STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2017AP001852-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN L. BUCKINGHAM,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Thomas J. McAdams Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. Ineffective assistance of counsel.

A. Trial counsel was ineffective for allowing irrelevant and prejudicial firearms evidence into this trial.

1. The firearms evidence should have been subject to an "other acts" evidence analysis.

The State claims that Mr. Buckingham has "incorrectly characterized" the testimony at issue. (State's Br. at 15). The State asserts that this was not other acts evidence and thus Mr. Buckingham's ineffectiveness claim necessarily fails. (State's Br. at 15). The State rests its argument on an assertion that "[n]one of the State's witnesses ever alleged that Buckingham possessed either firearm." (State's Br. at 16). Respectfully, that is an incomplete description of the facts and an unreasonable reading of the evidence. It also ignores obvious factual inferences.

With respect to the gun discovered by Officer Wawrzyniakowski, the State presented testimony that the officer in question participated in an unsuccessful attempt at arresting Mr. Buckingham. (101:7-8). During that attempt, he received information that Mr. Buckingham may have fled into a residence. (101:8). Accordingly, the officer searched that home. (101:10). The jury was told that law enforcement discovered a handgun inside. (101:10). Importantly, the jury was also told that the residents of the home denied possessing the gun in question. (101:14-15).

Considering the way in which this evidence was actually presented to the jury, the State's claim that there was no implication "that Buckingham had been in possession of the gun" is, quite simply, preposterous. (State's Br. at 16). While there may have been other inferences which a jury could draw, to claim that this inference was never at issue is a stretch. The State, via its misleading and disordered presentation of the evidence, also created a link between this gun and the shooting. The State told the jury that this was the exact same type of gun used to wound D.F., and any evidence that would have distanced the weapon from Mr. Buckingham or the crime was presented in a confusing fashion, as was argued at length in Mr. Buckingham's opening brief.

Taking the evidence in proper context, this was other acts evidence presented to further a propensity inference—that Mr. Buckingham is a young black male who runs wild through the streets of Milwaukee while armed with a gun like the one used to wound D.F. Its admission was clearly erroneous under the other acts analysis laid out in Mr. Buckingham's opening brief.

As to the gun discovered during the traffic stop, the evidence was clearly presented in order to show that Mr. Buckingham possessed the handgun. Respectfully, there is no other reading of the relevant transcript and to argue otherwise is a tellingly weak response to Mr. Buckingham's argument.

First, the State made sure to tell the jury that Mr. Buckingham was the *only* rear seat passenger. (100:89). They then elicited the following testimony which indisputably was designed to link him with that gun:

> Q: Did you or any other officer then look inside of the area where the Defendant had fled from?
>
> A: Yes, I did.
>
> Q: What did you see?
>
> A: I saw a black in color handgun. It was on the floorboard ***where the Defendant was seated***.

(100:92). What other inference could the jury reasonably be expected to draw from this evidence? Again, this was clearly other acts evidence designed to further yet more propensity inferences and, arguably, to mislead the jury. Its admission was clearly erroneous under the other acts analysis laid out in Mr. Buckingham's opening brief.

Aside from the very weak argument that Mr. Buckingham was never alleged to have possessed either firearm, the State has offered only conclusory assertions to support an argument that this evidence should have been exempt from the other acts inquiry. Accordingly, this Court should not be persuaded by the State's arguments and should instead hold that this was inadmissible other acts evidence.

2. The State has not adequately responded to Mr. Buckingham's argument that this evidence was inadmissible under Wis. Stat. §904.03.

The State's argument on this point is confusing and unsupported by legal authority.

The fatal flaw in the State's argument is that the State insists on maintaining two inconsistent positions. The State does not want to back down from its assertion that the guns were not other acts evidence because they simply had nothing to do with Mr. Buckingham or the shooting. (State's Br. at

17). But if they had nothing to do with the shooting, then how were they relevant?

In order to get out of this bind, the State argues that the evidence was still relevant and admissible notwithstanding its superficial lack of relevance. In the State's reading, admission of evidence which is concededly unrelated to the crime is relevant because its admission makes it less probable that the unrelated evidence is related to the crime. (State's Br. at 17-18). While that argument may deserve an A plus for effort, as a logical statement of the law which would make sense to a rational reader, it earns considerably poorer marks.

If the State is right, that means *anything* is theoretically relevant. And, if relevance is defined as "irrelevant evidence is admissible to prove its irrelevance," we seem to have drifted far afield from the evidentiary principles at hand (not to mention the basic tenets of logic).

The State's single sentence response to the prejudicial nature of the evidence is likewise insufficient, as are the other conclusory assertions presented. For the reasons presented in the opening brief, this Court should rule in favor of Mr. Buckingham on this point.

3. Trial counsel did not have a reasonable strategic reason which would excuse his deficient performance with respect to the gun evidence.

The State recites trial counsel's testimony verbatim and then asserts that this is proof of a reasonable strategy. (State's Br. at 18-19). However, the case law requires an objectively reasonable explanation, not merely *any* explanation. *See* ***State v. Guerard***, 2004 WI 85, ¶ 46, 273

Wis. 2d 250, 682 N.W.2d 12. (Reviewing court independently assesses proffered strategic reasons).

