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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2017AP1779-OK

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

Trial Court Case
No. 14-CF-5578

MARCIA RENDER,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON THE 1ST
DAY OF JULY, 2015 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY,
WISCONSIN, JUDGE STEPHANIE ROTHSTEIN PRESIDING, AND MOTION
FOR POST-CONVICTION RELIEF DENIED ON THE 25TH DAY OF AUGUST,
2017 IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN,
THE HONORABLE MARK A. SANDERS PRESIDING.

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred when it denied the Defendant-Appellant, Marcia Render's motion for post-conviction relief, based upon ineffective assistance of trial counsel for failing to obtain an independent expert forensic pathologist to refute the allegations made at trial, wherein the victim, S. H., died as a result of an altercation with her sister, the Defendant-Appellant, Marcia Render, wherein the State alleged that Ms. Render was guilty of Second Degree Reckless Homicide, as well as strangulation and suffocation resulting from the medical examiner, Dr. Tlomak's, autopsy and testimony at trial, wherein, an expert forensic pathologist, Dr. Shaku Teas, was available at the time of trial to rebut the testimony of Dr. Tlomak, as Dr. Shaku Teas had affirmatively shown in her report that S.H. died of sudden cardiac arrest?

Answered by trial court: Motion for post-conviction relief denied; motion for an Evidentiary Hearing also denied.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant, Marcia Render, requests both oral argument and publication. Oral argument could assist this Court in the important issues contained herein.

Additionally, publication would be warranted under the circumstances as the Defendant-Appellant's case results from a U.S. Court of Appeals decision for the Seventh Circuit, Oscar C. Thomas v. Marc Clements, 789 F. 3d 760 (7th Cir. 2015), as well as the seminal case on ineffective assistance of counsel, Strickland v. Washington, 466 U.S. 668 (1984).

STATEMENT OF FACTS

The Defendant-Appellant, Marcia Render, was charged in a criminal complaint with one count of Second Degree Reckless Homicide, and one count of Strangulation and Suffocation, both with a Domestic Abuse enhancer in the Milwaukee County Circuit Court, Criminal Division on December 14, 2014. (1:1-9). The Criminal Information was filed in the above matter on December 23, 2014, charging the same two counts. (3:1). A preliminary hearing was held on the same date, December 23, 2014. (94:1-7). The Defendant-Appellant, Marcia Render, hereinafter Marcia Render, waived the preliminary hearing. (4:1).

The State filed a witness list for trial on or about April 15, 2015. (6:1-2). Several other hearings were held in the above matter which are not subject to this appeal, including a scheduling conference held on January 8, 2015;

a motion to withdraw as counsel on February 4, 2015; the status of counsel heard on February 13, 2015; the final pre-trial held on March 10, 2015; a pre-trial conference held on April 15, 2015; and, a final pre-trial held on April 23, 2015. (95:1-5; 96:1-4; 97:1-3; 98:1-3; 99:1-4; 100:1-4).

Thereafter, a jury trial commenced on May 4, 2015. (101:1-3; 102:1-43). The trial concluded to verdict on May 7, 2015, with a sentencing hearing held on June 30, 2015. (105:1-10; 106:1-74).

The State's theory of the case at trial relied upon the testimony of Dr. Tlomak, who testified that she was trained in how to make cause of death determinations in cases involving asphyxia and strangulation. (103:132). Dr. Tlomak testified that the cause of the victim, S.H.'s death, in this case was "asphyxia due to manual strangulation and a compression of her chest." (103:133). The doctor also testified that she observed multiple petechial hemorrhages in both eyes. (103:135). Further, Dr. Tlomak identified the hemorrhages in autopsy photographs of the victim which were observed in both of the victim's eyes. (103:136-138).

Dr. Tlomak further testified that the presence of the hemorrhages in this case indicated pressure to the neck because of the presence of additional injuries. (103:140).

These additional injuries included abrasions on the right side of the victim's forehead. (103:135). Additionally, the internal examination revealed subcutaneous hemorrhages in the skin of the neck, additional hemorrhages in the muscles of the neck according to Dr. Tlomak as well. (103:141). The hemorrhages, according to Dr. Tlomak were in the front of the victim's neck. (103:142). This indicated to the doctor that pressure had been applied to the front of the victim, S.H.'s neck. (103:142-143). The pressure to the neck occluded, blocked blood vessels to and from the brain according to Dr. Tlomak's testimony. (103:148). Dr. Tlomak also included compression of the chest in her findings as to cause of death, along with manual strangulation. (103:148).

