whether the actual "matters" themselves were separate or distinct—that is, whether they were different charges or cases. Rather, the dispositive inquiry is whether the proposed communication with the represented person relates to the "*subject* of the representation." *See* SCR 20:4.2 (emphasis added). *See also* State's Br. 25, 28–30, 33–35.

The word "matter" and the phrase "subject of the representation" cannot be one and the same, or else the latter phrase is rendered superfluous in the rule. But even if it is unclear whether the words "matter" and "subject of the representation" refer to the same thing, that ambiguity illustrates the State's point. If the word "matter" is ambiguous and subject to different interpretations, then the application of the no-contact rule here is necessarily unsettled and unclear. *Maloney*, 281 Wis. 2d 595, ¶¶ 26–29.

This Court should also reject Reno's argument (Reno's Br. 6) that *In re New York v. Simels*, 48 F.3d 640 (2nd Cir. 1995), controls in Wisconsin. Reno fails to acknowledge that other authorities have rejected the *Simels* position. *Maloney*, 281 Wis. 2d 595, ¶¶ 21–22.[2]

Moreover, Reno fails to acknowledge that a post-*Simels* formal ABA ethics opinion has already rejected his overly narrow view of the word "matter," and adopted a more inclusive approach that protects all represented persons "whose *interests are potentially distinct* from those the client on whose behalf the communicating is acting." *See* ABA Formal Ethics Op. 95-396, 7 (1995) (emphasis added). The rule does not just protect persons who are represented in the same "matter"; but also protects represented persons whose "interests" may diverge. *See* State's Br. 29–30.

This Court should reject Reno's argument that the law is settled. Because the law is unsettled, this Court should not analyze the correctness of Attorney Eichenlaub's decision not to contact Abby, but should decide the "narrower" question of counsel's effectiveness—that is, whether the decision fell below an objective standard of *reasonableness*, as measured against the facts of the case and the prevailing professional norms. *Maloney*, 281 Wis. 2d 595, ¶¶ 26–30.

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[2] *See, e.g., United States v. Hammad*, 858 F.2d 834, 839–41 (2d Cir. 1988); *United States v. Koerber*, 966 F. Supp. 2d 1207, 1225–33 (D. Utah 2013).

B. Under the facts, Attorney Eichenlaub reasonably believed that the subject of the two representations were similar enough to trigger the no-contact prohibition, because Abby's attorney expressly forbade him from contacting Abby.

Attorney Eichenlaub knew that Abby was not actually charged as a co-defendant in Reno's same matter (60:43–45, A-App. 150–52.)[3] But he could not know—without talking to Abby or her counsel—exactly what the "subject" of Abby's representation was, or whether it involved the same "subject" as Reno's representation. Attorney Eichenlaub also knew about Abby's DPA, so he likely knew that Abby's prostitution charges were from a different date than Reno's charges. (60:46, 62, A-App. 153, 169.) But he still could not have known for sure whether Abby's prostitution charges were related to the "subject" of Reno's charged crimes in this case—that is, long-term trafficking and pimping.

Nevertheless, Attorney Eichenlaub did not need to know the exact facts surrounding Abby's representation. He knew one key fact—namely, that Attorney Valdez expressly forbade his contact with Abby. (60:45, 62, A-App. 152, 169.) Both the circuit court (43:8, A-App. 193) and Reno (Reno's Br. 3–4) brush aside this key fact, arguing that Attorney Eichenlaub should not have "felt constrained" by Attorney Valdez's "denial of access" to Abby.

But when Attorney Valdez expressly forbade Attorney Eichenlaub from contacting Abby, it was entirely

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[3] Reno cannot support his assertion that it was "unlikely" that Abby would be prosecuted for her prostitution in Reno's case. (Reno's Br. 5.) The prosecutor told the court that he *did not know* whether anyone considered prosecuting Abby as a potential co-defendant in Reno's case. (60:7–8, A-App. 114–15.)

reasonable for Attorney Eichenlaub to conclude that the "subject" of the two representations were sufficiently similar to trigger the no-contact rule. *See* SCR 20:1.0(g) (knowledge may be inferred from circumstances). Attorney Eichenlaub also reasonably concluded that communicating with Abby might delve into attorney-client protected "subject[s]."

