State of Wisconsin
Court of Appeals
District 1
Appeal No. 2017AP000075-CR, 76, 77

State of Wisconsin,

Plaintiff-Respondent,

v.

Lee Vang,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Stephanie Rothstein, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

Whether the circuit court erred in denying Vang's postconviction motion alleging ineffective assistance of counsel, without conducting an evidentiary hearing, where Vang's motion alleged that his attorney's performance was deficient and prejudicial in three respects: (1) for failing to object on hearsay grounds to a police officer's testimony recounting a statement he took from the alleged victim, Jennie Vang, about the sexual assault incident; (2) for eliciting from Vang on direct examination that, on the night of the sexual assault incident, Vang had been involved in an illegal street race, thereby opening the door to detailed cross-examination by the prosecutor concerning the incident; and, (3) for failing to object on relevance grounds when the prosecutor asked Vang on cross-examination about the fact that he was featured on a "most wanted" television show.

Answered by the circuit court: No. Vang's trial counsel was not constitutionally ineffective.

Summary of the Argument

Vang's postconviction motion alleged that his trial counsel was constitutionally ineffective because (1) she failed to object to officer Anderson's testimony recounting Jennie Vang's statement to police concerning the sexual assault; (2) she elicited testimony on direct examination of Vang that he was involved in illegal street racing; and (3) she failed to object to cross-examination of Vang that elicited the fact that he had been featured on a "most wanted" television program.

The circuit court denied the motion.

The court reasoned that, with regard Anderson's recounting of Jennie's statement to police, counsel's performance was not deficient because, had counsel objected on the grounds of hearsay, the court would have overruled the objection. According to the judge, Jennie's statements were admissible as prior consistent statements offered to rebut a claim of recent fabrication or improper motive. Additionally, the judge wrote, even if the evidence should not have been admitted, the admission of the evidence was not prejudicial because, even without the evidence, the judge found Jennie to be a credible witness.

The circuit court erred because there is no foundation in the record that Vang ever claimed that Jennie recently

fabricated her trial testimony. Rather, the record is clear that Vang's claim was that Jennie had been fabricating all along. The admission of this testimony, considering the entire context of the case and given Vang's theory of defense that Jennie was not truthful about the sexual assault, was prejudicial because it improperly bolstered Jennie's credibility. Whether, aside from Anderson's testimony, the circuit judge found Jennie to be credible is beside the point. The improper admission of this evidence undermines one's confidence that this was a fair trial because it improperly and unfairly undermined Vang's theory of defense.

The circuit court did not discuss deficient performance with regard to the remaining claims. Rather, the judge found that the admission of the street racing evidence was not prejudicial because there was already evidence in the record that Vang was of bad character. The circuit court found that the "most wanted" evidence was not prejudicial because it was merely another way of indicating that an arrest warrant had been issued for Vang after he failed to appear at the jury trial.

Plainly, though, this evidence is highly prejudicial. The illegal street racing evidence goes to Vang's character, and it offered the jury the temptation to find him guilty merely because he appears to be a person of bad character who is inclined to commit crimes. Finally, being on a "most wanted" list is hardly the same thing as merely having a warrant for one's arrest.

Most wanted lists represent an effort to publicize particularly dangerous fugitives. As such, this evidence was very unfair to Vang.

Statement of the Case

I. Procedural History

On January 3, 2014, the defendant-appellant, Lee Vang (hereinafter "Vang") was charged[1] with two counts of disorderly conduct, one of which was alleged to be a domestic abuse offense, arising out of an incident that occurred on December 30, 2013. (2014CM23 R:1)[2] In a nutshell, the complaint alleged that Vang was involved in an argument with his wife, Jennie Vang, and that the incident ended up at a police station. At the police station Vang was intoxicated, and he made a number of threats to various persons, including to his cousin, who is a police officer.

Vang entered not guilty pleas to those charges. He was released on bail.

