RECEIVED
08-14-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Court of Appeals Case No. 2017AP000798-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNALEE A. KAWALEC,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal from the Circuit Court for Walworth County, the Honorable John R. Race and Kristine E. Drettwan, Presiding

---

WALTER LAW OFFICES LLC
108 West Court Street
Elkhorn, WI 53121
Tel. (262) 743-1290

By: Andrew R. Walter
State Bar No. 1054162

TABLE OF CONTENTS

Issues Presented……1

Statement on Oral Argument and Publication……..2

Statement of the Case……..2

The Evidence at Trial……2

The Trial Court's Doubt that Kawalec Was a Bailee……8

The Altered and Additional Jury Instructions……8

The Trial Verdict……..10

The Postconviction Motion for a New Trial…….....10

The Bankers' Postconviction Testimony……10

Trial Counsel's Testimony……13

Circuit Court Ruling……..14

Standard of Review……16

Argument……..16

I. To Prove Beyond a Reasonable Doubt that Kawalec was a Bailee, the State had to Prove Beyond a Reasonable Doubt that H.K. Did Not Have Donative Intent when he Gave her Joint Ownership of his Bank Account……17

II. Counsel's Failure to Know the Applicable Law,

Present the Bankers' Critical Testimony, and Object to the Altered Instructions Denied Kawalec the Effective Assistance of Counsel.....20

A. The Circuit Court was correct when it found that Counsel performed deficiently.....21

1. Counsel performed deficiently by failing to present Moorefield and Carpio's testimony that H.K. had donative intent when he made Kawalec joint owner.....21

2. Counsel's failure to object to the altered definition of bailee in the jury instruction because he didn't understand the law constituted deficient performance.....23

3. Counsel also performed deficiently by failing to object to an instruction that was factually misleading and misstated the standard that the jury should apply to choose between the conflicting presumptions.....24

B. Counsel's errors caused prejudice because there is a reasonable probability that the jury would have found reasonable doubt if Counsel presented that testimony, and the probability would be even greater had the jury heard that testimony and then been instructed correctly.....26

Conclusion.....31

TABLE OF AUTHORITIES

Cases

Estate of Harms,
236 Ill. App. 3d 630, 177 Ill. Dec. 256,
603 N.E.2d 37 (Ill. App. 1992).....18, 28

Estate of Rybolt,
258 Ill. App. 3d 886, 197 Ill. Dec. 570,
631 N.E.2d 792 (1994).....18-19, 22, 27

Estate of Teall,
329 Ill. App. 3d 83, 263 Ill. Dec. 364,
768 N.E.2d 124 (2002).....19

Goodman v. Bertrand,
467 F.3d 1022 (7th Cir.2006).....22

In re Kemmerer's Estate,
16 Wis. 2d 480, 114 N.W.2d 803 (1962).....19

Russ v. Russ,
2007 WI 83, 302 Wis. 2d 264,
734 N.W.2d 874.....17-18, 19, 23

State v. Cooks,
2006 WI App. 262, 297 Wis. 2d 633,
726 N.W.2d 322.....29

State v. Jenkins,
2014 WI 59, 355 Wis. 2d 180,
848 N.W.2d 786.....16, 20-22, 26-30

State v. White,
2004 WI App 78, 271 Wis.2d 742,

680 N.W.2d 362……22

Strickland v. Washington,
466 U.S. 668 (1984)……..20-21, 27, 29

Toliver v. Pollard,
688 F.3d 853, 862 (7th Cir.2012)……..22

Other Sources

Wis. Stat. § 705.03……...17-18

Wis. JI-Criminal 1444 (2006)……...19

ISSUES PRESENTED

I. When H.K. gave Kawalec power of attorney, and then later changed her designation on his bank account from POA to joint owner, and she was charged with theft of the funds in that joint ownership account, what standard should the jury have applied to determine whether the joint ownership gave her the right to unlimited use of those funds pursuant to Wis. Stat. § 705.03, or whether she was prohibited from self-dealing pursuant to her role as power of attorney?

Circuit Court Ruling: The circuit court did not explicitly rule on this issue. However, it found that Kawalec's trial attorney did not know the applicable standard.

II. When Kawalec's attorney did not know the law applicable to her joint ownership defense, did not present the testimony of two bankers who would have testified that H.K. gave her joint ownership after the bankers told him that this was akin to a gift, and did not object to altered jury instructions, was she denied the effective assistance of counsel?

Circuit Court Ruling: The circuit court held that Counsel's performance was deficient but that the errors did not cause prejudice. Therefore, it denied Kawalec's motion for a new trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Kawalec does not request oral argument or publication of the opinion in this case.

STATEMENT OF THE CASE

In 2005 H.K. gave power of attorney to his nephew's wife, Kawalec. (141:6-8.) In 2007, he retitled his bank account to designate her as power of attorney and make her the beneficiary upon his death. (141:55.) In 2010, he changed the account to remove the POA designation and give her joint ownership. (141:55.) She subsequently used some of those funds for her own purposes. The State charged her with two counts of Theft by Bailee, (31), and she was convicted of one of the charges, (76, 77.) After she filed a motion claiming ineffective assistance of counsel, the circuit court held that her trial attorney was deficient because he didn't know the law applicable to her joint ownership defense, didn't present the testimony of the bankers who helped H.K. make her joint owner to testify as to his intent, and didn't object to deviations from the standard jury instructions. (155:4-8.) However, the circuit court found that Counsel's errors did not prejudice her defense, and it denied her motion for a new trial. (155:8-11.) She now appeals from that ruling, and from the Judgment of Conviction.

