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

04-23-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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The State claims that the circuit court properly denied the Defendant-Appellant, Marcia Render's motion for a new trial alleging ineffective assistance of counsel, without a hearing. (State Brief at 14). If the motion does not raise facts sufficient to entitle a Defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the Defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. (State Brief at 16, citing Allen 274 Wis. 2d 568, ¶9; Bentley, 201 Wis. 2d at 310, 311). This is not the case in Render's case. (See Render's lengthy post-conviction motion, Appendix of Appellant Brief-in-Chief).

Additionally, the State claims that the record conclusively demonstrates that Attorney Bowe, Marcia Render's trial attorney, did not perform deficiently in failing to call a rebuttal expert witness to testify about the decedent, S.H.'s (Head) cause of death. (State Brief at 16). Essentially, the State's argument is that the record conclusively demonstrated that Render would not be entitled to the relief requested, in spite of the fact that Render attached to her post-conviction motion the report and affidavit of Dr. Shaku Teas, a Forensic Pathologist with 30 years of experience who opined that the decedent, Head, did not die from strangulation, but likely died from sudden cardiac arrest associated with the stress of a verbal altercation, and the physical activity involved in discarding household items and furniture.

(73:14; State Brief at 16). Additionally, Dr. Teas noted that there were no external marks on Head's neck or "evidence of any trauma to the torso, chest or back to suggest that compression of the chest led to asphyxia and death." (73:14). Thus, Teas' conclusions, contained in her lengthy 14 page report, contradicted the trial testimony of Dr. Tlomak, who conducted the autopsy.

In spite of the Teas' report, the State still claims that Attorney Bowe was not deficient for failing to obtain an expert to question the findings of Dr. Tlomak who conducted the autopsy in this case. (State Brief at 17). For the reasons set forth herein, the State's claim that Ms. Render is not entitled to relief and, additionally, is not entitled to an evidentiary hearing, fails.

The State claims as much because the elements it had to prove for a Reckless Homicide charge, unlike Intentional Homicide, did not include whether Ms. Render intentionally caused her sister's death. Rather, the State had to show that Render's conduct was reckless; in other words, "by sitting on top of her sister and holding her face down by her head, knowing that she was in poor health, Render created an unreasonable and substantial risk of death or great bodily harm to Head." (State Brief at 17; citing Wis. Stat. 940.06(1) and 940.235). As for the strangulation charge, according to the State, the State did not have to show that Render's actions caused Head's death. (State Brief at 17, citing 940.24, Stats.).

In Render's brief, Render cited to the case of Oscar Thomas v. Clements, 789 F.3d 760, 769 (7th Cir. 2015) to establish that the decision of Attorney Ann Bowe to not consult a forensic pathologist in this case was ineffective, as failure to consult a forensic pathologist independently was not a reasonable trial strategy decision and was deficient causing prejudice to Ms. Render's case. It is Render's position that counsel Ann Bowe's failure to even reach out to, or consider talking to, a forensic pathology expert to review Dr. Tlomak's conclusions that manual strangulation, compression of the chest contributed to asphyxia and death, under these circumstances constituted deficient performance. Id.

However, the State argues that Render's reliance on Thomas is misplaced. (State Brief at 19). This is so, according to the State, because Thomas involved a charge of first degree intentional homicide, wherein intent was the key issue, and in Render's case, Render was charged with reckless homicide which did not require the State to prove that Render intended to kill Head. The State misses the point. In Render's case, Dr. Tlomak did, in fact, conclude that manual strangulation contributed to Head's death, thus leading to asphyxiation and compression of the chest. (104:132-133). Manual strangulation is an intentional crime; and this intentional crime, according to Dr. Tlomak and according to the State's theory of the case, directly caused Head's death. Thus, this intentional act of strangulation was no accident

according to the State; this is similar to the situation in the Thomas case. The fact that in Thomas the defendant was charged with intentional homicide, and Thomas denied that the act was intentional and in fact was accidental, is applicable to Render's situation as, like in Thomas, Render testified clearly that this was accidental and that she in no way knew any of her actions could have caused her sister's death. (104:49, 50-57, 81-92). Accidental is not the equivalent of criminal recklessness as Ms. Render denied strangling her sister and denied causing her death. Ms. Render's testimony was that she was holding her sister (Head) down until the police arrived as Head had been destroying her property throughout the house. (104: 50-51).