Manual strangulation alone could also have caused the death in this case according to Dr. Tlomak. (103:149). The shape of the hemorrhages in the fatty tissue revealed to Dr. Tlomak that the strangulation was manual and not ligature. (103:149). Dr. Tlomak further testified that any case of manual strangulation, the pressure to the victim's neck is applied by hand, forearm, or other limb. (103:149).

Dr. Tlomak acknowledged that S.H. in this case had no visible injuries to the exterior to her neck. (103:150). Dr. Tlomak found that the victim's death was caused by a

combination of pressure to the chest and neck, which in turn caused brain injury and death due to oxygen deprivation. (103:153). She thus concluded that the death was a homicide. (103:152).

At trial Ms. Render also testified on her own behalf. (104:25). Ms. Render testified that she and S.H. had been at a bar prior to the altercation. (104:26). Ms. Render knew that S.H. was drunk, and further that she and S.H. had a verbal argument which involved cussing, screaming and yelling. (104:28-29). Ms. Render also testified that she had never before seen S.H. in such a state. (104:33). Ms. Render called 9-1-1, making several phone calls to 9-1-1 throughout the evening, due to S.H. consistently destroying Ms. Render's property in the home. (104:32,47-48). Upon direct questioning by her defense attorney, Attorney Ann Bowe, Ms. Render indicated that when she first landed on her sister, S.H., she landed on her flat, and that S.H. "tried to get up and then I sat back down on her and told her she wasn't getting up until the police come, because before then, she tried to pull the mirror over on me and then I knew if she got up, she was going to fight me." (104:49). Thus, Ms. Render did not want to fight S. H. so she just held her down until the police came. (104:49).

The direct questioning of Ms. Render by her trial attorney, Ann Bowe, indicated that Ms. Render did not know that holding S.H. down would have caused the injuries. (104:49). In fact, it is clear in the way that Ms. Render was questioned, that her trial attorney had conceded that Ms. Render must have done something wrong, as even Ms. Render indicated in her testimony that she had "no idea that holding her [S.H.] down could cause injury." (104:50-51). It is clear that defense counsel, Ann Bowe felt that Dr. Tlomak's testimony was credible and the questions and responses Attorney Bowe elicited from the Defendant-Appellant, Marcia Render accepted that Dr. Tlomak's opinion was correct that Ms. Render was the cause of S.H.'s fatal injuries. (73:12).

In its closing argument, the State argued that it was the medical evidence that told the story that Ms. Render strangled her sister, S.H., recklessly causing S.H.'s death. (104:179). The State argued in closing that the medical examiner Dr. Tlomak's testimony, when looking at the damage that was done to the victim (S.H.), specifically to the neck and front of the neck, that the damage was unreasonable, substantial, and actually caused the death. (104:179). Additionally, the State argued that when one is impeding airways, this constitutes strangling, as one is

exerting the power of life and death over someone, which is what happened in Ms. Render's case. (104:179). That was what the medical evidence clearly established according to the State. (104:179). Putting all of the pieces together, the only reasonable inference was that Ms. Render acted recklessly, acted with intent to impede the airway of S.H., which ultimately resulted in S.H.'s death, according to the State. (104:180-181).

The jury convicted Ms. Render of both Counts in the criminal information on May 7, 2015. (105:4).

Thereafter, a sentencing hearing was held on June 30, 2015. (106:1-74). The Court sentenced Ms. Render to 22 years imprisonment on the Second Degree Reckless Homicide count, with 12 years of initial confinement followed by 10 years of extended supervision. (90:3). On the Strangulation and Suffocation count, Ms. Render was sentenced to 6 imprisonment, with 3 years of initial confinement followed by 3 years of extended supervision, concurrent to Count One, with credit for 204 days already served. (90:3).

On May 24, 2017, Ms. Render filed a notice of motion and motion for post-conviction relief, through the assistance of her appointed appellate counsel, Attorney Christopher W. Rose. (73:1-31). The notice of motion and motion for post-conviction relief requested a new trial for

Ms. Render on the basis of ineffective assistance of trial counsel. (73:2). Specifically, Ms. Render argued that a forensic pathologist, Dr. Shaku Teas, who was appointed as an expert witness by her appointed appellate counsel, to review the medical evidence in this case, post-conviction, found that the victim, S.H., most likely died from sudden cardiac arrest associated with the stress of a verbal altercation with the Defendant-Appellant, Marcia Render, and the physical activity involved in discarding household items and furniture during this event. (73:14). Further, that S.H. had a history of hypertension with an enlarged heart with fibrosis, anteronephrosclerosis of the kidney, and early cardiac cirrhosis, all of which were indicative of cardiac disease that can lead to sudden death. (73:14). Additionally, that there was no evidence of any external marks or pressure on S.H.'s neck anteriorly, laterally, or posteriorly to suggest that S.H. was manually strangled. The subconjunctival petechiae were sparse and there were no laryngeal petechia or fractures of the hyoid bone or thyroid cartilage. (73:14).