The Trial Evidence

In 2000, Kawalec married H.K.'s nephew Ray Kawalec. (145:19.) Within a few years, H.K. was hospitalized in Milwaukee. Kawalec began visiting him, and they became close. *Id.* at 20. She called him "Pops"; he called her his daughter (138:43.) Her son called him grandpa. *Id.*

Kawalec cared for H.K. as he dealt with health issues. In 2005, she took him to the doctor after she noticed a strange growth on his foot. (145:23.) It turned out to be a cancerous tumor, which he had removed. Kawalec stayed with him for two days in the hospital. *Id.*

Then doctors found that H.K. had Leukemia. *Id.* at 29. They prescribed a rigorous course of prescriptions and breathing treatments. *Id.* at 31. In whatever breaks she could find from her job teaching first grade, Kawalec visited H.K. several times every day to lay out his pills, give him breathing treatments, and feed him. *Id.*

Near this time H.K. gave Ray and Kawalec 40 of his 84 acres to build a family home. (138:44-45.) H.K. inherited the land from his father, and he wanted to keep it in the family. *Id.* Ray and Kawalec built the house on the land, a short distance from H.K.'s residence.

H.K.'s health continued to decline. He was hospitalized, then moved back and forth between the hospital and a nursing home. (138:14-15.) Kawalec shuttled him back and forth. (140:44.) During this time, Ray and Kawalec started divorce proceedings. (145:36-37.)

H.K.'s health improved, and the doctors wanted to release him. But they said he couldn't live alone. According to H.K., Kawalec "heard that, and she took me in." (140:73.)

Kawalec moved upstairs so H.K. would have the master bedroom. *Id.* She installed railings in the master shower. *Id.* at 82. She cut his toenails. *Id.* at 57. She took him to doctor

appointments, picked up prescriptions, and laid out his pills every day. *Id.* at 78-80. She took him out to eat once or twice a week. *Id.* at 84. H.K. said his farmhouse was a mess; she cleaned it up, put new carpets in, and fixed his cabinets. (138:61-62.)

She also took him on family vacations. *Id.* at 42. In H.K.'s words: "she was very good to me." (140:72.) He was part of her family, and she was part of his. (138:42.)

H.K.'s 2005 power of attorney gave Kawalec broad authority to handle his finances, but it prohibited gifting. (34:2.) However, H.K.'s attorney testified that, as long as H.K. remained competent, Kawalec could still gift to herself and others with H.K.'s verbal consent. (141:37-38.)

In 2007, H.K. retitled his bank account to give Kawalec authority to act as POA and to make it payable to Kawalec upon his death. (141:55.) In 2009 H.K. changed his will to make Kawalec the primary beneficiary. (35.)

In April of 2010, H.K. again changed his bank account, this time to make Kawalec a joint owner. (141:55.) Marlo Carpio, H.K.'s investment advisor from the bank, testified about the meaning of joint ownership. He testified that as joint owners Kawalec and H.K. each had the right to all of the funds in the account. (144:54.) However, on cross-examination Carpio testified that he didn't participate in setting up the joint account. *Id.* at 58. Therefore, he couldn't say what H.K.'s intentions were or whether he placed any restrictions on Kawalec's use of the funds. *Id.* at 58.

H.K. was asked about the joint account during a pretrial deposition which was later submitted to the jury:

Q: Did you ever sign anything that made Kawalec a co-owner of your checking account?

A: I couldn't write my checks anymore. I gave Kawalec the right to do everything…but I didn't tell her to write…checks out to whatever she wants.

…

Q: In April of 2010 did you sign something that made Kawalec co-owner on your checking account?

A: I don't understand you, what do you mean? I don't. I don't.

(138:63-65.)

Unfortunately, their relationship eventually fell apart. Kawalec asked H.K. to leave in August of 2011. (146:7.) Kawalec's explained that she had difficulty with H.K. being around her children once his mental state began to deteriorate. *Id.* His positive attitude turned negative. *Id.* He was crabby. *Id.* He talked about wanting to die every day, about being suicidal. *Id.* at 10. Kawalec worried how H.K.'s new behavior was affecting her family. *Id.*

The frustration came to a climax when Kawalec got into an argument with her mother, whom she had also taken in. H.K. became angry and scolded Kawalec. (140:53.) He yelled at her. (146:9.) Finally, Kawalec told her mother and H.K. that if they didn't like her rules, they should leave. *Id.* at 9-10. They did.

Kawalec immediately regretted the argument, and the next day she tried to bring H.K. home. *Id.* at 11-12. But H.K. demanded that Kawalec also bring back her mother, and Kawalec wasn't willing to do that. *Id.* H.K.'s attorney confirmed Kawalec agreed to have H.K. back under certain conditions, but it didn't work out. (141:41.)

H.K. went to U.S. Bank a few days later, and at trial he said there was much less money in the account than he expected. (140:61.) He contacted the police and accused Kawalec of stealing his money. He believed the fight between Kawalec and her mother was "a put up…they talked this over between themselves…" *Id.* at 62. However, he also says that Kawalec's mother told him to contact the police. *Id.* at 64.

The State eventually charged Kawalec with two counts of Theft by Bailee, contrary to Wis. Stat. § 943.20(1)(b). (31.) Count One alleged that she embezzled more than $10,000 between June 1, 2009, and June 30, 2010. Count Two alleged she did the same between July 1, 2010, and August 8, 2011. The charges related to checks that Kawalec wrote from the account at U.S. Bank.

H.K. testified that he had $3,200 in monthly income. (138:18-19.) He would give it all to Kawalec, and she would give him back what he needed or requested. *Id.* That was usually between $500 and $700. *Id.* He said sometimes she didn't give him money back when he didn't need or request it. (140:50.)