Several months later, on June 18, 2014, Vang was charged with second degree sexual assault, intimidation of a

[1] Milwaukee County case number 2014CM000023

[2] Vang was charged in three cases. The cases were joined for trial, and consolidated for appeal. The circuit court clerk never filed a consolidated statement of the record on appeal. Therefore, for the sake of clarity, when necessary, the circuit court case number will be included in the citation to the record.

victim, battery (domestic abuse), and bail jumping. (2014CF2539 R:1) This time the complaint alleged that Vang and his wife had been at a party and, when they returned home, Vang wanted to have sex. Jennie at first resisted him, but, because of his intimidating behavior, she later relented. Following the incident, the couple fought in the bedroom, and it was alleged that Lee punched Jennie in the face.

Following a preliminary hearing, Vang was bound over, and he entered not guilty pleas. Vang was once again released on bail.

The first two cases were set for trial on October 29, 2014. Vang failed to appear for the trial, and a warrant was issued for his arrest. He was later taken into custody, and he was charged with felony bail jumping. (2014CF5489 R:1)

The three cases were ordered joined for trial.

Finally, the cases were tried before a jury beginning on May 18, 2015.

During the trial, and without defense objection, the state presented the testimony a police officer, Darrell Anderson, who had interviewed Jennie following the June, 2014, sexual assault incident. (R:58-10, *et seq.*) Anderson recounted in great detail the statement that Jennie had given him about the sexual assault incident.

Vang also testified at trial. On direct examination he mentioned that he worked on race cars. Upon questioning by

his lawyer, he testified that, immediately before the October incident, he had been involved in an illegal street race. Then, on cross-examination-- and without any defense objection-- the prosecutor went into great detail about the "illegal street race". There was testimony that Lee won a $60,000 car in the race. (R:59-31, *et seq.*)

Finally, on cross-examination, the prosecutor elicited the fact that, after he failed to appear at the October trial date, Vang had been featured on "Wisconsin's Most Wanted" television show. (R:59-42)

In her closing argument, the prosecutor emphasized the fact that Vang had been involved in an illegal street race and that he did not pay child support out of his illegal race winnings. (R:59-100, 103,)

The jury returned verdicts finding Vang guilty on all counts. (R:59-113)

The court sentenced Vang to seventeen years in prison on the sexual assault, bifurcated as ten years initial confinement and seven years extended supervision. (R:60-50) On the intimidation of a victim count, the court sentenced Vang to a consecutive six years in prison, bifurcated as four years initial confinement and two years extended supervision. (R:60-50) On the felony bail jumping, the court imposed a consecutive four years in prison, bifurcated as three years initial confinement and one year extended supervision. The court

also imposed consecutive jail sentences on the remaining counts. In all, the court sentenced Vang to slightly in excess of eighteen years of initial confinement.

Vang timely filed a notice of intent to pursue postconviction relief.

He then filed a postconviction motion alleging that his trial counsel was constitutionally ineffective for failing to object to Officer Anderson's testimony recounting the statement that Jennie Vang made to him concerning the sexual assault; for questioning Vang so as to elicit the "illegal street racing" testimony; and for failing to object to the prosecutor cross-examining Vang about being featured on the "most-wanted" television program. (R:38)

On December 29, 2016, without conducting an evidentiary hearing, the circuit court issued a memorandum decision denying Vang's postconviction motion. (R:49)

Vang then filed a notice of appeal.

II. Factual Background

Lee Vang and Jennie Vang were married and they have five children. By almost all accounts, Jennie is less than an ideal mother and wife. By her own admission, during her marriage to Lee Vang, she had a boyfriend in Minnesota

On December 27, 2013, Vang was very drunk, and he got into an argument with Jennie. She left the house and went

to the police station. A few minutes later, Vang and his sister followed Jennie to the police station. (R:57-87) While there, Jennie was talking to an Officer Vang, who is Lee Vang's cousin. Lee lost his temper and threatened his cousin, Officer Vang (R:57-89), and then he later called his own mother and father and threatened to "shoot up the house." (R:58-81) As a result, he was charged with two counts of disorderly conduct.