The circuit court held that Attorney Eichenlaub had no strategic reason for not contacting Abby, "other than" the no-contact rule. (43:8, A-App. 193.) But the no-contact rule was reason enough. Attorney Valdez clearly did not want Attorney Eichenlaub talking with Abby. Even if Attorney Eichenlaub was mistaken that the rule did not bar the contact, under the circumstances he still reasonably concluded that he could not ethically contact Abby, given her counsel's express prohibition. *Maloney*, 281 Wis. 2d 595, ¶¶ 26–27 (counsel's belief that he was prohibited from doing something, though mistaken, was reasonable under circumstances).

C. Under *Kinast* and *Jennifer M.*, the prevailing professional norms in Wisconsin, Attorney Eichenlaub's decision not to contact Abby was reasonable.

Reno also argues that Attorney Eichenlaub's decision not to contact Abby was unreasonable, because *In re Kinast*, 192 Wis. 2d 36, 530 N.W.2d 387 (1995), and *In re Jennifer M.*, 2010 WI App 8, 323 Wis. 2d 126, 779 N.W.2d 436, do not apply. (Reno's Br. 7–10.) This Court should reject Reno's arguments.

1. The record supports the State's assertion that Abby was a vulnerable witness whose interests were potentially adverse to Reno's.

Reno first argues that Abby was not a vulnerable witness, because the State "ignores the fact" that Abby wanted to testify, making *Kinast* and *Jennifer M.* inapplicable to his case. (Reno's Br. 7–9.)

The fact that a witness wants to testify, however, is completely irrelevant if the witness *cannot* testify for some reason, such as when her testimony is inadmissible under the rules of evidence, or when her testimony has been suppressed or excluded by court order.

More importantly, the State *did* discuss at length the facts showing that, although Abby wanted to testify, her interests were potentially adverse to Reno's, such that Attorney Eichenlaub reasonably believed it would have been unethical under SCR 20:4.2 for him to contact Abby against her counsel's express prohibition. (State's Br. 33–37.)

Reno then argues that nothing in the record supports the State's assertion that Abby's stated interest in helping Reno was not necessarily in Abby's best interest. (Reno's Br. 9.) By Abby's own admission at the *Machner*[4] hearing, however, Abby prostituted herself along with N.B. to support her expensive heroin addiction. (60:13–14, 23–26, A-App. 120–21, 130–33.) Moreover, Abby was still subject to the DPA in her own case at the time of Reno's trial. (60:29, 69–74, A-App. 176–81.)

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

Thus, based on these facts of record, the postconviction court properly recognized that Abby was arguably either a victim of Reno's crimes or a party to them. (43:6, A-App. 191.) Either way, it would have been unwise, and not in her best interest, for Abby to talk with Reno's lawyer without her own lawyer present, because she was vulnerable to Attorney Eichenlaub's potential pressures. *See* State's Br. 17–18, 35, 40.

2. The circuit court erred in not applying *Kinast* and *Jennifer M.* as prevailing professional norms, because they are the only published Wisconsin cases construing SCR 20:4.2, and they both hold that all lay witnesses are vulnerable witnesses, even adult competent witnesses.

Reno next argues that the postconviction court did not need to apply *Kinast* and *Jennifer M.* as the prevailing professional norms in Wisconsin, calling the State's claim "incredulous." (Reno's Br. 8–9.) But those two cases clearly apply here, at least by analogy. Besides *Maloney*, they are the only published cases in Wisconsin directly construing SCR 20:4.2, and both cases discuss the purposes and policies behind the no-contact rule. The circuit court clearly erred by not considering published cases that construe the very rule at issue here.

Reno then argues that *Kinast* and *Jennifer M.* are distinguishable, because Abby was not a vulnerable witness, but an adult competent witness who understood her rights and wanted to testify. (Reno's Br. 8–9.) Those cases clearly hold, however, that Abby was vulnerable simply because she was a lay witness whose interests were potentially adverse to Reno's. *See* State's Br. 30–36.

This Court's decision in *Jennifer M.* makes clear that, even in cases with competent adult witnesses, the rationale behind the no-contact rule is to protect *all* lay witnesses from undue pressure from another person's attorney, and to ensure that the layperson does not inadvertently disclose privileged information or make unwise statements. *Jennifer M.*, 323 Wis. 2d 126, ¶ 10. Likewise, *Kinast* instructs that the no-contact rule exists to prevent *all* witnesses "from being intimidated, confused, or otherwise imposed upon by counsel for an adverse party," regardless of whether the communication was innocuous or sinister. *Kinast*, 192 Wis. 2d at 43–44.