At times H.K. called the money his, but at other times he said it was hers. He said the $2,500 to $3,200 per month was his payment to her. (140:60.) "She could use the money for anything she wanted." *Id.* at 65. He "gave her $3,200 a month," less what she gave back to him. *Id.* at 77. "I would pay her anywhere from

$2,500 to $3,200." (138:80.) "I gave her so much money every month, and she take good care of me, and she takes care of her…" (138:72.) "She should be living pretty good with the money that I gave her, what Ray gave her, and what she made." *Id.* at 76. When asked if Kawalec could use the joint account for her own personal purchases, he said:

> she had my checkbook, she can write her name, fill the thing out, she had permission…
>
> (140:88-89.)

However, at times he called it his money, and said she didn't have his permission to write certain checks. As an example, he said he didn't give her permission to "write checks to whatever she wants." (140:71.) At times, he complained about what she spent money on:

> [Y]ou do not give the fire department $275. You don't give $550 to the police department. You do not give your son -- $2,500 to a 10-year-old kid. You do not give $3,500 to your daughter to go to college…
> …
>
> Why she took $3,500 out of my checking account, why?
>
> *Id.* at 60-61.

Kawalec testified that each month she would deposit that income to the account. (145:44-45.) She said H.K. would usually accompany her to the bank. (145:46.) She said H.K.'s custom was to use only cash, so she would give him what he needed, which ranged from nothing to $900 per month. (145:45-46.)

The Trial Court's Doubts that Kawalec was a Bailee

The standard jury instruction for the charge lists the following as the first element:

> The Defendant had possession of money belonging to another because of her [status as a bailee].[1]

At the start of the instruction conference, the court questioned how Kawalec could be a bailee "if she owns the property." (146:22.) The court cautioned the prosecutor: "you already are imposing a bailment situation on this transaction when in fact it would appear that it was a joint tenancy." *Id.* at 25. After some discussion with the prosecutor, the court asked the State to draft an instruction regarding how her joint ownership of the account impacted her alleged status as a bailee. *Id.* at 22-26.

The Altered and Additional Jury Instructions

The State drafted, and the court adopted, changes to the standard instruction. The altered instruction changed the first element to state:

> The Defendant had possession of money belonging to another because of her status as a bailee. A person who acts as a power of attorney is a bailee.

---

[1] WIS. JI-CRIMINAL 1444 (2006). The court chose to substitute the bracketed alternative rather than the standard phrase "because of her employment." The jury instruction suggests this may be appropriate in this type of case. *See* Wis. JI-CRIMINAL 1444 at n.3. Kawalec agrees that this selection was appropriate.

(146:85.)

The court also adopted the State's proposed instruction regarding joint ownership, but, unlike the power of attorney language, the joint ownership language appeared only at the end of all of the elements and instructions regarding how the jury should determine the amount of any theft. *Id.* at 87-88. That new language added:

> Now, jurors, you have heard testimony from [H.K.] that the funds in the US Bank account were the property of [H.K.]. You must also – and you've also heard – you have also heard the testimony of the US Bank financial advisor that the bank, the bank recognized Johnalee Kawalec as a joint owner of the account. You are to determine what effect, if any, the bank's designation of the defendant as a JOO[2] has on this case when considering whether the defendant is guilty or not guilty of these offenses.

Id.

Kawalec's attorney argued that this wasn't an issue for the jury, that the court should have found her not guilty as a matter of law because a joint owner is not a bailee. *Id.* at 26-27. But once Counsel lost that argument, he didn't object to the form of the altered instruction or propose an alternative. *Id.*

---

[2] At trial, Carpio explained that JOO stands for Joint Owner Other, while JOF stands for Joint Owner First, that the bank considers JOF as the main owner, but there is equal ownership of the account. (144:53-54.)

The Verdict

The jury found Kawalec not guilty on count one, but guilty on count two. (76, 77.) It found that the amount of the theft was between $2,500 and $5,000. (77.)

The Postconviction Motion for a New Trial

Kawalec moved for a new trial based on the denial of her right to the effective assistance of counsel. She claimed that trial counsel performed deficiently in several respects, all of which were related to counsel's performance on the issue of whether Kawalec was a bailee, rather than a joint owner, of the funds in the joint account. She argued, as she does on appeal, that when a principal establishes and funds a joint account with the agent, the agent's right to those funds depends on the intent of the principal. If the principal had donative intent, then the agent owns the funds, is not a bailee, and cannot be guilty of theft. However, if the principal's intention in creating or funding the joint account was merely to make it more convenient for the agent to perform the agent's duties, then the agent is a bailee.

The Bankers' Postconviction Testimony

Kawalec argued, and the circuit court agreed, that trial counsel's failure to call the bankers who helped H.K. establish the joint account constituted deficient performance. Anthony Moorefield testified that in 2010 he was H.K.'s personal banker and spoke to H.K. about once per week. (156:6-7.) Moorefield said that H.K. first changed his account in 2007 to add Kawalec as POA. (155:7.) At the same time, H.K. added a payable on death designation with Kawalec as the beneficiary. (156:7.)

In 2010, H.K. asked Moorefield to make Kawalec a joint owner of the account. (156:7.) Moorefield had a fiduciary duty to ensure that H.K. understood the implications of joint ownership, (156:7), and he explained to H.K. the difference between joint ownership and power of attorney, (156:8).

Moorefield told H.K. that making Kawalec a joint owner would make the funds her money as much as his, that making her a joint owner was like giving her those funds. (156:8.) H.K. was lucid and responsive during this time, never gave Moorefield any reason to question H.K.'s mental abilities, and Moorefield believed that H.K. was mentally capable of making this decision. (156:9.) Moorefield said that after several similar discussions, H.K. instructed Moorefield to add Kawalec as joint owner. (156:8.)