Additionally, Dr. Teas' opinion was that there was no evidence of any trauma to the torso, chest or back to suggest that compression of the chest lead to asphyxia and death. Thus, S.H.'s behavior as described by her sister

(Ms. Render) and the resulting stress on her body may also have been influenced by ethanol and marijuana. (73:14). The opinions that Dr. Teas expressed in her report, which were attached to the post-conviction motion, are held to a reasonable degree of medical certainty, based upon her experience over the past 30 years. (73:13).

Thus, based upon Dr. Teas' expert report, which was attached to the motion for post-conviction relief, and pursuant to the case of Oscar C. Thomas v. Marc Clements, 789 F. 3d 760 (7th Cir. 2015), as well as Strickland v. Washington, 466 U.S. 668 (1984), the Defendant-Appellant, Marcia Render requested a new trial pursuant to the post-conviction motion. (73). Additionally, Ms. Render requested a Machner hearing and an evidentiary hearing as well. (73:11).

After briefing on the case, the trial court denied Ms. Render's motion for post-conviction relief in a decision and order dated August 25, 2017, the Honorable Mark A. Sanders, Circuit Judge presiding. (88:1-4). Thereafter, a notice of appeal was filed on September 8, 2017 from a judgment of conviction and an order denying the motion for post-conviction relief. (90:1-8). Thereafter, this appeal follows. The remaining relevant statement of facts will be cited in the argument section to avoid repetition herein.

ARGUMENT

I

The trial court erred when it denied the Defendant-Appellant's motion for post-conviction relief as the opinion and report of Dr. Shaku Teas made clear that trial counsel rendered deficient performance for failing to consult with an independent forensic pathologist, as this deficient performance caused prejudice to Ms. Render as Dr. Shaku Teas' opinion would have led to a new trial, and should have at least triggered an evidentiary hearing and Machner hearing on Ms. Render's motion for relief.

Pursuant to § 940.06(1) Wis. Stats., Second-Degree Reckless Homicide, provides as follows:

Sec. 940.06(1) Second-Degree Reckless Homicide. Whoever recklessly causes the death of another human being is guilty of a Class E felony (emphasis added).

Recklessly as defined in § 939.24(1) Wis. Stats., to mean:

That the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk... (emphasis added).

"Great bodily harm" as defined in § 939.22(14) Wis. Stats., is bodily injury which creates a substantial risk of death, or other numerated physical injuries. See § 939.22(14) Wis. Stats.

As the Judicial Council Note to § 939.24 Wis. Stats. explains, the Second-Degree Reckless Homicide statute requires “both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor’s subjective awareness of that risk. State v. Neumann, 2013 WI 58, 348 Wis. 2d 455, 496, ¶74, citing Judicial Council Note, 1988, Wis. Stats. 939.24 “recklessness requires the subjective mental state: the defendant must actually (in her own mind) be aware of the risk created by the conduct.” Walter Dickie et. al., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 Wis. L. Rev. 1323, 1352. The State is thus required to prove that an actor has a subjective *mens rea*. Neumann at ¶74.

Strangulation and Suffocation, contrary to Sec. 940.235(1), requires that a defendant intentionally impeded normal breathing, by applying pressure to the neck of another. See § 940.235(1) Wis. Stats.; § 939.50(3)(h), Wis. Stats.; § 968.075(1)(a), Wis. Stats. See also WI JI Criminal 1060.

To prevail on an ineffective assistance of counsel claim a defendant must show: (1) that her counsel’s performance was deficient, meaning it fell below the objective standard of reasonableness (the “performance

prong"), and (2) that she was prejudiced by the deficient performance (the "prejudice prong"). Strickland v. Washington, 466 U.S. 668, 687, 688, 694 (1984). The Defendant bears the burden on both of these elements. State v. Roberson, 2006 WI 80, ¶24, 292 Wis. 2d 280.

