STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 17AP001723CR
Milwaukee County Cir. Court Case No. 2013CF0569

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KEITH J. BROOKS,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY BRANCH 25, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE FAILS TO REBUT BROOKS' INEFFECTIVENESS CLAIMS

A. The State's rebuttals miss the point.

Brooks asserts that counsels were ineffective when, unwittingly, they precipitated Brooks' conviction of homicide, by first admitting that Brooks "pushed [A.B.] over the edge to suicide" and next not ensuring that the jury was properly informed, through jury instructions they would presumptively follow, of the law as counsel understood it to be: that a homicide conviction was legally impossible when/if A.B. died by suicide.

The State counter-attacks by claiming -- erroneously -- that Brooks misunderstands the law and is legally "wrong." See e.g. Brief at p. 17 (claiming Brooks does not understand that the English language and the law treat homicide and suicide as distinct), 19 (attacking Brooks for asserting that "in Wisconsin, a person can commit homicide by mentally pushing someone to suicide").

These attacks miss the point of Brooks' arguments.

Brooks' argument is not about how the law treats homicide vs. suicide, so the State's legal analysis at pp. 17-20 misses the point.

Brooks' argument is about *how the law was presented to the jurors via the jury instructions*: it was not stated fully and correctly, consistent with counsels' understanding of it and their defense theory. Brooks asserts that such failed statement of the law in the instruction, following the defense's admissions that "Brooks pushed A.B. over the edge

to suicide," caused the homicide conviction, ineffectively. This argument is not contrary to law. The State's attempt to discredit it as legally invalid fails.

The State's other rebuttal efforts also fail because they are attacks on positions Brooks never takes.

The State erroneously states that Brooks claims counsels were ineffective for not anticipating that jurors could "misconstrue" counsels' arguments to convict improperly of homicide. State's Brief at pp. 1, 20, passim.

But Brooks does not so claim. Brooks asserts that jurors *reasonably* followed, considered, and applied counsels' admissions/arguments (that Brooks "pushed [A.B.] over the edge to suicide"), to convict of homicide. Stating that Brooks "pushed her over the edge to suicide" plainly admitted that Brooks' abuse precipitated A.B.'s death and that A.B. would have lived had Brooks not abused her as he did. On hearing this admission, and relying on their common sense, jurors would reasonably conclude that Brooks' abuse was the major cause of A.B.'s death by suicide. This admission was repeatedly, emphatically put to the jurors by defense counsels. It was supported by the evidence of abuse. This was the core of the theory of defense. It sunk in because it was credibly made. The jury lacked reasons *not* to accept it. Counsels' success in persuading the jurors to accept it prejudiced Brooks, by leading the jurors to conclude reasonably -- in light of the jury instructions given -- that Brooks was guilty of reckless homicide.

Neither does Brooks assert that jurors "disregarded the jury instructions," as the State claims at p. 1. Rather, Brooks asserts that the jurors *properly, reasonably*, consistent with common sense and plain English, understood the jury instructions that were given and followed such instructions, as

presumed to do. *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis.2d 85, 750 N.W.2d 780 (jurors are presumed to follow the instructions given by courts). The instructions unambiguously stated that one was guilty of reckless homicide if his conduct was a "substantial factor" in another's death.[1] From this unambiguous instruction -- based on the abuse evidence presented and on counsels' repeated admissions that Brooks "pushed [A.B.] over the edge to suicide" -- the jurors *reasonably* would conclude that Brooks' abuse was a "substantial factor" in A.B.'s death.

The State's Brief does not deny or rebut the claim Brooks actually makes: that counsels were ineffective in *mishandling* the strategy of "embracing the bad facts," in such a way that it would invite and precipitate a homicide conviction, the opposite of Brooks' key goal in choosing the Strategy. This claim should be deemed admitted. *State v. Chu*, 2002 WI App 98, P41, 253 Wis.2d 666, 643 N.W.2d 878 (argument admitted when not rebutted or responded to).