Moorefield said that upon hearing that making Kawalec joint owner was like giving her the money, H.K. "was fine with it, [h]e always seemed to want the money to go to Kawalec; that's why she was originally the POD as well." (156:9.)

As to whether H.K. did this only to make it more convenient for Kawalec to act as POA, Moorefield said that changing the account to joint ownership did not add any convenience regarding her ability to perform that role. (156:12.) Prior to becoming joint owner, Kawalec's designation as POA meant that the bank allowed her to make any withdrawal or deposit, write any check, and conduct any other transaction she desired. (156:11-12.)

Moorefield also testified as to the distinction between JOO and JOF. He said the only difference is that the JOF, or joint owner first, would get a 1099 for tax purposes. (156:10-11.)

Carpio, H.K.'s investment advisor, testified that he also met with H.K. close to the same time H.K. established the joint account. Carpio said that in 2010 he met with H.K. while H.K. was placed in a nursing home. During that meeting, H.K. asked Carpio to cash out two annuities so that he could give the approximately $100,000 profit to Kawalec. (156:28.) H.K. told Carpio that he was giving Kawalec the money to help her with living expenses, so that she could keep her house beyond her pending divorce action, and because she was like a granddaughter to him. (156:28-30.) In addition, it was a good time to give this gift because the annuity companies waive certain fees for nursing home residents. (156:29.) When Carpio went to meet with H.K. to complete these transactions, Moorefield asked Carpio to take along the signature card that would finalize making Kawalec joint owner of the account. (156:30-31.)

Since Carpio was having H.K. sign that card, he also explained to H.K. that making her joint owner was just like giving her the money. (156:32-33.) H.K.'s response was "what's the difference, she's going to get the money—she was going to get the money anyway." (156:33.)

H.K. signed the signature card making Kawalec joint owner of his account, and during the same meeting completed the transaction to give her the gift of more than $100,000. (156:30-31.) Kawalec was not present during Carpio's meetings with H.K.. (156:33.)

Trial Counsel's Testimony

Kawalec's trial attorney Michael Masnica admitted that he based his trial strategy on an incorrect interpretation of the applicable law. (156:53-54.) At the time of trial, he believed that if Kawalec was a joint owner, then as a matter of law she was not a bailee regardless of her status as agent under the POA, and that this was not an issue to present to the jury. (156:50-52.) He admitted that his view was wrong, that in retrospect he now knows that the issue for the jury to decide was whether H.K. made Kawalec joint owner with the intent to donate that money, or whether he did it only to make it more convenient for her to perform her duties as H.K.'s agent. (156:53.)

Trial counsel admitted because of this mistaken view of the law he didn't present evidence that H.K. made Kawalec joint owner with the intent of giving her the funds. He didn't present Carpio's testimony that Carpio told H.K. that making Kawalec joint owner was akin to giving her the money. (156:55-56.) He made no attempt to establish that H.K. acted with donative intent because he didn't think H.K.'s intent was an issue. (156:56-57.)

Trial counsel testified that he pursued two compatible strategies at trial. The first defense was that Kawalec had H.K.'s permission for each individual transaction. The second was that she didn't need H.K.'s permission for each transaction because she was a joint owner of the funds and could spend them in whatever way she wanted. (156:58.) But he didn't know the standard that applied, and didn't know it was a matter for the jury to decide. (156:50-54.)

Counsel also testified that he didn't know that Moorefield was involved in setting up the joint account. However, his file includes notes from a subordinate attorney who conducted trial preparation, including a note that identifies Anthony Moorefield as the personal banker, includes Moorefield's address, and says "need the guy Tony." (125.) Counsel said he didn't see that note because, although he relied on the investigation done by his subordinates, he didn't review all of their notes. (156:88-89.) He thought Carpio set up the joint account, but he never asked Carpio and he didn't know why he believed that. (156:90-91.) Counsel admitted that Moorefield's testimony would have been helpful to the joint ownership defense. (156:58.)

Regarding the jury instructions, Counsel could provide no strategic explanation for not objecting to the instructions regarding whether Kawalec being a bailee and the effect of joint ownership. He said he couldn't remember why he didn't object to the instruction that states a person who acts as a power of attorney is a bailee. (156:60-63.) Regarding the instruction that told the jury that H.K. testified that the funds in the account were his but didn't include that he also made statements that the money was Kawalec's, (140:87-88), Counsel said he probably missed it. (156:65.) He also agreed that the same instruction misstated the issue when it told the jury to consider what impact "the bank's designation of Johnalee Kawalec as JOO" has on this case. (156:65-66.) Counsel admitted he also missed that issue. (156:66-67.)

The Circuit Court Ruling

The circuit court found that Trial Counsel performed deficiently in two ways. First, he did not conduct a reasonable investigation to determine what Moorefield and Carpio knew.

(155:5-6; App. at 7-8.) He never spoke to Moorefield. *Id.* In addition, the court found it unreasonable that he relied on his subordinate attorney's investigation but he did not review all of that attorney's notes, and those notes would have alerted him that Moorefield had relevant information. *Id.*

Second, the circuit court held that Counsel was deficient because he did not understand the law relating to bailee versus joint owner, whether that was a factual question for the jury, and how the jury instructions should have dealt with that issue. (155:7; App. at 9.) According to the circuit court, that was one of the issues for the trial, and to not know the applicable law was outside the wide range of professionally competent assistance. *Id.*

However, the circuit court found that Kawalec was not prejudiced by Counsel's deficient performance. (155:8-9; App. at 10-11.) The court's reasoning was that the case came down to a contest of credibility between Kawalec and H.K., and the jury simply did not believe Kawalec when she said she had asked for and obtained permission before making each of the transactions. (155:9-10; App. at 11-12.) The court held that there was not a reasonable probability of a different result if Moorefield and Carpio had testified that H.K. established the joint account with the intent to give Kawalec joint ownership. (155:10; App. at 12.)