Later, on June 14-15, 2014, Lee and Jennie were at a house-warming party, and Vang again had a lot to drink. When the couple arrived home, Vang sent the children to bed, and then he went into the bedroom with Jennie, and he tried to have sex with her. (R:57-96 to 98; 109-111) She resisted, and an argument started. (R:57-98) Jennie testified that he punched her in the face, and then he threw her phone against the wall. (R:57-106) Then he tried to "comfort" her by hugging her and saying, "Look what you made me do." (R:57-109) He then tried to have sex with her again. She said no, but eventually relented because, she said, she was afraid of him. (R:57-109)

Vang testified at trial. On direct examination he mentioned that he worked on race cars. (R:58-130) Upon questioning by his lawyer, he testified that, immediately before the October incident, he had been involved in an illegal street race. (R:58-139 Then, on cross-examination-- and without any defense objection-- the prosecutor went into great detail about

the “illegal street race”. There was testimony that Vang won a $60,000 car in the race. (R:59-31)

Finally, the prosecutor also elicited the fact that, after he failed to appear at the October trial date, Vang had been featured on “Wisconsin's Most Wanted” television show. (R:59-42)

Argument

I. Vang’s trial counsel was constitutionally ineffective.

Vang’s postconviction motion alleged that his trial counsel was constitutionally ineffective because (1) she failed to object to officer Anderson’s testimony recounting Jennie Vang’s statement to police concerning the sexual assault; (2) she elicited testimony on direct examination of Vang that he was involved in illegal street racing; and (3) she failed to object to cross-examination of Vang that elicited the fact that he had been featured on a “most wanted” television program.

The circuit court denied the motion.

The court reasoned that, with regard Anderson’s recounting of Jennie’s statement to police, counsel’s performance was not deficient because, had counsel objected on the grounds of hearsay, the court would have overruled the objection. According to the judge, Jennie’s statements were

admissible as prior consistent statements offered to rebut a claim of recent fabrication or improper motive. Additionally, the judge wrote, even if the evidence should not have been admitted, the admission of the evidence was not prejudicial because, even without the evidence, the judge found Jennie to be a credible witness.

The circuit court erred because there is no foundation in the record that Vang ever claimed that Jennie recently fabricated her trial testimony. Rather, the record is clear that Vang's claim was that Jennie had been fabricating all along. The admission of this testimony, considering the entire context of the case and given Vang's theory of defense that Jennie was not truthful about the sexual assault, was prejudicial because it improperly bolstered Jennie's credibility. Whether, aside from Anderson's testimony, the circuit judge found Jennie to be credible is beside the point. The improper admission of this evidence undermines one's confidence that this was a fair trial because it improperly and unfairly undermined Vang's theory of defense.

The circuit court did not discuss deficient performance with regard to the remaining claims. Rather, the judge found that the admission of the street racing evidence was not prejudicial because there was already evidence in the record that Vang was of bad character. The circuit court found that the "most wanted" evidence was not prejudicial because it was

merely another way of indicating that an arrest warrant had been issued for Vang after he failed to appear at the jury trial.

Plainly, though, this evidence is highly prejudicial. The illegal street racing evidence goes to Vang's character, and it offered the jury the temptation to find him guilty merely because he appears to be a person of bad character who is inclined to commit crimes. Finally, being on a "most wanted" list is hardly the same thing as merely having a warrant for one's arrest. Most wanted lists represent an effort to publicize particularly dangerous fugitives. As such, this evidence was very unfair to Vang.

A. Standard of appellate review

"Whether counsel was ineffective is a mixed question of fact and law. [internal citation omitted] The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. [internal citation omitted] The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law." *State v. Balliette,* 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 370, 805 N.W.2d 334, 339

Here, no evidentiary hearing was held. Therefore, there are no findings of historical fact. Thus, it is a question of law as to whether trial counsel was ineffective.