For the reasons outlined in the opening brief, the strategy at issue is unreasonable under these facts and circumstances. More to the point, the State's argument in a footnote misconstrues the way in which this evidence was presented, labeling it as "exculpatory" evidence despite its obviously prejudicial nature. (State's Br. at 19). Finally, the State indulges in speculation, averring that "had the State not introduced this evidence, Buckingham would now be claiming Toran was ineffective for failing to introduce it himself." (State's Br. at 19). The State does not explain how it could possibly have been helpful to the defense to allow the State to tell the jury that although they never found the gun that was used to injure D.F., whenever they encountered Mr. Buckingham there was a gun at hand.

The gun evidence was irrelevant, immaterial, and plainly prejudicial. Its admission was error, and trial counsel was ineffective for allowing it to distort the factual picture in this jury trial.

4. The gun evidence was prejudicial.

The State claims that Mr. Buckingham's prejudice argument consists of a "single sentence." (State's Br. at 19-20). That is not a reasonable characterization of Mr. Buckingham's arguments. Instead, it is the State which has offered only conclusory allegations as to why this evidence was not prejudicial, in the process ignoring numerous important factual distinctions. (State's Br. at 20). For example, the fact that the jury was not told about the caliber of the gun found in the car is part of the prejudice inquiry which supports, rather than weakens, the defense argument. (State's Br. at 20).

For all the reasons set forth in the opening brief, this evidence was plainly prejudicial, and its admission undermines confidence in the jury's verdict.

B. Failure to present Officer Reilly's testimony regarding D.F.'s inconsistent identification of the shooter was both deficient and prejudicial.

As to deficient performance, the State indulges in speculative weighing of testimony that was never presented to the jury, assuming that the evidence was not sufficiently probative for the same speculative reasons articulated by the postconviction court. (State's Br. at 21). While the circumstances in which the statement was made are clearly relevant, just because a jury *could* choose to disregard the statement because of the surrounding circumstances does not necessarily mean that they would do so. Just because the State can imagine a hypothetical reason why a juror might weigh the evidence different does not mean it was excusable to not present the exculpatory statement at issue.

That is because jurors are always free to disregard *any* evidence—even, in some cases, when that evidence is especially relevant, reliable, and persuasive. What matters for the deficient performance inquiry is whether a reasonable lawyer would seek to place this information before a jury and whether there would be any downside to doing so. In this case, the defense had much to gain and little to lose. The evidence is directly contradictory to the other statements made by the victim and is therefore material to the central disputed issue—identity of the assailant. It is not so unreliable that its admission would damage the defense case or contradict with the chosen defense strategy—challenging identification. The State's arguments are unduly speculative

and do not fairly reckon with the favorable nature of the omitted testimony.

As to prejudice, the State falls back on an argument that there was other evidence to support a finding of guilt. Of course, as the State well knows, the prejudice inquiry is legally distinct from a sufficiency of the evidence test. ***State v. Pitsch***, 124 Wis. 2d 628, 645, 369 N.W.2d 711, 720 (1985). D.F.'s failure to consistently identify his assailant is the type of fact which a reasonable juror could conclude was a "reasonable" doubt under the circumstances.

Accordingly, trial counsel was ineffective for allowing the admission of this evidence.

C. Trial counsel was ineffective for failing to object to the unfair and unreliable in-court identification by Tamar Aaron.

The Wisconsin Constitution forbids the use of unnecessarily suggestive show-up identifications at trial**.** ***State v. Dubose***, 2005 WI 126, ¶ 36, 285 Wis. 2d 143, 699 N.W.2d 582. As Mr. Buckingham has argued, the in-court identification in this case was indistinguishable from a show-up. Any distinctions claimed by the State are mere fictions intended to obscure the functional equivalence of the two procedures. In fact, as Mr. Buckingham has argued, such in-court identifications are probably even more suggestive than show-ups, since they carry additional baggage—like the fact that the "target" is seated at defense table while on trial for the very crime at issue in the identification procedure.

Likewise, the United States Constitution forbids, at least in some circumstances, the introduction of an identification derived from an "unnecessarily suggestive identification procedure" conducted by the agents of the

State. ***Perry v. New Hampshire***, 565 U.S. 228, 241 (2012). It is Mr. Buckingham's position that this Court should follow the lead of the persuasive authorities and hold that, at least under these circumstances, the State did act improperly and, as a result, Mr. Aaron's identification should have been excluded. After all, the prosecutor knew—at that time he asked Mr. Aaron to participate in an impromptu show-up in the presence of the jury—that Mr. Aaron had already participated in a prior procedure targeting Mr. Buckingham. He presumably knew that this raised the specter of suggestiveness under the Model Policy discussed in the opening brief. He proceeded anyway. It is Mr. Buckingham's position that this unnecessary and unfairly suggestive procedure is one of those extraordinary situations warranting the sanction of exclusion under the authorities discussed in the opening brief. Trial counsel was therefore ineffective for not objecting under those authorities.