Counsels' deficiently failed to ensure that the jury instructions correctly and fully stated the law as counsels understood it, on which hinged the acquittal of homicide: that Brooks *as a matter of law* could not be guilty of homicide if

[1] It is an uncontroverted fact of record that the jury instructions, as given, did *not* state that, under Wisconsin law, death by homicide was mutually exclusive with death by suicide; or that a defendant could not be guilty of (reckless) homicide if the decedent died by suicide; or that a defendant's conduct could *not* be a "substantial factor" for reckless homicide purposes, if the death was by suicide; or that the law did not allow for a homicide conviction when the death resulted from suicide; or that proactive, physical acts by the defendant had to be proven before his conduct could be a "substantial factor" in a death by (reckless) homicide; or any equivalent clarification of the letter of the law, as defense counsels understood it.

A.B. killed herself. Had the instructions correctly and fully stated this law, the jurors would presumably follow it, to acquit of homicide. *LaCount*, 2008 WI at ¶23.

B. Deficiency

Defense counsels' actions were deficient and not strategic. They were done with the goal of avoiding a homicide conviction, but in fact precipitated such conviction by opening an inviting, wide-open path for the jurors *reasonably* to conclude that Brooks' abuse was a "substantial factor" in A.B.'s death and he guilty of reckless homicide.

If counsels correctly understood the law of homicide, then they were deficient in allowing an incorrect and incomplete statement of the law in jury instructions to mis-guide the jurors into concluding *reasonably* (in light of the wording of the jury instructions as given and counsels' admissions) -- but contrary to law -- that Brooks was guilty of reckless homicide for abusing A.B. until she took her life.

Counsels were deficient insofar as they did not see the danger of such an illegal homicide conviction, but helped cause such danger instead of preventing it (e.g. by ensuring the instructions fully stated the law that made homicide and suicide mutually exclusive); and insofar as they *assumed* that the jurors would know and follow the law based on counsels' arguments alone, though not fully stated in the instructions.

C. Prejudice

The State claims, at p. 24, that plentiful evidence -- including Milwaukee's medical examiners' testimony -- supported the conclusion that A.B. "could not have committed suicide," preventing Brooks from showing prejudice under *Strickland*.

This claim fails when the State prominently, persistently argued that Brooks *intentionally* killed A.B., yet the jury found Brooks not guilty of intentional homicide. They did not buy the State's arguments or positions.

Based on weapon-related evidence, the State in closing cursorily suggested that Brooks may have accidentally shot A.B. (R.143:104). This was secondary afterthought barely argued to the jury. It is highly improbable that the jury found Brooks guilty on this barely-argued, thinly supported accidental shooting theory, when they had before them an inviting, wide-open path to convicting of reckless homicide on the emphatically stated, law-supported (by the instructions as given), evidence-backed theory unwittingly presented by the defense: that Brooks' abuse "pushed A.B. over the edge to suicide," becoming a "substantial factor" in her death.

The (weapon) evidence that Brooks shot A.B. accidentally was scant and very unclear. (R. 143:103-104). Evidence supporting suicide was much clearer, multi-sourced, and plentiful. There was no "overwhelming evidence" that Brooks unintentionally shot A.B., or that she did *not* shoot herself.

The 150+ exhibits proved the intensity of Brooks' emotional abuse of A.B. and her fragile mental health. These exhibits supported that Brooks "pushed A.B. over the edge to suicide," but not that he shot her.

The homicide-supporting testimony of Milwaukee's three medical examiners was counter-balanced by the testimony of the defense's two forensic experts: that A.B.'s death was not incompatible with suicide and that the Milwaukee medical examiners' methodologies and findings were unreliable. This evidence bolstered Brooks' credibility

and supported that abuse "pushed A.B. over the edge to suicide."

The State claims incorrectly that there was "overwhelming evidence against Brooks" to support the guilty verdict, so counsels' complained-of acts could not be prejudicial. See. e.g. pp. 2, 24.

The evidence against Brooks "overwhelmingly" showed only that Brooks persistently emotionally *abused* A.B.. There was no direct evidence at all, certainly no "overwhelming evidence," that Brooks shot A.B. There was evidence indicating that A.B. may have been shot, and also evidence supporting that she may have shot herself.