B. Ineffective assistance of counsel generally

The standard for ineffective assistance of counsel is well-known.

> "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970). The benchmark for judging whether counsel has acted ineffectively is stated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That requires the ultimate determination of "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, 104 S.Ct. at 2064. The overall purpose of this inquiry is to ensure that the criminal defendant receives a fair trial. A fair trial is defined as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* at 685, 104 S.Ct. at 2063.
>
> The *Strickland* Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. The first test requires the defendant to show that his 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." *Id.* at 687, 104 S.Ct. at 2064. Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.[4] *Id.*

State v. Johnson, 153 Wis. 2d 121, 126-27, 449 N.W.2d 845,

847-48 (1990)

C. Failing to object to Officer Anderson's hearsay testimony.

Jennie Vang, the alleged victim, testified at trial, and she was subject to cross-examination.

The state's next witness, though, was Milwaukee police officer Darrell Anderson. Anderson testified that he was dispatched to a gas station parking lot, where he met Jennie Vang. Jennie said that she wanted to report an incident to him, but that she did not want to talk in the parking lot. Anderson suggested that they go back to her apartment, but Jennie declined, saying that "he" (meaning Lee) might still be there. Consequently, Officer Anderson took Jennie to the District 4 police station to talk to her. (R:58-4 to 7)

Thereafter, the prosecutor elicited from Anderson, in great detail, the substance of Jennie Vang's statements concerning the alleged sexual assault. (R:58-7 to 26) Jennie's statements were plainly offered for the truth of the matters asserted, and they were made in response to police questioning at the District 4 police station.

Significantly, defense counsel did not object on the grounds of hearsay.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted." § 908.01(3), Stats.

Since officer Anderson was testifying to statements made by Jennie Vang (the "declarant"), and the statements were made other than while Jennie was testifying at the trial, the statements are unambiguously hearsay, and defense counsel should have objected.

1. The record does not support the circuit court's finding that Anderson's testimony was properly admissible as a prior consistent statement offered to rebut a claim of recent fabrication or improper motive.

In denying Vang's postconviction motion, the circuit court gave short shrift to the claim that Anderson's testimony was objectionable hearsay. The court mentioned that Anderson's testimony was not hearsay because it was offered for the "purposes of rebutting recent fabrication or improper influence or motive on the part of the declarant. (R:45-3) The court did not explain this finding, except to write, "In this case, all of these criteria[3] were present . . ." *Id.*

Thus, the judge concluded, if defense counsel had objected, the court would have overruled the objection. Consequently, counsel's performance was not deficient for

[3] The foundational requirements to establish that the out-of-court statements were properly offered as consistent statements to rebut a claim of recent fabrication or improper motive.

failing to object.

An examination of the record, though, does not support the circuit court's conclusion that Jennie Vang's hearsay statements were admissible as prior consistent statements offered to rebut a claim of recent fabrication or improper motive.

For example, in her opening statement, defense counsel told the jury, "There is an incident report generated by police in this case. Part of that incident report as it relates the battery is something that is filled out in the context of domestic violence investigations. . . . You will see that the contents of that domestic violence report does not [sic] correspond to the pictures." (R:57-36) In other words, Vang's contention, if anything, was that Jennie was *lying even in the statement she gave to police on the night of the incident.* That is, Jennie's fabrications were not recent. She was fabricating from the very beginning.

