STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2017AP000837-CR

DAKOTA R. BLACK,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and
from an Order Denying Post-Conviction Relief Entered
in the Circuit Court for Dane County,
The Honorable Stephen E. Ehlke, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

The State's response brief, like the Circuit Court's decisions continues to down play the significance of Appellant's arguments about the trial court's errors. The trial court's rulings led to Appellant failing to be able to present a complete defense. The State also misses the significance of trial counsel's failure to properly follow the rules on learned treatises. Trial counsel prejudiced Appellant's defense by being unable to fully attack the State's witnesses and being unable to buttress his own witnesses' testimony. The result from all the errors was that the Appellant did not receive a full and fair trial. Therefore, this Court should vacate Appellant's conviction and remand this matter for a new trial.

I. THE BRUISING IS A RED HERRING.

The State makes a great deal of the fact that there were multiple bruises on BAT's body as proof that this was not an accident. Yet, the State's own argument points out the error of the court in excluding Defense evidence. The State's own experts testified that you cannot date bruising. (See Dr. Knox testimony, R.187:164-65; Dr. Frasier testimony, R.194:266.) The fact that BAT's mother did not notice the bruising that morning does not prove that the injury causing the bruising did not occur prior to that day, during the school day before BAT came home, or as the State alleged that afternoon by Appellant.

As Appellant noted in his initial brief, there was no testimony of abuse by Mr. Black at any time. Instead, there was an approximately one-hour time period between other witnesses seeing BAT alive and his mother coming home and finding him on the cot in the basement having trouble breathing. Nevertheless, the trial court excluded evidence by his cousin that he fell on the playground equipment that day. (R.182:42-47, A-App. 122-27.) This evidence was relevant to alternative causes of his injuries.

The State argued in supporting the trial court that there was no evidence that BAT hit his head in the fall. (Br. at 9-10, 25-26.) The State also argued that although the trial court excluded this evidence, that it still allowed Defense expert Dr. Plunkett to testify about a possible short fall down the stairs and therefore that Appellant was able to present a defense. (Br. at 25.) The State's argument, however, misses the point.

Without allowing in additional evidence of other falls or injuries, the Defense was left basically with pure speculation about what might have happened. No one saw BAT fall and no one saw Mr. Black hit or injure BAT. BAT's cousin, NG, however, could testify that he fell at least twice on the playground. The trial court should have allowed this in and let the jury judge the credibility of the witnesses. The court also prevented Appellant's expert from showing a demonstrative video of how short falls can cause head injuries and death in children.

Mr. Black had a constitutional right under the Compulsory Process Clause to present a defense. Const. Am. VI; Wisconsin Constitution Art. I, Sec. 7. This constitutional right is not to present just any defense or part of a defense, but to "present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Instead, the court only allowed Appellant to present a partial defense. The jury was perfectly capable of weighing the credibility of the evidence. Therefore, the trial court erred in excluding the evidence. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 159 (1974).

II. THE TRIAL COURT SHOULD HAVE EXCLUDED THE STATE'S EXPERT EVIDENCE.

The State argues that the testimony of its experts should not have been excluded in part because *Daubert* is not meant to exclude medical testimony supported by relevant

experience. (Br. at 28.) It cites the Wisconsin Supreme Court's recent opinion in *Seifert v. Balink*, 2017 WI 2, ¶ 85, 372 Wis. 2d 525, 888 N.W.2d 816. The problem here, however, is that their testimony is not just based on relevant medical experience.

As the State and its experts contend, this is a case of alleged abusive head trauma. As Appellant argued, abusive head trauma is not a medical diagnosis, but rather a determination of medical causation and criminality. (See App. Br. at 14-16.) The State's response points out the controversy of these diagnoses by citing to articles and non-Wisconsin authority accepting abusive head trauma testimony. On the other hand, Appellant cited to numerous articles on how the diagnosis has been called more and more into question. This could have, and should have, been handled in an evidentiary hearing—not on post-conviction motions and appeals.

In addition, the State's arguments about biomechanical engineering testimony are misplaced. The State contends that because they supposedly relied on clinical experience that this satisfies Wis. Stat. § 907.02. (Br. at 33.) This, however, is exactly the type of evidence the legislature meant to exclude by modifying Rule 907.02. As Appellant argued, Doctors Knox and Smith offered testimony about force necessary to cause BAT's injuries without any scientific background to support their conclusions. (App. Br. at 6-7, 16.) Dr. Smith even admitted that biomechanical engineers can give an idea of force whereas physicians cannot. (R.192:70.) Yet, the court still allowed the State's physicians to speculate about the force necessary to cause BAT's injuries.

"Reliability depends 'solely on principles and methodology, not on the conclusions that they generate.'" *Seifert*, 2017 WI 2 at ¶ 61, *quoting Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). Doctors Knox and Smith have no training or experience in biomechanical engineering or any other discipline that would

allow them to testify as to force involved in an accident. They had no principles or methodology on which to base their opinions. Nonetheless, the trial court allowed the doctors to speculate as to the force necessary to cause BAT's injuries. The trial court failed to exercise its gate-keeper role.

All of this establishes how the trial court erred in not having an evidentiary hearing on these issues. Justice Ziegler in *Seifert* stated that the best practice for a trial court "is to create a detailed, complete record regarding why any particular expert's testimony meets the heightened scrutiny due under § 907.02." *Seifert*, 2017 WI 2 at ¶ 189 (J. Ziegler concurring). Defense counsel requested such a hearing. (R.70:4.) The trial court did not do so. Instead, without holding an evidentiary hearing that would have presented a complete record for the court to exercise its gatekeeper function, the court simply said that the rules of evidence would apply and let the State's witnesses testify. (R.182:60, 62; A-App. 133, 135.)