The State does not explain why the jurors would *not* take the inviting, wide-open path to a reckless homicide conviction that lay before them, which was emphatically, credibly, reasonably prepared with the defense's unwitting help. If that path was legally incorrect, the jurors could not and did not know it. And for this counsels were responsible.

The State does not say how or why counsels' complained-of actions did *not* precipitate, facilitate, or invite the reasonable conclusion that Brooks' conduct was a "substantial factor" in A.B.'s death and that Brooks committed reckless homicide, as defined in the jury instructions given. This argument should be deemed admitted. *Chu*, 2002 WI App 98, P41.

In this case a wide, smooth path was paved for the jurors reasonably to conclude that Brooks' abuse was a "substantial factor" in A.B.'s death and he was guilty of reckless homicide. Counsels' actions helped make such homicide conviction reasonably unavoidable. Counsels unwittingly laid the groundwork for such conviction, contrary

to their intentions and goals (acquittal of homicide) -- ineffectively.

D. Brooks' claims for relief are valid whether or not Wisconsin's law allows a homicide conviction when death was by suicide.

Counsels testified and the State argues, passim, that Wisconsin's law of homicide as a matter of law does not reach situations involving death by suicide.

Such interpretation of the law by counsels and the State does not rebut Brooks' claims for relief. Those claims are valid whether or not Wisconsin law allows a homicide conviction when death was by suicide.

Nothing in the law bars or invalidates Brooks' claim: that here the otherwise-avoidable homicide conviction was precipitated by the defense, and reasonably followed from defense counsels' decisions, including provision of jury instructions that did not fully and correctly state the law and that would precipitate a reckless homicide conviction.

The State mischaracterizes Brooks' reliance on the *Carter* case when it alleges, at p. 20, that Brooks "suggests that his attorneys performed deficiently by failing to alter their trial strategy based on news reports about a case from another state [the Carter case] that did not exist at the time of Brooks' trial." The State calls such alleged suggestion "farcical." Id.

Indeed, it would be "farcical," if made. But Brooks does not make this suggestion.

Brooks invokes the *Carter* case to show that, based on their understanding of the law, lawyers and non-lawyers can reasonably conclude (as did the jurors in Brooks' case) that a

defendant commits homicide by substantially contributing to someone's suicide, even if indirectly, remotely, without direct physical acts; and that courts have indeed agreed.

II. THE STATE FAILS TO REBUT BROOKS' JURY INSTRUCTION-BASED CLAIMS FOR RELIEF.

The State fails to rebut Brooks' JI-140CR-based arguments for vacatur or, alternatively, certification to the Wisconsin Supreme Court.

Contrary to the State's claim at page 24, Brooks' JI-140CR arguments were not rejected by the Wisconsin Supreme Court in *Avila*. *Avila* was decided without the benefit of the data and conclusions derived from the Two Studies, which empirically disprove the *Avila* holding in a scientifically reliable, verifiable way. Brooks' arguments were never before the *Avila* court.

Brooks asserts that *Avila* would have been differently decided if the high court had known the data and conclusions from the Two Studies and understood their reliability and validity. The State does not assert otherwise, so Brooks' assertion should be deemed admitted. *Chu*, 2002 WI App 98, P41.

The State correctly states, at page 27, that the Two Studies are "inconsistent with controlling Wisconsin law" announced in *Avila*. For this reason -- and because the Studies are scientifically correctly designed, and yielded reliable, reproducible results validly supporting the conclusions presented -- certification to the Wisconsin Supreme Court is proper. Wisconsin's highest court should clarify and develop the law governing the criminal jury instructions defining the State's burden of proof, in light of the solid science of the Two Studies.

The Two Studies are reliable, verifiable science, contrary to the State's claims at pp. 27-35. The State points to no "flaws" invalidating the results, conclusions, or import of the Two Studies.

The alleged "flaws" the State names are debunked in Brooks' Brief at pp 29-32 and in sources there cited; and in the Studies themselves; and in Cicchini's article titled "The Battle over the Burden of Proof: A Report from the Trenches," at pages 8-10 and passim.

The State's attacks on the scientific methodologies of the Two Studies, the accuracy or reliability of the data obtained in the Two Studies, and the validity of the conclusions drawn from such data all fall flat.