It is well-settled that,

> To use prior consistent statements, the proponent of the statements must show that they [the statements] predated the alleged recent fabrication and that there was an express or implied charge of fabrication at trial. *State v. Peters*, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct.App.1991); *State v. Mares*, 149 Wis.2d 519, 527, 439 N.W.2d 146, 149 (Ct.App.1989). If the prior consistent statements predate the alleged recent fabrication, then the statements have probative value and are admissible. *Peters*, 166 Wis.2d at 177, 479 N.W.2d at 201. In addition, a suggestion of recent fabrication must be made at trial. For example, in *Mares*, a sexual assault victim was asked questions on both

> cross-examination and recross-examination which suggested that the victim had been coached by the prosecutor about explaining the differences between her preliminary hearing testimony and her trial testimony. *Mares*, 149 Wis.2d at 527, 439 N.W.2d at 149. We concluded that this line of questioning raised the spectre of improper prosecutorial coaching and suggested that the victim was fabricating her testimony at trial. *Id.* at 528–29, 439 N.W.2d at 149.

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 53, 588 N.W.2d 321, 327 (Ct. App. 1998).

Here, there is nothing in the record to establish that Lee Vang claimed that Jennie recently fabricated her trial testimony. To the extent it is even mentioned by Vang, the claim is that Jennie fabricated from the very beginning.

Jennie's statements to Officer Anderson the day after the incident, then, do predate any fabrication by Jennie. The statements are not properly admitted to rebut a claim of recent fabrication because there is no such claim[4].

For these reasons, if Vang's attorney had lodged a hearsay objection, the circuit court would have been obliged to sustain the objection.

2. Officer Anderson's testimony was prejudicial

The circuit judge wrote, "[E]ven if Officer Anderson's testimony had been restricted and the jury only heard from the

[4] Neither does the record establish that Vang ever claimed that Jennie had an improper motive

defendant's wife, there is not a reasonable probability the outcome of the trial would have been different. *The court found the victim to be completely credible.*" (emphasis provided; R:49-3)

The measure prejudice, of course, is not whether, aside from Anderson's hearsay testimony, the judge Jennie Vang's testimony to be credible. Rather, the '[P]rejudice analysis is necessarily fact-dependent. Whether counsel's deficient performance satisfies the prejudice prong of *Strickland* depends upon the totality of the circumstances at trial." *State v. Jenkins,* 2014 WI 59, ¶ 50, 355 Wis. 2d 180, 199, 848 N.W.2d 786, 795 The prejudice prong of the ineffective assistance of counsel analysis is not necessarily outcome determinative. That is, it is not required that the defendant prove that, but for counsel's errors, he would have been acquitted. Rather, "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.*" *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984) Additionally, "The required showing of prejudice is that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Jenkins,* 2014 WI 59, ¶ 37, 355 Wis. 2d at 196, 848 N.W.2d at 794.

Here, this was a trial that pitted the testimony of Lee Vang against the testimony of Jennie Vang. Vang's theory of defense was that Jennie was not being truthful, especially about the sexual assault. Thus, the jury was called upon to make a credibility determination between the two. To permit the state to improperly bolster Jennie's testimony by offering it a second time, and in a much more detailed and clear manner, through the testimony of Officer Anderson certainly calls into question whether this was a fair trial, whose result is reliable.

D. The "illegal street racing" testimony

The circuit court did not address whether trial counsel's performance was deficient for eliciting the illegal street racing testimony. Instead, the court found that, "Vang's testimony explaining his involvement with illegal street racing was tangential at best, in fact paling in comparison with the violent behavior as recounted by the witnesses to the December 2013 incidents[5]. . . . Based on the totality of the evidence, the court concludes that there is not a reasonable probability the outcome of the jury's verdict was prejudiced by the admission of evidence concerning illegal street racing." (R:49-5)

[5] This is the incident at the police station

1. Counsel's performance was deficient for eliciting the illegal street racing testimony.

On the night of the sexual assault, Vang and his wife went to a house warming party, where Vang had too much to drink. During direct examination by defense counsel, Vang testified that he left the house-warming party around 10:00 p.m. because he had a "car meet". (R:57-139). Then he said, "I know it's called an 'illegal street race' It's a car meet where everybody go meet up and bring their cars and I took one of my cars there at 10:00 " *Id.*

Then, remarkably, defense counsel instructed Vang, "Tell the jury what an illegal street race is." *Id.*

Vang explained, "It's when three or four of us, we schedule a time. We go meet up and we race for money." *Id.*

Then defense counsel asked, "In part, is that how you supported yourself?"

