STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1332-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AKIM A. BROWN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Order Denying Motion for Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Daniel L. Konkol and the Honorable M. Joseph Donald, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Brown is Entitled to a New Trial Because He Was Denied His Constitutional Right to the Effective Assistance of Counsel When Trial Counsel Failed to: (A) Elicit His Testimony that L.S. Stimulated Herself During Their Intercourse and to the Intercourse Act; and (B) Object to Officer Mueller's Testimony Repeating L.S.'s Prior Statements Consistent with Her Testimony that Mr. Brown had Sexually Assaulted Her.

Mr. Brown argued this issue in his brief-in-chief. He relies on those arguments and incorporates them here. Mr. Brown briefly rebuts some of the State's arguments. In all other respects, Mr. Brown relies on his arguments contained in his brief-in-chief.

A. Failure to Elicit Mr. Brown's testimony.

Contrary to the State's suggestion[1], Mr. Brown claims that counsel's performance was deficient regarding his testimony in two respects. Counsel performed deficiently when he failed to: 1) elicit Mr. Brown's testimony that L.S. stimulated herself during their sexual intercourse; and 2) elicit his testimony to the sexual intercourse act itself.

1. Failure to elicit Mr. Brown's testimony that L.S. stimulated herself during the sexual intercourse.

It was Attorney Batt's duty to ensure that Mr. Brown testified completely to all facts of his consent defense, including that L.S. stimulated herself during the intercourse.

[1] State's brief, p. 6.

It was inadequate to only instruct Mr. Brown in advance to testify to certain facts. Counsel needed to guide Mr. Brown *as he testified* "with effective questioning to facilitate the presentation of [his] account" of his and L.S.'s sexual intercourse. *See* ***State v. McDowell***, 2003 WI App 168, ¶52, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.

It is not a defendant's job to make sure on his own that he testifies completely to all necessary facts. His attorney is required to do so. This is because: 1) an attorney determines which facts are legally relevant; 2) a defendant, whose freedom is on the line, may be rattled and/or stressed; 3) a defendant may be unaccustomed to speaking in public; and 4) a defendant may give an incoherent explanation or overlook important facts.

In a related context, the United States Supreme Court explained the need for the counsel's guiding hand when a defendant speaks to the jury: "[T]he tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely." ***Ferguson v. Georgia***, 365 U.S. 570, 594 (1961) (finding unconstitutional a state rule prohibiting defense counsel from directly examining the defendant when he chose to speak in his own defense, ***Id***. at 596) If left to speak "without the guiding hand of counsel…he may fail to properly introduce or to introduce at all, what might be a perfect defense…" ***Id***. at 594 (internal quotations and citations omitted).

Mr. Brown was denied counsel's guiding hand while testifying in his own defense. Attorney Batt failed to ask sufficient questions to elicit his testimony that L.S. stimulated herself during the sexual intercourse. Attorney Batt intended to elicit this testimony but admitted he overlooked doing so. (*See* 136:36) Deficient performance is shown, where, as here,

counsel's failure results from oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); *see also* ***State v. Thiel***, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305.[2]

2. Failure to elicit Mr. Brown's testimony to the sexual intercourse act itself.

The State's attempt to sidestep this claim, by asserting that Mr. Brown graphically described the sex act[3], is belied by the record. Mr. Brown's trial testimony did not include a description of the penis-to-vagina intercourse act itself. *See* 126:80-110.

Rather, he testified to what occurred immediately before and then immediately after the intercourse. In contrast, his postconviction hearing testimony described the penis-to-vagina intercourse:

[2] Counsel also admitted he forgot to ask L.S. if she masturbated during their intercourse. (134:101) Despite this testimony, the State inaccurately claims that counsel testified his failure to do so was a deliberate decision. State's brief, p. 6. In so claiming, the State cites counsel's testimony about his decision not to question L.S. about conversations and behavior occurring outside her home. (*Compare* State's brief, p. 6 *with* 134:106-110)

[3] State's brief, p. 5.