The court also held that Counsel's failure to object to the jury instructions did not prejudice Kawalec's case. The court noted that the jury instructions were probably imperfect, but found that they correctly laid out what the law is and what the jury had to decide. (155:10; App. at 12.)

Having found that Counsel did perform deficiently, but that those deficiencies did not prejudice Kawalec's defense, the circuit

court denied her motion for a new trial. She now appeals from the judgment of conviction and that ruling, and she asks this Court to find that the deficient representation did cause prejudice to her second defense strategy that argued she did not need H.K.'s permission for each transaction because she jointly owned the funds in the joint account.

STANDARD OF REVIEW

Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786. The Court should uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* The application of those facts to the standard for ineffective assistance is a question of law that the Court should determine independently. *Id.*

ARGUMENT

To Kawalec's great misfortune, she relied upon an attorney who did not know that the central issue in her joint ownership defense was H.K.'s intent in setting up the joint account. If he had a donative intent, meaning that he meant to share it with her, then she was an owner. *See Infra* pp. 17-19. But if he set it up merely as a convenience account so she could more easily perform as POA, then she was a bailee. *See id.*

Fortunately for her, she had very strong evidence that H.K. intended to share it with her – the testimony of the bankers who set up the account with H.K.. But her lawyer didn't present that crucial evidence. And to add to her woes, her attorney didn't object to the altered jury instructions, instructions that misstated the issue to her detriment.

As a result, she was denied the effective assistance of counsel. For these reasons, she respectfully asks this court to grant her a new trial.

I. To Prove Beyond a Reasonable Doubt that Kawalec was a Bailee, the State had to Prove Beyond a Reasonable Doubt that H.K. Did Not Have Donative Intent when he Gave Her Joint Ownership of his Bank Account.

Under Wis. Stat. § 705.03, "unless there [was] clear and convincing evidence of a different intent," as a joint owner Kawalec had the right to the funds and could make withdrawals without accounting to H.K..[3] On the other hand, as POA Kawalec had an obligation to avoid self-dealing. *Russ v. Russ,* 2007 WI 83, ¶ 32, 302 Wis. 2d 264, 734 N.W.2d 874.

Her dual role as a joint-account owner and POA raised two conflicting presumptions. First, under § 705.03, the deposit of

---

[3] Wis. Stat. § 705.03 states in relevant part:

> Unless there is clear and convincing evidence of a different intent:
> (1) A joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment. The application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability, except that the spouse of one of the parties may recover under s. 766.70. No financial institution is liable to the spouse of a married person who is a party to a joint account for any sum withdrawn by any party to the account unless the financial institution violates a court order.

funds into a joint account creates a presumption that the depositor had a donative intent. *Russ*, 302 Wis. 2d 264, ¶ 31. However, a POA agent's withdrawal of funds for the agent's own use creates a presumption of fraud. *Id.*, ¶32.

When these two conflicting presumptions collide, the trier of fact is free to make a determination of the principal's intent based on the facts and credibility of the witnesses. *See id.*, ¶36. Our supreme court adopted this approach from the Illinois court of appeals, and in particular said it was adopting three of that court's decisions. *Id.*, ¶¶34-36.

In the first of these Illinois cases, *Estate of Harms*, 236 Ill. App. 3d 630, 177 Ill. Dec. 256, 603 N.E.2d 37 (Ill. App. 1992), a woman established joint accounts with her daughter, and several years later created a POA with that daughter as her agent. While serving as her mother's agent, the daughter deposited her mother's income into the joint account. When the mother died, the other heirs demanded equal shares of the joint account. The court noted that the case raised conflicting presumptions. On one hand, a depositor's establishment and funding of a joint account creates a presumption of donative intent. 603 N.E.2d at 44-45. On the other hand, a presumption of fraud attaches to self-dealing by a power of attorney. *Id.* The court held that when these presumptions come into conflict, the factfinder should determine the depositor's intent based on the facts and credibility of the witnesses. *Id.*

In *Estate of Rybolt*, 258 Ill. App. 3d 886, 197 Ill. Dec. 570, 631 N.E.2d 792, (1994), the Illinois court of appeals extended that holding to joint accounts created after the creation of a POA. It also held that when determining the intent of the depositor, testimony by a banker that the banker explained the effect of a

joint account and that the depositor understood is crucial. *Id.* at 796.

In *Estate of Teall*, 329 Ill. App. 3d 83, 263 Ill. Dec. 364, 768 N.E.2d 124 (2002), the Illinois court of appeals held that there are no conflicting presumptions when the POA agent exploits that position to establish a joint account without authorization by the principal. In that situation, the presumption of fraud controls. *Id.*

Similarly, Wisconsin courts have looked to depositor intent to determine ownership rights of bank accounts. *See, e.g., In re Kemmerer's Estate*, 16 Wis. 2d 480, 487-88, 114 N.W.2d 803 (1962) (holding that "there is no formalistic rule" to determine the rights in a joint account, the "underlying principle is to determine the intent of the depositor in establishing the account."). Accordingly, in *Russ* our supreme court adopted the Illinois approach as applied in *Harms, Rybolt, and Teall*. *Russ*, 302 Wis. 2d 264, ¶ 34-36.

Therefore, whether Kawalec was a joint owner able to spend the money as she wished pursuant to Wis. Stat. § 705.03(1) or a bailee prohibited from self-dealing depends on what H.K. intended when he made her joint owner. Thus, in this case the proper standard for the jury to consider was whether H.K. had donative intent when he established the account.