According to the State, the trial court correctly decided that the critical issue in the case was whether the elements of Second Degree Reckless Homicide were satisfied, and that the actual cause of death was not determinative of that issue. (State Brief at 19). Thus, the "jury's verdict determined that Render's actions constituted or created a substantial and unreasonable risk of death or great bodily harm under the totality of the circumstances" including Head's health and medical problems known to Render. Id. This is the problem with the State's argument. It was not Render's actions which caused or created a substantial and unreasonable risk of death or great bodily harm according to the Teas' report; in fact, Dr. Teas clearly states that it was Head's own actions which caused her death and

likely cardiac arrest. (73:13-31). Thus, if the jury were to believe Dr. Teas' opinion, they would conclude that it was Head's own actions which resulted in her death by destroying property and the stress of the moment, as opposed to Dr. Tlomak's opinion that manual strangulation caused her death. This is a jury question and it is the reason why it was ineffective for Attorney Bowe to not at least consult with a forensic pathologist, Dr. Teas, whom was readily available to testify at the time.

Additionally, the fact that intent was an issue in the Thomas case is not the key issue to the holding of the Thomas case. The deficiency in Thomas was the failure of counsel to even consult with a forensic pathologist, when trial counsel knew, in Thomas, his client was going to testify that it was an accident as opposed to an intentional act. *Compare Thomas* at 762, 764. Strangulation is also an intentional act; and Dr. Tlomak concluded that strangulation and compression and asphyxia of Head's chest caused her death.

Therefore, the fact that Render's position was that she did not cause Head's death, and testified that she in no way knew that any of her actions would have caused her sister's death, Render, in essence, acquiesced to the State's theory of the case based upon her testimony. (See Render's Brief-in-Chief at 20-22). Thus, failure to even consult with an expert, as in Thomas, is deficient performance because Attorney Bowe knew that her client did not

believe that she caused her sister's death, and the defense relied solely on the findings of Dr. Tlomak, to support that theory. The defense accepted the fact that Dr. Tlomak was correct, without any independent pathology expert to look at the case, in spite of the perceived flaws of the case as outlined in Dr. Teas' report, and in spite of the fact that Ms. Render was clearly going to testify that she did not think she caused Head's death.

Additionally, the State's claim that Ms. Render knew about all of the medical issues that her sister had as well, is simply not true. Additionally, it is inconceivable to conclude that Render was aware of those health problems, including that this event could have led to a heart attack, based upon a medical history that was determined by a forensic pathologist, not Ms. Render.

Criminal recklessness, as defined in 939.24(1), means not only that the actor created an unreasonable and substantial risk of death or great bodily harm, but also that the actor ***was aware of that risk***. (Emphasis added); See 939.24(1) Stats. The judicial council note indicates that "recklessness 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." See Judicial Counsel Note 939.24 (1987 Senate Bill 191). Thus, subjective awareness of that risk is required. When questioned, Marcia Render's testimony on direct and cross, clearly indicate that she in no way

felt that her actions were creating any risk of harm to her sister, and further denied strangling her as well. (104:81-92; 98).

It is also evident, as stated in Render's brief-in-chief, that in the way in which Ms. Render was questioned, Attorney Bowe had essentially conceded that Ms. Render must have caused S.H.'s death, as even Ms. Render indicated in her testimony that she had "no idea" that holding S.H. down could have caused injury. (104:50-51). Render's testimony is the reason why there is a problem in her case in failing to consult with an independent expert witness, as Dr. Teas' opinion would have led to significant questions about the theory of the case, and whether or not Ms. Head actually died of a heart attack due to her (Head's) own actions, as opposed to the actions of Ms. Render. The questions and responses Attorney Bowe elicited from Ms. Render, furthermore, accepted the fact that Dr. Tlomak's opinion must be correct, as she specifically asked Ms. Render whether she knew that her (Ms. Render's) actions caused S.H.'s circulation to be cut off, and whether her actions caused a substantial risk of death. (104:50-51). It is clear that Ms. Render and her attorney would not have accepted the premise that Ms. Render did anything wrong in this case, if they would have consulted with a separate forensic pathologist (Dr. Teas), and would have likely changed the theory of their defense, as Attorney Bowe and Ms. Render would not have accepted the premise that Ms. Render caused Ms. Head's death. (86:9). This

is why counsel's trial strategy was ineffective for failure to consult a forensic pathologist in this case, as in Oscar v. Clements, by not even 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. See Clements at 769. Trial counsel knew, as in Clements, that Render had said that the death was an accident, and that she (Render) did not know that she had caused or could have caused her sister's death. Id.