Trial testimony	*Machner*[4] hearing testimony
Physical contact preceding the intercourse	
As he and L.S. were in her bed, they discussed the condition of each other's feet. (126:93-95) L.S.'s feet were in the air. (*Id*.:94) Neither he nor L.S. were naked at that time. (*Id*.:95) He knelt in front of L.S. and pulled off her socks. (*Id*.) He leaned over L.S. with his hands on either side of her body and L.S.'s hands were on the side of his torso. (*Id*.) He kissed her on her neck and ears, physically "wooing" her into sex. (*Id*. 95-96) He did not force himself on her or hold her down with his body and L.S. never said she did not want to have sex nor struggled with him. (*Id*.:96)	While in her bed, they discussed each other's feet, which led to him kneeling in front of L.S. who had her legs up in the air. (137:59) He pulled her socks off. (*Id*.) He leaned forward and kissed her on the neck and ears. (*Id*.)

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

She never tried to keep her legs from opening and her legs were around his side at this point. (126:97) "It was missionary sex position at that moment. We weren't having sex at that moment and her legs were up on my side." (*Id*.) His hands were down and he was leaning over, kissing her neck and ear. (*Id*.) He did not ever put his finger up her vagina. (*Id*.) They continued to make out for a few minutes; they started to kiss, but he stopped right away and went back to necking. (*Id*.)	He pulled up her shirt, pulled her breast out of her bra, and sucked on her breast and nipples. (137:59) He briefly kissed her on the mouth. (*Id*.:60)

Trial testimony	*Machner* hearing testimony
Sexual Intercourse Act	
	He pulled off her pants and underwear, and took off his clothes. (137:61) He placed his penis in her vagina and moved his penis back and forth. (*Id*.) L.S. legs were around his sides, he leaned over her body propping himself off her torso. (*Id*.) L.S. pulled herself up off the bed; took off her T-Shirt and bra and laid back down on the bed. (*Id*.:62) He reinserted his penis into her vagina, leaned back on his knees, and L.S. legs were up in the air in front of him. (*Id*.) He continued moving his penis back and forth in her vagina. (*Id*.) As he did so, L.S. legs were in the air; she continuously massaged her clitoris with her hand. (*Id*.:63) He eventually ejaculated in her vagina. (*Id*.)
After the sexual intercourse	
He rolled over and knelt back. L.S. took a shower in the bathroom. (126:98)	

In context, Mr. Brown's use of the phrase "the missionary position" was not, as the State suggests, a contemporaneous description of their sexual intercourse. He qualified the time frame, by explaining that they were not having sex *at that time*. He was describing events which preceded the intercourse. What is critically missing from Mr. Brown's trial testimony is what happened after he kissed L.S. while laying on top of her body with her legs up around his sides.

Unfortunately, one of the things that counsel's deficient questioning did was cause Mr. Brown to give extraneous testimony in an attempt to answer his unfocused and vague questions. For example, counsel asked "[c]ould you tell us then what happened when you got to her residence that evening?" (126:86) Mr. Brown answered that question in a lengthy detailed narrative. (*Id*.:86-89) Counsel then asked "[h]ow did it come about then that the two of you had sex that night?" (*Id*.:89) Mr. Brown responded in a lengthy detailed narrative. (*Id*.:89-94)

The State, recognizing that Attorney Batt's questioning invited and caused Mr. Brown's narrative answers, then objected "[i]f it can be a question here rather than in the format of a narrative." (*Id*.:94) After the judge sustained this objection, Attorney Batt continued his direct examination in a question and answer format. (*Id*.:94-102)

In any event, Mr. Brown's detailed answers were consistent with his prior statements to counsel that L.S. consented to their sexual intercourse. More importantly, his testimony did not include the specific helpful information that counsel already knew about and then failed to elicit.

Further, the State's depiction of Mr. Brown's trial

testimony as "boastful[5]" is not supported by this record. Mr. Brown described mutually consensual sexual foreplay, flirtation, and post-coital comments between two adults. Additionally, his description was not "lurid"[6] but rather, at worst, distasteful in some social contexts. Moreover, such details are to be expected in a sexual assault jury trial.