"Deficiency" means that trial counsel's performance fell below an objective standard of reasonableness. See Strickland at 688. "Prejudice" means that there exists a reasonable probability of a different outcome, but for counsel's serious errors. A reasonable probability is a probability which undermines confidence in the outcome of the proceedings. Id. at 694.

In many cases, a strategic decision to not talk to or hire a [forensic pathology] expert may be strategic or tactical. Oscar v. Clements, 789 F. 3d 760, 770 (7th Cir. 2015); Strickland v. Washington, 466 U.S. 668, 687, 688, 694 (1984). However, as outlined in Oscar v. Clements, the decision in Marcia Render's case, of her trial attorney, Ann Bowe, to not consult a forensic pathologist in this case constitutes ineffective assistance of counsel, as the failure to consult an independent forensic pathologist, was not a reasonable trial decision, and was deficient causing prejudice to Ms. Render's case. The opinion of an independent forensic pathologist, Dr. Shaku Teas, indicates

that there is a reasonable probability of a different outcome at trial, if an independent forensic pathologist had been consulted. See Oscar v. Clements, 789 F. 3d at 772.

Dr. Shaku Teas was appointed as an expert witness to review the medical evidence in Ms. Render's case, post-conviction, and was appointed as an expert witness by Ms. Render's appellate counsel through the State Public Defender's Office, pursuant to the affidavit of Dr. Teas, as well as the affidavit of Attorney Christopher W. Rose, which was attached to the post-conviction motion. (73:13-14). The motion raised ineffective assistance of counsel claims as the Defendant-Appellant, Marcia Render's trial counsel did not consult with an independent expert forensic pathologist in this case prior to trial. Additionally, failure to consult with such an expert represents ineffective assistance of counsel, causing prejudice to the defendant pursuant to Strickland v. Washington as outlined in the report of Dr. Teas which was attached to the motion. See Strickland at 687-688, 694.

Dr. Teas' affidavit and report indicated that she is Board Certified in Anatomic, Clinical, and Forensic Pathology, having conducted over 6000 autopsies. (73:13). Additionally, that she was asked to provide an opinion on

the medical findings for one S.H. (D.O.D. 12/09/2014). Dr. Teas reviewed the materials listed in her report as Appendix B, which was attached and included with the post-conviction motion. (73:13-30). Her opinion was expressed to a reasonable degree of medical certainty, and based on her experience over the last 30 years. (73:13).

Additionally, Dr. Teas' report was divided into five sections. Part I contained the summary of her conclusions; Part II summarized the surrounding circumstances as set forth in the police reports, interviews and transcripts of testimony; Part III summarized the Medical Examiners investigative and autopsy reports; Part IV contained a Forensic Evaluation of the autopsy and photographs; and, finally, Part V addressed the forensic issues, while Part VI contained her conclusions. (73:13).

Dr. Teas' opinion based upon her review of the relevant information, was that S.H. most likely died from sudden cardiac arrest associated with the stress of a verbal altercation with her sister, the Defendant-Appellant Marcia Render, and the physical activity involved in discarding household items and furniture. (73:13-14). S.H. had a history of hypertension with an enlarged heart with fibrosis, arterial arterioneophrosclerosis of the kidney,

and early cardiac cirrhosis, all of which were indicative of cardiac disease that can lead to sudden death. (73:13).

Additionally, Dr. Teas concluded that there was no evidence of any external marks or pressure on the neck of S.H., anteriorly, laterally or posteriorly to suggest that S.H. was manually strangled. The subconjunctival petechiae were sparse and there were no laryngeal petechiae or fractures of the hyoid bone or thyroid cartilage. (73:14). Additionally, there was no evidence of any trauma to the torso, chest, or back to suggest that compression of the chest lead to asphyxia and death. (73:14). Marlon Davis reported that S.H. was unconscious and "breathing" when initially seen by paramedic Kurth. S.H.'s behavior as described by her sister and the resulting stress on her body may have been influenced by ethanol and marijuana. (73:14).