Unlike those cases, this is a criminal case to which the reasonable doubt standard applies. Thus, the State was required to prove beyond a reasonable doubt that Kawalec was a bailee. Wis. JI-Criminal 1444 (2006). Whether she was a bailee depended upon whether H.K. created the account with donative intent or as a convenience account. Therefore, the State had the

burden to prove beyond a reasonable doubt that H.K. didn't have donative intent when he made Kawalec joint owner.

II. Counsel's Failure to Know the Applicable Law, Present the Bankers' Critical Testimony, and Object to the Altered Instructions Denied Kawalec the Effective Assistance of Counsel.

To prevail on an ineffective assistance claim, a defendant must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, she must show that her attorney performed deficiently. *Id.* at 687. Second, she must show that the attorney's deficient performance prejudiced the defendant's cause. *Id.* The same test applies to claims brought under the Wisconsin Constitution. *Jenkins*, 355 Wis. 2d 180, ¶ 34.

Kawalec was denied the effective assistance of counsel. Counsel's failure to know the applicable law, call critical witnesses, and object to unfair and confusing jury instructions constituted deficient performance. These errors prejudiced Kawalec's case; there is a reasonable probability that the result would have been different if the jury had heard the bankers testify that H.K. knew that giving Kawalec joint ownership was akin to a gift, and if the jury had been correctly instructed. Therefore, the record demonstrates deficient performance and prejudice, and Kawalec is therefore entitled to a new trial.

A. The circuit court was correct when it found that Counsel performed deficiently.

An attorney's performance is constitutionally deficient if it falls below objective standards of reasonableness. *Strickland,* 466 U.S. at 687–88. Courts are highly deferential to a trial attorney's strategic choices. A court should make every effort to reconstruct the circumstances of counsel's conduct, to evaluate counsel's conduct from counsel's perspective at the time of the alleged errors, and to eliminate the distorting effects of hindsight. *Jenkins*, 355 Wis. 2d 180, ¶ 36. To avoid unjustified second guessing, the court should begin with the presumption that counsel acted within the wide range of reasonable professional assistance. *Id.*

In this case Counsel's failure to present the bankers' crucial testimony and to object to harmful jury instructions resulted from his failure to learn the applicable law and his failure to review investigative notes before trial. Neither of these is strategic or reasonable. Therefore, these errors each constitute deficient performance.

1. Counsel performed deficiently by failing to present Moorefield and Carpio's testimony that H.K. intended to give Kawalec a gift when he made her joint owner of his account.

Moorefield and Carpio could have presented crucial evidence about H.K.'s intent, evidence that no other witness could provide. This evidence clearly would have added a great deal of substance to Kawalec's joint ownership defense. Counsel's only explanation for not presenting this testimony is that he didn't understand the applicable law, and didn't know the

significance of Moorefield because he didn't review investigative notes. This constitutes deficient performance.

A lawyer's failure to call a witness can constitute deficient performance. *Jenkins*, 355 Wis. 2d 180, ¶ 41; *Toliver v. Pollard,* 688 F.3d 853, 862 (7th Cir.2012) ("in a swearing match between two sides, counsel's failure to call two useful, corroborating witnesses…constitutes deficient performance."); *see also Goodman v. Bertrand,* 467 F.3d 1022, 1030 (7th Cir.2006) (the testimony of witnesses who would corroborate the defendant's account was a "crucial aspect of [the] defense"); *State v. White,* 2004 WI App 78, ¶¶ 20–21, 271 Wis.2d 742, 680 N.W.2d 362 (trial counsel's performance was deficient for failure to call witnesses who would have brought in evidence that "went to the core of [the] defense.").

Trial counsel's deficiency is clear. Testimony by a banker, who helped the principal create the joint account, and who would testify that he made sure the principal understood the significance of creating a joint account, is "crucial". *See Rybolt*, 631 N.E.2d at 796. Moorefield and Carpio both would have testified that H.K. opened and funded the joint account with the intent to give Kawalec those funds. Counsel did not know Moorefield had this information because he didn't read the investigative notes of his subordinate. Even if he had known, he admits that he wouldn't have presented Moorefield's testimony about H.K.'s intent because he didn't know the law, didn't know that H.K.'s intent was the issue. That also explains why, even though Carpio did testify, Counsel did not present the evidence that Carpio told H.K. that making Kawalec joint owner was akin to a gift.

At the postconviction hearing, Counsel presented no strategic explanation for failing to present this evidence. Therefore, the circuit court was correct to find that Counsel performed deficiently.

2. Counsel's failure to object to the altered definition of bailee in the jury instruction because he didn't understand the law constituted deficient performance.

The altered instruction misstated the bailment issue to Kawalec's detriment. It added that a POA is a bailee. This favors the State; it makes it seem as though Kawalec's status as POA establishes as a matter of law that she was a bailee. This is an incorrect statement of the law, whether she was a bailee or joint owner depended on H.K.'s intent. *See Russ*, 302 Wis. 2d 264, ¶ 36.

This alteration made it easier to convict Kawalec. Instead of having to prove that H.K. was merely setting up the joint account for convenience, the State only had to show that Kawalec had power of attorney. There was never any dispute that she did. (156:61.) Given that, and given the premise that a power of attorney is a bailee, the jury had to find that Kawalec was a bailee. If Kawalec holds power of attorney, and those who hold power of attorney are bailees, then Kawalec is a bailee. It is the simplest form of a transitive law, if A equals B, and B equals C, then A equals C.

The problem is with the premise; not all who act as power of attorney are bailees with regard to all of the principal's property. They are not bailees to any property that the principal chooses to gift to them. They are not bailees as to any money the principal pays for their services, for rent, or for household

expenses. In sum, the change to the standard instruction was unjustified, and it made it easier for the jury to find Kawalec guilty.