The State also argues that Render's argument that she was prejudiced by failing to consult with an independent forensic pathologist fails because, according to the State, Render would have been convicted even if Attorney Bowe had presented a rebuttal witness based upon the other evidence at trial, including Render's testimony. (State Brief at 22). According to the State, it did not matter whether Dr. Tlomak's opinion came into evidence in this case. It was Render's own testimony, according to the State, which supported the jury's inference that she acted recklessly, sitting on top of her and holding her face down by her head, and was therefore sufficient for the jury to find Render's testimony incredible; further, that Render sat on top of S.H. with her face down, held Head's neck, strangling and suffocating her. (State Brief at 23). The problem with this argument is to accept the State's theory, the jury must have also accepted the opinion of Dr. Tlomak, who opined that Head was strangled.

The medical evidence was contradictory on this point, as Dr. Teas clearly stated that manual strangulation was not the cause of death, nor was asphyxiation or compression of the chest; in fact, Dr. Teas specifically said it was Head's own actions which caused her death, and likely died from cardiac arrest. (73:13-14). Thus, for the State to suggest that Dr. Teas' opinion would not have mattered in this case, based upon Render's testimony, isn't credible. It is clear that the medical evidence could have supported Ms. Render's case that she did not strangle her sister, and did not cause her death, and finally was not reckless, because nothing that Render did resulted in her sister's death. It was Head's own actions, according to Dr. Teas, which caused the death of S.H., not Ms. Render's actions and that is the key point that the State misses in this case, and why Oscar v. Clements is applicable to this situation. Oscar v. Clements, 789 F.3d 760 (7th Cir. 2015).

It is thus the State's position that the expert testimony about Head's cause of death made very little impact on the jury's findings in this case. (State Brief at 23). However, contrary to the State's argument, the closing argument of the State as outlined in Render's brief-in-chief clearly shows why it was the medical evidence which told the story here. As the State argued in its closing comments, it was the medical evidence that told the story that Ms. Render strangled her sister, causing her death recklessly. (104:179-181; Appellant's Brief-In-Chief p. 23-25.)

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 Head's death was merely accidental, unintentional, (not manual strangulation) and that she (Render) did nothing to cause the death of her sister either by strangulation, asphyxiation or otherwise, and that it was S.H.'s own actions which led to her own death by discarding household furniture and furnishings, acting out of control, and having a heart attack.

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. Strickland v. Washington, 466 U.S. 668, 696 (1984). By consulting with a forensic pathologist, separate from that of Dr. Tlomak, defense counsel would not have accepted the State's premise that Render's actions resulted in Ms. Head's death. Strangulation is an intentional act, like in Thomas. ***Compare Thomas***, 789 F.3d at 768. A death resulted in this case, as in Thomas. ***Compare Thomas***, supra. As in Thomas, Ms. Render was claiming that this was an accident and that her actions in no way caused the death of her sister. ***Compare Thomas***, at 764. The fact that criminal "recklessness" was charged

in this case, is of no import as both cases were manual strangulation cases, which is intentional, resulting in death. *Compare* Thomas, at 768.

As the Judicial Council Note to Wis. Stat. 939.24 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.” Judicial Council Note, 1988, Wis. Stat. 939.24; State v. Neumann, 2013 WI 58, 348 Wis.2d 455, ¶74. Thus, a subjective scienter requirement can alleviate vagueness because an actor who knows what he or she is doing and is aware of the unlawful risk, cannot be heard to claim that he or she did not know his or her conduct was prohibited. See Neumann at ¶77. Thus, in Render, the medical examiner’s testimony, Dr. Tlomak, was used to prove that Render must have been aware, which Render denied, that her conduct of sitting on and strangling her sister would have caused her sister’s death. This is why failure to consult with a forensic pathologist, Dr. Teas, is ineffective and prejudicial, requiring a new trial, as it is reasonably likely that with the opinion of a separate forensic pathologist, a jury would not have found Ms. Render guilty beyond a reasonable doubt of either Second Degree Reckless Homicide or Strangulation. Id.

CONCLUSION

For the reasons cited herein and for the reasons cited in Ms. Render's brief-in-chief, Ms. Render would request that this court reverse and remand the trial court's decision denying her post-conviction motion for a new trial. In the alternative, for this court to reverse and remand for an evidentiary hearing and Machner hearing on Ms. Render's motion.

Respectfully submitted,

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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) for a brief produces with a proportional serif font. The length of this brief is 2,921 words.

Dated this 18th day of April, 2018.

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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 18th day of April, 2018.

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