Vang said that it was part of it.

Then, on cross-examination, and without objection from the defense, the prosecutor went into great detail about the so-called illegal street race. She asked, "Why is it illegal?" (R:58-31)

Vang said, "Because we go race at abandon buildings where there's no rule, no-- no law, if I could say it right, no law it it. I mean, it's basically we're hiding it, so it's illegal." *Id.* Upon prompting by the prosecutor, Vang went on to explain that on

this particular night they were racing for titles, which means that the winner keeps the loser's car. The car he won that night was worth $60,000." *Ibid. p.* 36

Vang's testimony that he left the house-warming party to attend an illegal street race is not relevant; and to the extent the evidence is relevant, any probative value is exceeded by the unfair prejudice.

For the purpose of this discussion, we will assume that defense counsel was surprised by the fact that Lee characterized the street race as an "illegal street race".[6]

Whether defense counsel was surprised by it or not, the testimony is plainly not relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." § 904.01, Stats.

Here, Vang was in the process of explaining his activities at the party that preceded by several hours the alleged sexual assault. Unless those activities involved something that would have later affected his ability to perceive and recall the events that happened at the house (i.e. consumptions of drugs or alcohol); or, perhaps, bore upon the issue of consent to sexual activity by Jennie, the activity is not relevant.

[6] The preceding question did not explicitly require Vang to mention that he went to an illegal street race. Nevertheless, one wonders why defense counsel did not know what Vang's testimony would be.

Where Vang went after he left the party is utterly irrelevant to whether he later sexually assaulted Jennie. Much less is it relevant that *where he went was an illegal street race.*

Instead of moving to strike Lee's irrelevant testimony; or, at the very least, instead of moving on to another subject, defense counsel asked Vang to describe in further detail the illegal street race; and even asked him whether that was how he supported himself.

Not surprisingly, on cross-examination, the prosecutor seized upon this fortuitous turn of events, and invited Vang, without objection from defense counsel, to expound upon the details of this illegal street race.

Undoubtedly, the State will argue that Vang "opened the door" to further inquiry concerning the otherwise irrelevant illegal street race. Vang may have mistakenly testified to otherwise inadmissible evidence; *but it was his attorney who attempted to throw the door wide open.*

The Supreme Court has explained, "We use the curative admissibility doctrine, commonly referred to as "opening the door," as the framework for our analysis. [internal citations omitted] The curative admissibility doctrine is applied when one party accidentally or purposefully *takes advantage* of a piece of evidence that would normally be inadmissible. *State v. Jackson,* 216 Wis.2d 646, 665, 575 N.W.2d 475 (1998). Under such circumstances, the court may allow the opposing party to

introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to prevent unfair prejudice." *State v. Dunlap,* 2002 WI 19, ¶ 14, 250 Wis. 2d 466, 477, 640 N.W.2d 112, 117

Firstly, the context of Vang's comment makes clear that he was not attempting to "take advantage" of the fact that he had been involved in an illegal street race. Rather, it is likely that Vang simply did not understand the rules of relevance, or he did not appreciate the prejudicial nature of this testimony. Thus, had defense counsel moved on, or moved to strike, the door was clearly not opened for the complained about cross-examination. Plainly, under concepts of fundamental fairness, Vang's comment, standing alone, does not require the court to allow the state to explore the illegal street race further.

Inexplicably, though, defense counsel then invited Vang to explain in further detail the illegal street race; and she even went so far as to ask him *whether that was how he supported himself.*

There can be no strategic reason for doing this. This was a grievous error by defense counsel.