Therefore, the rule exists to level the playing field, to eliminate the disparity in skill between attorney and layperson, thereby leaving a skilled attorney to deal with another skilled attorney. *Jennifer M.*, 323 Wis. 2d 126, ¶ 10; *Kinast*, 192 Wis. 2d at 43–44. It does not just apply to incompetent or minor witnesses.

Moreover, *Jennifer M.* further instructs that the no-contact rule exists for reasons unrelated to the protection of the witness herself. *Jennifer M.*, 323 Wis. 2d 126, ¶ 10. It also protects the integrity of the attorney-client relationship between the opposing attorney and that attorney's client, so that counsel is "precluded from driving a wedge between the opposing attorney and that attorney's client." *Id.*

This Court should find that Attorney Eichenlaub did not render ineffective assistance, because his decision not to contact Abby was reasonable, both under the facts and under the prevailing professional norms. *Maloney*, 281 Wis. 2d 595, ¶¶ 26–30.

II. Attorney Eichenlaub's decision not to call Abby as a trial witness was neither deficient nor prejudicial.

The circuit court also erred (43:7–9, A-App. 192–94) in finding that Attorney Eichenlaub's failure to call Abby as a trial witness was deficient performance that prejudiced Reno.

A. Attorney Eichenlaub's failure to call Abby as a trial witness was not deficient, because he had no obligation to litigate her Fifth Amendment privilege.

Reno argues that Attorney Eichenlaub was deficient in failing to litigate the issue of Abby's Fifth Amendment privilege to determine whether Abby could testify at trial. (Reno's Br. 9–10.) But Reno provides no legal authority for this argument, such that this Court should reject it outright. *State v. Pettit,* 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (court does not consider arguments unsupported by legal authority).

Moreover, no affirmative obligation existed for Attorney Eichenlaub to litigate the issue or to seek a court order. *See* State's Br. 38–40. Reno does not respond to the State's arguments, so this Court should deem them admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

B. Attorney Eichenlaub's failure to call Abby as a trial witness did not prejudice Reno.

There was also no reasonable probability that Abby would have testified at trial against her Fifth Amendment privilege, had Reno subpoenaed her to testify. *See* State's

Br. 40–41. In calling the State's argument "speculation," Reno cites the circuit court's factual findings that Abby did not invoke her privilege, nor did she seek counsel, at the later *Machner* hearing. (Reno's Br. 12–13.) But those facts, although not clearly erroneous, have no bearing on whether Abby would have invoked the privilege earlier, at trial, when she was still subject to the DPA in her own case, and when her attorney prohibited her from even speaking with Reno's counsel.

More importantly, there is no reasonable probability that Abby's testimony would have changed the result at trial, even if she had waived her Fifth Amendment privilege. *See* State's Br. 41–45.

Reno argues that, as in *State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, Abby was an "eyewitness" whose testimony went to the "core of the defense," because Abby was the only witness to "almost all of the events." (Reno's Br. 3–4, 10–14.) But *Jenkins* is completely distinguishable, because Abby was not an independent source covering information that was different than what the jury already knew. *See* State's Br. 41–45.

Reno does not address any of the facts the State cites (State's Br. 41–45) showing that other testimony and evidence presented at trial duplicated what Abby would have testified. Nor does Reno address any of the facts the State cites (*id.*) showing that Abby could *not* have testified about the most crucial events—namely, the abduction and the sexual assault—because she was not there for either one.

This Court should deem the State's facts admitted, because Reno has failed to dispute them. *Charolais*, 90 Wis. 2d at 109 (unrefuted facts deemed admitted).

CONCLUSION

This Court should REVERSE the circuit court's decision granting a new trial, and reinstate Reno's conviction. Attorney Eichenlaub's decision not to call Abby as a trial witness was neither deficient nor prejudiced Reno.

Dated this 28th day of February, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,981 words.

Dated this 28th day of February, 2017.

_____
SARAH K. LARSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 28th day of February, 2017.

_____
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