Moreover, even if this Court agrees with the State that the due process argument is too novel to support an ineffectiveness claim, the State has done nothing to rebut Mr. Buckingham's argument under ***State v. Hibl***, 2006 WI 52, ¶48, 290 Wis. 2d 595, 714 N.W.2d 194, which would allow trial counsel to ask the circuit court to exercise its role as gatekeeper under Wis. Stat. 904.03 and exclude an unduly suggestive identification. Because the State has failed to address the argument under ***Hibl***, it should be conceded in Mr. Buckingham's favor. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108, 279 N.W.2d 493 (Ct. App. 1979).

As to the State's specific arguments as to trial counsel's actions at trial, the State's argument as to "surprise" ignores the basic fact that trial counsel could have at least objected as the offending question was being asked—the

same way that lawyers frequently object to impermissible and objectionable questioning at trial. And, while the State is correct that trial counsel did take steps to ameliorate the error's impact, it is Mr. Buckingham's position that those steps did not go far enough. Accordingly, his performance was deficient. As to prejudice, the State again falls back on other evidence which supports the guilty verdict. (State's Br. at 30). That, however, is not the standard. ***Pitsch***, 124 Wis. 2d at 645. It also makes the surprising choice to downplay the significance of this evidence, asserting that it was "clear" that the identification was unreliable. (State's Br. at 30). If that is so, then why did the State present this evidence at trial? In any case, it is not at all clear that a reasonable juror would feel the same way. Accordingly, the evidence was prejudicial to Mr. Buckingham.

D. Trial counsel was ineffective for not moving to strike Detective Salaam's concededly objectionable testimony.

The State concedes that Detective Salaam's testimony was inadmissible hearsay. (State's Br. at 32). It claims, however, that trial counsel's reason for not objecting was reasonable and entitled to deference. (State's Br. at 33).[1] Undersigned counsel persists in his argument that this was not a reasonable strategy for the reasons articulated in the opening brief.

As to prejudice, the State ignores the way in which an otherwise compelling alternative suspect—based on the DNA

[1] It is worth noting that trial counsel's proffered strategic reason—that he did not want to highlight the evidence—is contradicted by his closing argument where he references Paul Nelson at length. (102:56).

match—was transformed into an accomplice based on this inadmissible utterance. Accordingly, the error was prejudicial to Mr. Buckingham.

E. Trial counsel was ineffective for not alerting the jury that the State's theory was unsupported by the underlying investigation.

Mr. Buckingham's argument goes beyond mere second-guessing. (State's Br. at 34). In this case, the State made specific claims as to motive which trial counsel would reasonably know to be unsupported by their underlying investigation. That is, although the State tried to corroborate the victim's story via Facebook subpoena, they were unable to do so. Failure to make the jury aware of a central defect in the State's overall evidentiary picture is unreasonable and therefore deficient performance.

As to prejudice, the State again lists other evidence which would support a jury verdict. They also speculate as to how the jury may have evaluated such an argument. Neither argument is persuasive. Accordingly, this Court should find that trial counsel's error was prejudicial.

F. Cumulative prejudice.

The State's prejudice argument comes down to an assertion that, even if all of Mr. Buckingham's instances of deficient performance are credited, there would still be other evidence to support a jury verdict. (State's Br. at 36). That, however, is not the standard. As Mr. Buckingham has argued at length in the opening brief, there is a reasonable probability that absent these combined errors, the jury would have had a reasonable doubt about Mr. Buckingham's guilt.

II. Postconviction discovery.

A. Facebook records.

The State first argues that Mr. Buckingham's argument should fail with respect to the Facebook records, asserting—without evidentiary backing—that the State does not possess any records. (State's Br. at 37). However, the State has never satisfactorily explained why, in this case, a subpoena was issued but no responsive records were turned over to the defense. If the State served that subpoena and received confirmation from Facebook that no such records were available, that would be a "record" which they would be obligated to turn over in accordance with undersigned counsel's numerous postconviction requests. No such record has been generated or turned over.

Thus, Mr. Buckingham is not imposing on the State a duty to independently delve through Facebook's records in response to his postconviction motion, as the State alleges. (State's Br. at 38). He is not asking for what the State does not have as, after all, that would be a meritless motion. Rather, he has only ever asked for one of two things: Either (a) the records which were received in response to the subpoena which was apparently issued during the pendency of this action or (b) the proof that no responsive records were available. Because the postconviction court—like the State—did not appear to understand the request's straightforward terms before denying it, that is an erroneous exercise of discretion.

B. Materials related to codefendant.

The records presented by Mr. Buckingham show that Ms. Eichelberger was suspected of being a party to the crime in this offense. Accordingly, she would be Mr. Buckingham's

codefendant. Their cases are interrelated and, to the extent that evidence exonerates her, it is therefore indisputably relevant to Mr. Buckingham's defense.

Again, the postconviction court apparently failed to grasp the nature of this claim before denying it. That is an erroneous exercise of discretion.

CONCLUSION

Mr. Buckingham therefore respectfully requests that this Court grant the relief requested.

Dated this 27th day of March, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,927 words.

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 27th day of March, 2018.

Signed:

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