The forensic issues surrounding Dr. Teas' opinion therefore were contained in her report. (73:23-28). Dr. Teas also concluded that the absence of congestion or cyanosis of the face, florid bilateral petechiae of the eyes and face, petechiae of the larynx, fractures of the hyoid bone and thyroid cartilage in an obese 52 year old woman with cardiac disease, enlarged heart and diabetes who was in an agitated state at the time of the collapse and

had been intubated with unknown difficulty (not by an anesthesiologist) with mild subconjunctival petechiae and neck hemorrhage after intubation, do not support manual strangulation as a cause of death. (73:27-28). There were no pressure marks, abrasions or bruising on the anterior or posterior torso and no hemorrhage on the muscles of the back. (73:28). There was nothing in the history, including Ms. Render's statements, to suggest she "sat" on S.H. for any substantial amount of time to lead to "asphyxia." (73:28). None of the statements confirmed that S.H. was alive after she collapsed on the ground with Ms. Render landing on top of her. (73:28). If S.H. was "breathing" when the MPD and MFD arrived on the scene (some 12-22 minutes after Marcia told Nelson that her sister had passed out, presumably from the incident described), asphyxia would be further precluded since death due to strangulation or compression asphyxia occurs during the process of the act or within seconds to minutes thereafter. (73:28).

Thus, enlarged heart with fibrosis associated with arterionephrosclerosis, early cirrhosis (probably cardiac or possibly due to alcohol) and pulmonary edema are consistent with sudden cardiac death, according to the Teas report. (73:28). The circumstances suggest that sudden death was associated with an epinephrine rush and

excitement. S.H. was under the effects of ethanol and marijuana at the time she collapsed. (73:28).

Finally, according to Dr. Teas, there was nothing in the autopsy findings that were inconsistent with Ms. Render's statements. (73:28, ¶59). Dr. Teas' foregoing opinions are held to a reasonable degree of medical certainty and were based on her education, experience and review and evaluation of the literature. (Teas Report, dated 04/20/2017; 73:13-30).

Additionally, attached to the post-conviction motion requesting a new trial and Machner hearing, was the affidavit of Attorney Christopher W. Rose, appointed appellate attorney in this case. (73:12). In it, Attorney Rose indicated that he spoke with Attorney Ann Bowe, who represented Marcia Render during the trial in this case, and wrote to Attorney Bowe and asked whether or not she had spoken to an independent expert witness, specifically a forensic pathologist in this case, and whether or not she had consulted such an expert during the trial phase of the case. (73:12). Counsel also made Attorney Bowe aware of the report of Dr. Shaku Teas, whom indicated that sudden cardiac arrest was what led to the death of S.H. as opposed to manual strangulation or asphyxiation. (73:12). Attorney Bowe indicated that she did not speak to any independent

expert witness. (73:12, ¶3). Further, that she spoke to the Medical Examiner from Milwaukee who did the autopsy and eventually testified, whom Attorney Bowe indicated was firm in her opinion, and that Attorney Bowe had found the medical examiner credible in the past, and had no reason to doubt her conclusions. (73:12).

The decision of Attorney Ann Bowe to not consult a forensic pathologist in this case constitutes ineffective assistance of counsel, as the failure to consult a forensic pathologist independently was not a reasonable trial decision and is deficient. Oscar v. Clements, 789 F. 3d at 769. As in Oscar v. Clements, counsel Ann Bowe's failure to even reach out to, or consider talking to, a forensic pathology expert to review Dr. Tlomak's conclusion that manual strangulation, compression of the chest contributed to asphyxia and death, under these circumstances constituted deficient performance. Id.

As in Clements, Attorney Bowe's client denied having strangled the victim. In her testimony, and her statement to police which was consistent, Marcia Render indicated that after S.H. and she fell to the ground, Ms Render fell on top of her sister and stayed on top of her. (104:49). Ms. Render sat on top of her sister, putting her hand on S.H.'s head and pinning her shoulders and waited until the

police came. (104:48-49). This was due to S.H. consistently destroying Ms. Render's property after making several phone calls to 9-1-1 throughout the evening. (104:32, 47-48).

Additionally, Ms. Render indicates in her testimony that:

When we first - when I first landed on her, because I landed on her flat, she tried to get up and then I sat back down on her and told her she wasn't getting up until the police come because before then, she tried to pull the mirror over on me and then I knew if she got up she was gonna fight me. So I didn't want to fight her, and so I just held her down until the police come. (Witness is crying profusely). I wasn't trying to do nothing else. I wasn't trying to hurt her. I didn't know holding her down like that would have caused her injuries. I just was holding her down until the police came so she wouldn't fight or tear up anymore property. (104:49).

Additionally, Attorney Bowe asked the following questions of Ms. Render:

Q. So when you were pushing her head down, and her shoulders down, pinning her with the hoodie, were you trying to cut off her breath?