As a result, the jury learned that Vang and his friends apparently raced cars in an urban area, putting the public at risk, and that, in so doing, they were making illegal bets of $60,000 or more. None of this had anything to do with any of the counts alleged in any of the three criminal complaints that

were being tried.

2. The illegal street racing evidence was extremely prejudicial even though, as the court notes, there may have been other unflattering descriptions of Vang's behavior.

The circuit court's main reason for finding that defense counsel's error was not prejudicial is because there was other testimony presented to the effect that Vang had gotten very intoxicated, went to the police station, and began shouting and threatening members of his own family. Put another way, the improper admission of evidence of Vang's bad character (illegal street racing) was not prejudicial because the record was already full of evidence that Vang was of bad character.

This reasoning fails to take into account the unfairly prejudicial nature of all character evidence. The best articulation of this point comes from the Wisconsin Supreme Court. The court wrote:

> [T]he 'character rule' is universally established that evidence of prior crimes is not admitted in evidence for the purpose of proving general character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged. Indeed, Wigmore states ***such evidence is 'objectionable, not because it has no appreciable probative value, but because it has too much.'***
>
> The character rule excluding prior crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong

> tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes

(emphasis provided) Whitty v. State, 34 Wis. 2d 278, 291–92, 149 N.W.2d 557, 563 (1967)

It makes no sense, then, to conclude that additional evidence of Vang's bad character is harmless. It added to the already *overstrong tendency* to believe that Vang was guilty of the charges merely because he appears to be a person likely to do such acts; and, further, it appeals to the jury's temptation to condemn Vang not because the evidence proves him guilty beyond a reasonable doubt, but because he illegally won a $60,000 car, and endangered the community in doing so.

Thus, counsel's deficient performance in eliciting the the street racing testimony was highly prejudicial.

E. The "most wanted" testimony

During prosecutor's cross-examination of Vang, the following exchange took place:

> Q It [meaning a warrant for Vang's arrest} was all over Facebook?
>
> A Correct.
>
> Q All over Facebook from Fox 6 News?
>
> A Yes.
>
> Q And that was from a broadcast about you, correct?

A Correct.

Q And that broadcast was the subject of a series called "Wisconsin's Most Wanted", correct?

A Correct.

(R:59- 42).

There was no objection by defense counsel.

Deficient performance means that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Johnson,* 153 Wis.2d at 127.

Here, it would be difficult to imagine an error that better exemplifies the concept of "not functioning" as defense counsel. Defense counsel failed to object to the prosecutor's question eliciting that the defendant was featured on a television program entitled, "Wisconsin's Most Wanted."

In denying Vang's postconviction motion, the court again did not address the deficient performance prong of the analysis. Rather, the court simply concluded that, "The court finds the testimony did not in any way meaningfully prejudice the defendant." (R:49-5) The judge went on to suggest that the "most wanted" evidence was merely another way of indicating that there was a warrant for Vang's arrest after he had failed to appear at the jury trial.

The court's reasoning, of course, wholly disregards the highly negative connotation associated with the phrase "most wanted".

A person named in an arrest warrant is fairly described as being “wanted.”

However, a person who finds himself on a *most wanted list* is thought to be in an elite company of bad guys. “Most wanted” lists represent an effort to publicize particularly dangerous fugitives, so as to capture them before they cause any more harm in the community.

Plainly, defense counsel’s failure to object to his highly prejudicial and inflammatory testimony was both deficient and prejudicial.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse the circuit court's order denying Vang's postconviction motion. The matter should then be remanded to the circuit court with instructions to conduct an evidentiary hearing into whether defense counsel had any strategic reasons for her apparently deficient performance.

Dated at Milwaukee, Wisconsin, this _____ day of March, 2017.

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Certification as to Length and E-Filing

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 the brief is 6085 words.

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_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2017AP000075-CR, 76, 77

State of Wisconsin,

Plaintiff-Respondent,

v.

Lee Vang,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal
B. Memorandum decision denying postconviction motion

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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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Jeffrey W. Jensen