2. Prejudice.

Mr. Brown was prejudiced by counsel's failure to elicit his testimony that L.S. stimulated herself during their sexual intercourse and his testimony to the intercourse act itself, as outline above in the graph on page 6.

L.S. accused Mr. Brown of sexually assaulting her in her bed. Mr. Brown testified that their sexual intercourse was consensual. In the face of this accusation and denial, there was no overwhelming evidence of guilt. There was no physical evidence that the sexual intercourse was nonconsensual. L.S. did not have any physical injuries, did not yell out, call for help or leave her apartment. She told a friend the next morning that she had been "taken advantage of" and delayed reporting her accusation to law enforcement.

The jury's credibility determination was pivotal to the outcome of this trial. This was an extremely close case. After hearing L.S.'s and Mr. Brown's live testimony and observing their demeanor and body language, this jury struggled with making its credibility determination, deliberating nearly four hours. This jury compared L.S.'s and Mr. Brown's contrasting testimony specifically on the "sex act" to reach its verdict. It returned a guilty verdict 40 minutes after being read this testimony.

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[5] State's brief, p. 1.

[6] *See* State's brief, p. 12.

The State's prejudice argument focuses on the wrong question. The question is not whether Mr. Brown's trial testimony included some evidence of L.S.'s consent. The question is whether there is a reasonable probability that the jury would have reached a different verdict had it heard the additional evidence of L.S.'s consent and Mr. Brown's testimony describing their act of sexual intercourse.

Further, contrary to the State's suggestion, in evaluating prejudice here, this court cannot: 1) assume that L.S.'s trial testimony was credible; 2) speculate that the jury would have believed any rebuttal testimony from L.S., or 3) assess whether a jury would have been alienated or offended by Mr. Brown's additional testimony and/or not believed it.[7] When assessing the prejudicial effects caused by counsel's deficient conduct, a court "may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible." ***Jenkins***, 355 Wis. 2d 180, ¶64.

Here, there is a reasonable probability that this jury would have reached a different verdict had it heard Mr. Brown's testimony regarding the sexual intercourse act itself, including that L.S. stimulated herself during it. Not only were these facts additional evidence of L.S.'s consent, the jury would have viewed Mr. Brown's credibility differently. L.S. had provided details about the sexual act, while he had not. The jury could have believed, as the prosecutor argued[8] that his failure to testify to the intercourse act was because he had non-consensual sexual intercourse with L.S. but could not admit it.

There is a reasonable probability that this evidence would have affected the jury's assessment of L.S.'s

[7] *See* State's brief, p. 12.

[8] 150:22

testimony. With this additional evidence, the jury could have believed that: 1) she intentionally lied about her consent; or 2) she was mistaken, without believing that she intentionally lied. If this jury had believed that she was a much more active participant in the sex act, the jury could have believed that she consented at the time and that her later regret colored her perceptions. In other words, with this testimony, there is a reasonable probability that this jury could have believed that he was telling the truth and her recollection was incorrect.

B. Counsel's failure to object to Officer Mueller's testimony to L.S.'s prior statements consistent with her testimony was deficient and prejudicial.

This argument is set forth in full in the brief-in-chief and will not be repeated here.

C. The cumulative effective of counsel's deficient conduct prejudiced Mr. Brown.

This argument is set forth in full in the brief-in-chief and will not be repeated here.

CONCLUSION

For all of the reasons set forth above and in his Brief-in-Chief, Mr. Brown respectfully requests that this Court enter an order reversing the circuit court's order denial of his motion for postconviction relief, vacating the judgment of conviction and sentence, granting him a new trial, and remanding this case to the circuit court for a new jury trial.

Dated this 29th day of June, 2018.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) The length of the brief is 2,227 words.

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I certify that the text of the electronic brief is identical to the text of the paper copy of the brief.

Dated this 29th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 29th day of June, 2018, I caused 10 copies of the Defendant-Appellant's Reply Brief to be mailed, properly addressed and postage pre-paid, to Sheila T. Reiff, Clerk, Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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