A. No.

Q. Were you trying to cut off the circulation of her blood?

A. No.

Q. Did you know that that could be happening?

A. No.

Q. Was she talking or -

A. No, she wasn't. Once I got on her and held her down, she wasn't talking.

Q. Originally, she was trying to get up?

A. Right. When she was trying to get up was the first time when we first fell.

Q. But you were able to push her down, keep her pushed down?

Q. Yes?

A. Yes.

Q. Alright. So did you have any idea that your actions would create a risk to her?

A. No, no. I was just holding her. I was just thinking I was just holding her until the police came. You know there was no other reason why I was holding her. I was holding her until the police came. I didn't think-it was dark in there. I didn't think - I didn't think - I had no idea. (104:50-51).

These questions and Marcia Render's responses above and on cross, indicate that it is clear that Ms. Render in no way felt that her actions were creating any risk of harm to her sister, and denied strangling her. (104:81-92; 98). Additionally, and even more importantly, the questions and responses elicited by defense counsel indicate why defense counsel was further ineffective. Defense counsel indicated, pursuant to the affidavit of Attorney Christopher W. Rose, that she assumed the medical examiner's testimony and findings were accurate, and that she had no doubt about her conclusions. (73:12).

It is also evident in the way that Ms. Render was questioned, that Attorney Bowe had essentially conceded that that Ms. Render must have caused S.H.'s death, as even Ms. Render indicates in her testimony that she had "no idea" that holding S.H. down could have caused injury. (104:50-51). However, the problem is that failure to consult with an independent expert witness, specifically a forensic pathologist, would have led to significant questions about the theory of the case. It is clear that defense counsel felt that Dr. Tlomak's testimony was credible, and the questions and responses Attorney Bowe elicited from Ms. Render, accepted that Dr. Tlomak's opinion must be correct, as she specifically asked Ms. Render whether she knew that her actions caused S.H.'s circulation to be cut off, and whether her actions caused a substantial risk of death. (104:50-51).

However, with the opinion of a separate forensic pathologist, Dr. Teas, which was readily available at the time of the trial in this case, it is clear that Ms. Render and her defense attorney, would not have accepted the premise that Ms. Render did something wrong, in that anything she may have done, would not have caused her sister's death. (86:9). This is why counsel's trial strategy was ineffective, for failure to consult a forensic

pathologist, as in Oscar v. Clements, by not reaching out to an expert to review, or challenge Dr. Tlomak's findings, counsel acquiesced to the State's strongest evidence, despite its perceived flaws as outlined in the Teas report, and Dr. Tlomak's report. See Oscar v. Clements, 789 F. 3d at 769.

Further, counsel knew or should have known that the State was going to use Dr. Tlomak's testimony to show that Marcia Render acted intentionally via strangulation, and recklessly based upon the autopsy findings and Dr. Tlomak's findings that S.H. died resulting from manual strangulation and/or asphyxiation. Id. Trial counsel also knew, as in Oscar v. Clements, that her client had said that the death was an accident that she did not know she caused, or could have caused. Id.

Counsel also knew, or should have known, that there were no external marks on S.H.'s neck consistent with manual strangulation, pursuant to the medical examiner's findings. (73:25). There were absolutely no external injuries on the neck or muscles on the back. (73:25). Further, the abrasions on the forehead were small, superficial, inconsequential, and easily explained by falling face down on the floor with multiple objects on it. Additionally, the anterior neck was photographed multiple

times from several angles, with no marks, abrasions, or bruises seen. The internal hemorrhages are seen in precisely the muscles and area in which hemorrhages are caused artefactually by intubation and possibly by the face down position. (73:25, ¶45-46). Based on those facts, reasonable counsel would have at least reached out to a forensic pathologist to see if the medical findings could be reconciled with Marcia Render's version of the events. See Oscar v. Clements. Id. To not even contact an expert, however, was to accept Dr. Tlomak's finding of strangulation and asphyxiation and death without challenge, and basically doomed the defense's theory of the case. Id.

Nor was this a case where the cross examination of Dr. Tlomak made up for the lack of an expert. Id. As the State argued in its closing, it was the medical evidence that told the story that Ms. Render strangled her sister, causing her death recklessly. (104:179).

Did this conduct create a risk of death of great bodily harm?

Yes. Impeding a person's airways, impeding the blood circulation to their brain does that. Did it create a risk of death or great bodily harm that was unreasonable and substantial? Looking at the Medical Examiner's testimony, looking at the statements of the defendant and her level of anger as it built during the course of this incident and looking at the damage that

was done to this victim specifically to her neck including the front of her neck, yes. It was unreasonable. It was substantial and it actually caused her death. (104:179).