Counsel gave no strategic reason for why he didn't object. (156:61-62.) As the circuit court noted, Counsel did not know how the jury instructions should read because he didn't know the law. (155:7.) Therefore, the circuit court was correct to find this deficient.

3. **Counsel also performed deficiently by failing to object to an instruction that was factually misleading and misstated the standard that the jury should apply to choose between the conflicting presumptions.**

To its credit, the circuit court spotted the joint ownership issue, and the court tried to clarify for the jury how it should determine whether Kawalec was truly a joint owner or a bailee. However, the instruction it used to achieve clarity, which was submitted by the State with no objection from Kawalec's attorney, misstated an important fact and was plainly wrong as to how the jury should decide the issue.

Saying that H.K. testified that the funds in the US Bank account were his property gave the jury a false impression that his testimony was clear on that point, or that the court believed that he was. In fact, H.K.'s testimony was contradictory as to whether he had donative intent. In addition to calling it his money, he also said it was hers. He repeated this several times:

- "She could use the money for anything she wanted." (140:65.)

- "I would pay her anywhere from $2,500 to $3,200." (138:180.)
- As to whether she asked him for money, he said "She had my checkbook, she can write her name, fill the thing out, she had permission…" (140:88-89.)
- "She should be living pretty good with the money I gave her, what Ray gave her, and what she made." (140:76.)

Counsel should have objected to that instruction which made it seem as though H.K.'s testimony was clear when it wasn't. Counsel agreed that H.K. sometimes testified that the money in the account was Kawalec's. (156:64-65.) Counsel gave no reason for not objecting to that instruction except that he probably just missed the issue. (156:65.)

Perhaps even more importantly, Counsel should have objected when the circuit court told the jury that it should consider "what effect, if any, the bank's designation of the defendant as a JOO has on this case when considering whether the defendant is guilty or not guilty of these offenses." (146:87-88.) This misstated the issue. The real issue was whether H.K. established the joint account with donative intent or for convenience. If H.K. had donative intent, then she was truly a joint owner, could use the money for whatever she wanted, and wasn't a bailee. The bank's designation is irrelevant.

Because Counsel never objected or suggested other language, the jury was never told the real standard that it should apply, that it needed to determine H.K.'s intent. There was no strategic reason for Counsel's omissions. He just didn't know the standard, and thus he wasn't in a position to suggest the proper instruction. (156-66-67.)

For all of these reasons, the circuit court was correct when it held that trial counsel performed deficiently. Thus, Kawalec is entitled to a new trial if the Court finds that Counsel's errors prejudiced her joint ownership defense.

B. Counsel's errors caused prejudice because there is a reasonable probability that the jury would have found reasonable doubt if Counsel presented the bankers' testimony, and the probability would be even greater if the jury was also instructed correctly.

Kawalec's lawyer did not know the law applicable to her defense. Unsurprisingly, that handicap hindered her defense. The record demonstrates the prejudicial effect in several ways. First, the bankers' testimony would have added a great deal of substance and credibility to her joint ownership defense. *See Jenkins*, 355 Wis. 2d 180, ¶ 62 (holding there is prejudice when the unpresented testimony would have added "a great deal of substance" to the defense). Second, there were no other witnesses that testified about why H.K. made her joint owner, so there was no strong evidence to contradict the bankers' testimony. That error alone was enough to prejudice the defense. But adding to that, the altered jury instructions made it more likely the jury would determine Kawalec was a bailee, and they never instructed the jury that the real issue was H.K.'s intent. If the jury had not been given that altered instruction, and instead was instructed to determine whether H.K. made Kawalec joint owner with donative intent, there is a reasonable probability that the bankers' testimony would have inspired a reasonable doubt.

To demonstrate prejudice, Kawalec must show that Counsel's errors had an adverse effect on her defense. The test is whether "there is a reasonable probability that, but for counsel's

errors, the result of the proceeding would have been different." *Jenkins*, 355 Wis. 2d 180, ¶ 37. "Reasonable probability" does not mean more likely than not. *Strickland*, 466 U.S. at 693. Instead, a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* A defendant fails to demonstrate prejudice if it appears beyond a reasonable doubt that counsel's errors didn't contribute to the conviction. *Jenkins*, 355 Wis. 2d 180, ¶ 37.

When the fact-finder must determine a depositor's intent, testimony by bankers like Moorefield and Carpio is crucial. *See Rybolt*, 631 N.E.2d at 795-96. In *Rybolt*, a grandmother gave POA to her grandson, and they subsequently opened several accounts that were either jointly owned or payable on death to the grandson. *Id.* at 793-94. Regarding one bank account, a banker testified that she made certain that the principal knew what joint ownership meant before opening the account. *Id.* at 794. Based on that testimony, the court upheld the trial court's finding that the grandmother had a donative intent. *Id.* at 795. However, the court refused to find a donative intent regarding a joint investment account because the investment advisor didn't testify that he explained the effect of joint ownership to the grandmother before opening the account. *Id.* at 795-96. According to *Rybolt*, testimony by a banker or advisor that they explained the effect of joint ownership to the principal is "crucial." *Id.* at 796.

In this case, the bankers' testimony would have been as or more significant than in *Rybolt* because the bankers were the only witnesses with information about what H.K. intended when he made Kawalec joint owner. At trial, H.K. wasn't asked why he made her joint owner. Kawalec wasn't either, presumably because her lawyer didn't think it was relevant. No other witness

testified about why H.K. made Kawalec joint owner or his mindset at that time. Moorefield and Carpio are the only witnesses who were around H.K. at the time he made that decision. They had extensive conversations with him about the effect of that decision. They explained the effect of joint ownership, and heard his reactions.