The State claims, at pp. 30 et al., that the Studies were biased from the start, designed to prove defense-favorable positions, making their findings and conclusions invalid.

The State clearly misunderstands the process of scientific inquiry and standard research methodology. As shown and explained in Brooks' Brief and in the Studies themselves, the Studies were designed not to prove certain preconceived positions, but to test certain hypotheses and -- through widely accepted steps in scientific investigation -- to prove OR disprove such hypotheses. The Studies were not "biased" just because the State so asserts, without valid support.

The State claims, at p. 31, that the Studies were invalid because the samples used were not random. This claim is plainly false. In both Studies samples were in fact randomly selected, consistent with the principles of valid empirical research. See the Two Studies, passim; Cicchini, The Battle over the Burden of Proof, p. 10.

The State claims the Studies were invalid because the authors relied on Amazon's Mechanical Turk. Id. But the State does not show that, or how, reliance on such tools as Turk would invalidate the scientific studies. And in fact it does not, but at best calls into question the application of the results to a larger population. Nothing supports this invalid attack of the State.

The Brief claims at p. 32 that the Studies are invalid because their participants could not decide the case as juries do, by assessing the credibility of testifying witnesses after observing the tonality, volume, etc. of witness' testimony; but instead "decided" the case based on written materials. This is a "red herring" argument. The State does not validly, credibly show that or how the *manner in which information was presented* to the test participants would impact the scientific validity and reliability of the Studies. Nothing in science indicates that such manner impacts the scientific validity of the Studies' results or implicates bias within them.

The Brief claims at pp. 31-33 that the Studies are invalid because their participants were not screened for "preconceived notions" regarding matters relevant to the guilt/innocence decision. Here the State contradicts itself, now claiming that samples should *not* have been random, but pre-screened through a voir-dire-like process, to weed out those with "preconceived ideas." Scientifically speaking, such pre-screening would have caused the sample to be "biased" and the Studies' validity be compromised. Thus here too the State's critique misfires.

Lastly, the Brief conveniently ignores that the Second Study *replicates* the results of the First, stating it "adds nothing" to the First Study. See id. at 36, passim. But replication validated the scientific methods and results of the

First Study, and greatly enhanced the reliability of the results. Replication provided by the Second Study re-confirmed the scientific validity of both Studies, their methodologies, their findings, and their conclusions.

Also the State's reliance of *State v. Avila*, 532 N.W.2d 423 (1995), in trying to rebut Brooks' arguments misses the point of this appeal. When Brooks challenges the validity of *Avila's* holding and asks that it be overruled based on the empirical results of the Two Studies, then citing *Avila* as controlling authority is not valid rebuttal on the merits.

The State fails to rebut Brooks' arguments for overruling *Avila*. It does not reliably argue that *Avila's* holding regarding JI-140CR withstands the empirical "reality check" from the Two Studies. The State does not assert that -- pursuant to the Two Studies -- *Avila* is still correctly decided, or that the *Avila* court would issue the same holding if it had access to the Two Studies and properly understood their validity. These claims should be deemed admitted. *Chu*, 2002 WI App 98, P41.

Nothing in the State's Brief validly shows that the Two Studies are scientifically unsound or yield biased, unreliable data or conclusions.

For all the above reasons, this Court should take judicial notice of the facts discovered through the Two Studies and the conclusions derived from such facts; or should certify this issue to the Wisconsin Supreme Court for necessary clarification, refinement, and development of the law consistent with the scientific facts established through the Studies.

III. THE STATE FAILS TO REBUT BROOKS' "INTEREST OF JUSTICE" ARGUMENTS

The State fails to deny or rebut Brooks' argument that new trial is due in the interest of justice based on the *Austin* case; and also because, relative to the charge of reckless homicide, defense counsels acted as the prosecution, contrary to due process. Thus, these arguments should be deemed admitted. *Chu,* 2002 WI App 98, P41.

CONCLUSION

For the reasons asserted in his Brief in Chief and above, Brooks respectfully renews his requests for relief.

Dated this 15th day of February, 2018.

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 2801 words.

Dated this15th day of February, 2018.

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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 15th day of February, 2018.

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