Additionally, the prosecutor argued:

That's what the medical evidence demonstrates. And that, ladies and gentleman, if you are putting pressure on someone's neck when you are strangling them with the hands, strangling them by wrapping an arm around, placing your knee on the back of somebody's neck, you're aware, you're aware that you are engaging in conduct that creates a risk of, at minimum, serious bodily harm and maximum death. If you're impeding airways - if you're impeding airways, you're strangling. You are exerting the power of life and death over someone and that's what happened here. That's what the medical evidence establishes clearly.

Ms. Render was intentionally applying pressure to her sister's neck. She was angry. She lost it. And she engaged in an act of strangulation. Does she state it expressly? Do we have S.H. here to tell us what happened? No. But we have her conduct leading up to it, her state of mind leading up to it. We have her own statements of her being on top of her sister and we have the medical examiner's testimony. Put all those pieces together, the key, huge reasonable inference right in the center is that she acted recklessly and she acted with intent to impede the airway of this victim and it ultimately

resulted in S.H.'s death. (104:180-181).

The State ends that this was a painful, horrific tragedy but the truth was that Ms. Render caused S.H.'s death, and the evidence established it beyond a reasonable doubt. (104:181).

Thus, with the report of Dr. Teas, trial counsel would have taken a different strategy in this case. Trial counsel would have been able to challenge the medical findings. The medical findings of Dr. Teas supported Ms. Render's position that this was merely accidental, unintentional, and that she (Render) did nothing to cause the death either by way of strangulation or asphyxiation.

Thus, it is clear that Ms. Render was prejudiced by her counsel's deficient performance in failing to consult a forensic pathologist. Thus, counsel was deficient as there is a reasonable probability sufficient to undermine confidence in the outcome pursuant to Dr. Teas' report. See Strickland v. Washington, 466 U.S. at 696. Dr. Teas' opinion that there is no evidence of any external marks or pressure on S.H.'s neck anteriorly, laterally or posteriorly to suggest that S.H. was manually strangled, and, additionally, that there was no evidence of any trauma to the torso, chest or back to suggest that compression of

the chest lead to asphyxia and death, led Dr. Teas to conclude that there is nothing in the autopsy findings inconsistent with Marcia Render's statements and testimony.

Had the jury been presented with this testimony of Dr. Teas, instead of just an argument unsupported by expert testimony, it is substantially likely that Marcia Render could have raised at least a reasonable doubt and had a different outcome at trial. See Oscar v. Clements, 789 F. 3d at 772. Therefore, Render has shown that there is a reasonable probability that the outcome of the trial would have been different if trial counsel had provided adequate representation. Id. Dr. Teas' ultimate determination that the facts were consistent with Marcia Render's testimony was accidental, is sufficient to raise a reasonable doubt and therefore show prejudice for the ineffective assistance of counsel prong. See Strickland v. Washington, 466 U.S. at 695.

The State and the trial court, the Honorable Mark A. Sanders presiding, believed that the failure to call Dr. Teas as a witness for the defense could not constitute deficient performance as the "Court is satisfied the jury would still have found the defendant had engaged in reckless behavior so as to create an unreasonable risk of death or great bodily harm given her sister's medical

condition, and that she was subjectively aware of that risk. (88:4). The Court apparently believed that because the testimony demonstrated that S.H. in this case was in poor health, and given Ms. Render's actions, it was irrelevant what Dr. Teas' opinion was in her report. (88:3). In the absence of the medical examiner's testimony, or even if Dr. Tlomak would have testified the cause of death was inconclusive, Ms. Render would have still been found guilty of Reckless Homicide, according to the trial court. (88:3). Additionally, as to the strangulation count, Dr. Teas' opinion would have had very little or no impact on the jury either. (88:4).

The trial court erred in its decision. Ms. Render was not convicted of Strangulation and Suffocation, and Reckless Homicide based upon her testimony, or the testimony of any other lay witness. In fact, the State's argument in closing argument was it was all of the medical evidence which supported a conviction for strangulation or suffocation, as well as Reckless Homicide based upon the testimony of Dr. Tlomak. (104:179-181). The Kasieta case and Virgil v. State cases, cited by the trial court, are irrelevant to the Render case, which was directly tied to Dr. Tlomak's testimony. Compare State v. Kasieta, 62 Wis. 2d 564 (1974), Virgil v. State, 84 Wis. 2d 166 (1978).