Their testimony would have added a great deal of substance to Kawalec's joint ownership defense. Their testimony suggests that H.K. intended joint ownership as a gift to Kawalec. He made her joint owner after both Carpio and Moorefield told him that it would be the same as giving her the money. When Carpio told H.K. that, H.K. said "what's the difference—she's going to get the money—she was going to get the money anyway." (156:33.) Both had an obligation to protect H.K., and both believed he knew what he was doing. Moreover, both would have testified that H.K. had a history of giving Kawalec gifts and expressing a desire to take care of her.

In addition, Moorefield's testimony contradicts an argument that this was a convenience account, because he said the account didn't add any convenience. He noted that prior to the joint ownership, Kawalec was designated POA on the account, and the bank allowed her write any check and make any transaction. It is illogical that H.K. would have made her joint owner only for convenience when that action didn't add any convenience. *See Harms*, 603 N.E.2d at 41 ("It is illogical that an individual would place all of her substantial assets in joint accounts if she just wanted someone to relieve her of the day-to-day burden of writing checks.").

Even if this were the only error counsel made, it was significant enough to cause prejudice. *See Jenkins*, 355 Wis. 2d

180, ¶ 62 ("when a potential witness 'would have added a great deal of substance and credibility' to the defendant's theory and when the witness 'could not have been impeached as having a criminal record,' the exclusion of the witness's testimony is prejudicial, even if the witness's credibility could be impeached." (quoting *State v. Cooks*, 2006 WI App. 262, ¶ 63, 297 Wis. 2d 633, 726 N.W.2d 322)).

Furthermore, Counsel's failure to present this testimony was particularly prejudicial considering that there wasn't strong contradictory evidence about H.K.'s intent. *See Strickland*, 466 U.S. at 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Neither party asked H.K. why he made her joint owner. There was indirect evidence, such as H.K. describing the money as "his." However, that is entirely consistent with joint ownership. He also made inconsistent statements, such as saying Kawalec could not use the money for whatever she wanted, (140:71), but at other times saying she could use it for anything, (140:65). In addition, when asked about using the checkbook for her own purchases he said: "she had my checkbook, she can write her name, fill the thing out, she had permission…" (140:88-89.) Overall, the evidence was conflicting and weak enough that the jury found her not guilty on one of the two counts, and found that the amount of the theft was much less than the State alleged. In sum, there was not overwhelming evidence that H.K. did not have donative intent when he made Kawalec joint owner of his account.

Given the significance of the bankers' testimony, it is perplexing that the circuit court decided that the case involved a credibility battle between Kawalec and H.K., and that having the bankers testify that H.K. intended the joint ownership as a

donation wouldn't have changed the result. Of course, the circuit court was correct that the jury had to make a credibility determination between Kawalec and H.K.. But there are two problems with that reasoning. First, that credibility determination led to an acquittal on one of the two charges. More importantly, the jury never heard the bankers' testimony about H.K.'s intent, wasn't given a chance to evaluate their credibility, and didn't get to decide what weight to assign to the bankers' testimony.

The circuit court should not have decided the jury would have given H.K.'s testimony more weight than that of the bankers. When assessing prejudice, a court should not substitute its judgment for that of a jury in deciding the credibility and weight to assign the new testimony. *See Jenkins*, 355 Wis. 2d 180, ¶¶64-65 (holding that when a circuit court assesses the prejudice prong it may not substitute its judgment for that of the jury in assessing the credibility and weight to assign to the new testimony). Instead, the circuit court should have limited its analysis to whether the bankers' testimony added "a great deal of substance" to Kawalec's claim that H.K. had donative intent when he made her joint owner. *Id.*, ¶ 62.

Finally, Counsel's failure to object to the altered jury instructions lowered the State's burden and confused the issue for the jury. As has already been stated, telling the jury that a person who acts as power of attorney is a bailee made it more likely the jury would find that Kawalec was a bailee, because she clearly had power of attorney. The other instruction, which stated that H.K. testified that the money in the account was his, gave the jury an incomplete picture. He also testified that it was her money.

In addition, the altered instructions didn't instruct the jury on the proper standard. The court should have instructed the jury to determine whether H.K. made Kawalec joint owner with donative intent. Instructing the jury to consider the effect of the bank's designation of Kawalec as joint owner is not even close to the same thing, and it only confused the issue. The banks designation is irrelevant, and the instruction made it seem as though only the bank thought she was a joint owner. Had the jury been given the standard instruction on the bailee element, and been told to determine what H.K. intended when he made Kawalec joint owner, and had it heard the bankers testify that about his intent, that he said "what's the difference…it was going to be her money anyway," there is a reasonable probability of a different result.

In sum, Counsel's errors prevented the introduction of crucial evidence that would have supported Kawalec's defense. This error alone is enough to demonstrate prejudice. The prejudice is even more apparent when that error is combined with Counsel's failure to object to the jury instruction, to ensure that the State had to prove that she was a bailee, and to ensure that the proper standard was submitted to the jury. For these reasons, the Court should find that Counsel's errors caused prejudice, and that Kawalec received ineffective assistance of counsel.

CONCLUSION

For the above-stated reasons, Kawalec respectfully requests that the Court reverse the circuit court order denying her motion for a new trial, and instruct the circuit court to grant that motion and vacate her judgment of conviction.

Dated this 8th day of August, 2017.

_____
Attorney Andrew R. Walter
Attorney for Defendant-Appellant
State Bar No. 1054162

CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and that it is proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 8,058 words.

Dated this 8th day of August, 2017.

_____
Attorney Andrew R. Walter
Attorney for Defendant-Appellant
State Bar No. 1054162

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

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

electronic brief is identical in content and format to the printed form of the brief filed on or after 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 8th day of August, 2017.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of the brief, is an appendix that complies with Rule 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.

Dated this 8th day of August, 2017.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162