The trial court's failure to properly exercise its gatekeeper role and exclude the State's expert witnesses allowed the jury to hear speculative testimony. Therefore, this Court should vacate defendant's conviction and remand for a new trial.

III. THE TRIAL COURT ERRED IN ALLOWING DR. FRASIER AS A REBUTTAL WITNESS.

The State contends that Dr. Frasier was a proper rebuttal witness because the defense cross-examination of Dr. Knox created a disagreement between two of the State's experts: Dr. Knox and Dr. Roman. (Br. at 34.) This argument is without merit. As the State noted, Dr. Knox immediately followed Dr. Roman. (Id.) The fact that the State now had two of its own experts in disagreement did not mean that Dr. Frasier was a legitimate rebuttal witness. Instead, at best, the State should have called Dr. Frasier sometime in its case in chief.

The State basically admitted that Dr. Frasier's testimony was necessary for its case in chief, not due to the defense case. Dr. Frasier's testimony was just more of the case in chief. Therefore, it was not "bona fide rebuttal evidence." *See State v. Novy*, 2013 WI 23, ¶34, 346 Wis. 2d 289, 827 N.W.2d 610. Instead, the trial court simply allowed the State to call an additional witness after the Defense case to underscore the State's case.

IV. DEFENSE COUNSEL WAS INEFFCTIVE.

The State and the trial court miss the significance of defense counsel's failure to file adequate notice of learned treatises. Wis. Stat. § 908.03(18)(a) provides that: "No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial." Counsel gave notice of a mere five learned treatises. (R.28.) As Appellant argued, this was highly insufficient and the State's own objection at trial sustained by the court proves the point. (R.193:103-04.)

As the State recognized, this case relied on expert testimony and circumstantial evidence. Trial counsel did not even have all of the learned treatises necessary to use with his own experts, let alone to attack the State's experts. Appellant in his post-conviction motion cited to numerous other treatises that trial counsel could have and should have listed. (R.167:20.) Thus, trial counsel was incapable of fully defending Appellant.

In addition, the State's response to the issue of trial counsel failing to impeach Patricia Garwo also overlooks the significance of counsel's error. The State asserts that there was no error because her testimony was consistent with the Defense theory that BAT had a lucid interval after a fall down

the stairs that allowed him to walk to the cot. (Br. at 38.) Yet, this is exactly why trial counsel was ineffective. As Appellant noted in his initial brief (App. Br. at 7-8), Patricia Garwo testified at trial for the first time that BAT was on the bed with the blanket tucked around him. (R.189:70-71.) This was inconsistent with his mother's testimony. It also was inconstant with theory that BAT could have fallen down the stairs and then made it to the cot, because he would not have been able to tuck himself in. Instead, her testimony implied that someone else tucked BAT in, namely Mr. Black. Therefore, it was error not to impeach Ms. Garwo and it was prejudicial to Appellant's defense. Therefore, he entitled to a new trial.

V. THIS COURT SHOULD VACATE THE CONVICTION AND REVERSE THIS MATTER FOR A NEW TRIAL IN THE INTERESTS OF JUSTICE.

Contrary to the State's assertion (Br. at 39), Appellant is not arguing that the conviction is suspect because it is based largely on circumstantial evidence. Instead, it is Appellant's argument that due to the trial court's rulings, Appellant was hampered in his ability to present a defense. (App. Br. at 23.) The jury heard basically a one-sided and speculative case from the State. The real controversy was never tried. Therefore, Appellant believes that this Court should exercise its discretion under Wis. Stat. § 752.35 to order a new trial in the interest of justice.

Although the Wisconsin Supreme Court has stressed that the courts should exercise discretionary reversal only in exceptional cases, this case is exceptional. *See State v. McKellips*, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. This was a tragic occurrence in which a five-year old child died. It is hard enough for a defendant accused of such a crime to get a jury to put aside its sympathies and bias to give a fair consideration of the evidence. It is even harder when a trial court keeps out defense evidence, allows

speculative expert testimony by the State, and defense trial counsel fails to properly defend the case. Even if this Court finds that some of the errors raised by Appellant are not sufficient to vacate the conviction on their own, this Court should exercise its discretion and reverse in interests of justice.

VI. THIS IS NOT A HARMLESS ERROR CASE.

As a last-ditch argument, the State asserts that any error by the trial court was harmless because "there is no reasonable possibility that the error contributed to the conviction." (Br. at 40.) The basis for this argument is again the reference to the number of bruises and injuries on the body. The State argues that only Mr. Black could have caused these injuries. As noted above, this argument is misplaced because even as the State's own experts testified, they cannot date the bruises. BAT could have been injured at any time prior to his death.

Although there may be circumstantial evidence to support the State's arguments to a jury, the trial court's errors listed by Appellant cast doubt on the State's case. Contrary to the State's argument, if the trial court erred as contended by Appellant, the State simply cannot meet its burden of proving that there is no reasonable probability that those errors contributed to the conviction. *See State v. Thomas*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (cited by State Br. at 40). Therefore, any error cannot be harmless.

CONCLUSION

For the above reasons and those set forth in his initial brief, Appellant respectfully requests that this Court reverse the trial court, vacate the judgment of conviction, and remand this matter to the Circuit Court for a new trial.

Dated this 6th day of October, 2017.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in 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 of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2162 words.

Dated this 6th day of October, 2017.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This 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 6th day of October, 2017.

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