Additionally, there was no evidence that Ms. Render was aware of S.H.'s specific medical conditions, as outlined in Teas' report, as in Kasietta. Id. (104:50-51). Dr. Tlomak's opinion was clearly that Ms. Render's sister died from asphyxiation, and possibly from strangulation. Dr. Teas' report, as attached to the Motion for Post Conviction Relief, completely contradicted the medical examiner's testimony in this case, and in fact supported Ms. Render's position that this death was accidental, and was due to the victim's own conduct and poor health, by throwing things down the stairs, and due to the stress of the moment, and it was likely that Ms. Render's sister therefore died from sudden cardiac arrest, as opposed to asphyxia or strangulation. (Emphasis added); (73:13-31). Additionally, that Ms. Render did not strangle her sister either according to Dr. Teas. Given the Teas' report, a subjective *mens rea* would be irrelevant, as S.H.'s own conduct led to her death. Compare Neumann at ¶74. Dr. Teas' opinions are to a reasonable degree of medical certainty with over 30 years of medical experience. (73:13). Dr. Teas' opinion therefore, would have cast a reasonable doubt as to Ms. Render's guilt in this case, if she would have testified. See Clements at 772.

Thus, as in Oscar v. Clements, Counsel Ann Bowe's failure to even reach out to, or consult with, a forensic pathology expert to review Dr. Tlomak's conclusion that manual strangulation, compression of the chest contributed to asphyxia and death under these circumstances constitutes deficient performance. See Oscar v. Clements at 771-773. The questions and responses of Ms. Render when she testified at trial clearly indicated that Ms. Render in no way felt that her actions were creating any risk of harm to her sister. (104:50-51). Consulting with an independent forensic pathologist would have lead to significant questions about the theory of the State's case. With the opinion of a separate forensic pathologist, Dr. Teas, which was readily available at the time of the trial in this case, it is clear that Ms. Render and her defense attorney would not have accepted the premise that Ms. Render caused S.H.'s death, and anything that Ms. Render may have done, could not have resulted in her sister's death. This is why defense counsel's strategy was ineffective, for failure to consult a forensic pathologist, as in Oscar v. Clements, by not reaching out to an expert to review, or even challenge Dr. Tlomak's findings, counsel acquiesced to the State's strongest evidence of intent, manual strangulation and,

additionally, reckless homicide, despite its perceived flaws. See Oscar v. Clements, 789 F. 3d at 769.

The fact that in Oscar v. Clements, the defendant in that case was charged with intentional homicide, and Ms. Render was charged with reckless homicide makes no difference in this case. The fact of the matter is both defendants were charged with criminal conduct. The fact of the matter is that Dr. Teas' opinion completely contradicted the State's theory of the case, Dr. Tlomak's medical findings, which were relied upon by the State to charge and convict Ms. Render of intentionally strangling her sister, as well as reckless homicide. If Dr. Teas' opinion was heard by a jury it is substantially likely that Ms. Render could have at least raised a reasonable doubt with the jury as to her guilt and had a different outcome at trial. See Oscar v. Clements at 772; Strickland v. Washington at 695.

Therefore, Ms. Render has shown that there is a reasonable probability that the outcome of the trial would have been different if counsel had provided adequate representation. See Strickland at 695. Thus, it is clear that Ms. Render, pursuant to her post-conviction motion, should be entitled to a new trial. Ms. Render also should at least be entitled to an evidentiary hearing, as she has

clearly established a prima facie case, contrary to the trial court's decision.

CONCLUSION

In conclusion, the trial court erred when it denied Marcia Render's motion for post-conviction relief. Further, it also erred when it failed to allow the Defendant-Appellant a Machner hearing as the Defendant-Appellant clearly made a prime facie case for ineffective assistance of counsel, requiring an evidentiary hearing. For either reason, Ms. Render requests that this court remand the trial court's decision for a new trial or an evidentiary Machner hearing.

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CERTIFICATION

I certify that this brief of appellant meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

Typewritten (pica, 10 spaces per inch, mono font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides).

The length of the Brief is 31 pages.

Dated this 29th day of December, 2017.

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS.
§(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 Wis. States. §(RULE) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of this brief filed as of 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 29th day of December, 2017.

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CERTIFICATION RE APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains as a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 29th day of December, 2017.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2017AP1779-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

Trial Court Case
No. 14-CF-5578

MARCIA RENDER,

Defendant-Appellant

APPELLANT'S APPENDIX

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