

STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT ONE

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff, Respondent

-vs-

ANTHONY D. DIXON,
Defendant, Appellant

**Appellate Case No: 17AP2221
17AP2222**

**Trial Case Nos.: 16CF002789
16CF003737**

BRIEF

**Appeal from the Sentence in Milwaukee County, Branch 36
Before the Honorable Jeffrey A. Kremers on April 13, 2017**

Dated at Brookfield, Wisconsin on this 11th day of December, 2017.

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STATEMENT ON PUBLICATION

This case should not be published because it will follow existing case law on applicability of lesser included offences.

STATEMENT ON ORAL ARGUMENT

Petitioners submit that this case does not require oral argument to fully enlighten the Court about the issues and relevant points should be fully appreciated from the briefing alone.

STATEMENT OF ISSUES

- I. The Trial Court Failed to Conduct Proper Inquiry Into Mr. Dixon's Request for Substitute Counsel as it Failed to Make An Adequate Inquiry, Mr. Dixon's Request Was Timely, And the Lack of Communication Between Counsel and Client Prevented an Adequate Defense From Being Raised.**

- II. Defense Counsel's Failure to Investigate and Call an Alibi Witness at Trial Represents Ineffective Assistance of Counsel as it Constitutes a Failure to Meet an Objective Standard of Reasonableness and Directly Prejudiced Mr. Dixon at Trial.**

STATEMENT OF THE CASE

Anthony Dixon (“Mr. Dixon”) asks this court to find that the trial court erred by denying his request for substitute counsel. Additionally, Mr. Dixon asks this court to find that his defense counsel offered ineffective assistance in his preparations for trial as he failed to secure potential alibi witnesses that would have supported the defense strategy at trial, and therefore entitles him to a new trial.

In connection with events occurring on June 16th, 2016, Mr. Dixon was charged with knowingly violating a domestic abuse order and disorderly conduct. (R44 P28-L 10) Additionally, in connection with events occurring on August 13th, 2016, Mr. Dixon was charged with knowingly violating a domestic abuse order, criminal damage to property-domestic abuse repeater, and disorderly conduct-domestic abuse repeater. (R44 P28-L21) To each of these charges, Mr. Dixon entered a plea of not guilty. (R44 P29-L 19) Prior to both of these incidents, Marilyn Long (“Ms. Long”) filed for and was granted a restraining order against Mr. Dixon in July of 2014. (R45 P23-L 9)

On the first day of trial, Mr. Dixon made known his desire to replace his trial counsel, Patrick Wait (“Mr. Wait”), for his failure to contact and make available for trial potential alibi witnesses. (R44 P3 L 5) Mr. Dixon stated before the court that he had only been able to speak with his attorney on one occasion, (which is not denied by his counsel) at which time he gave his counsel the names and contact information for potential witnesses to be called at trial. (R44 P5-L 7). Mr. Wait instead claimed that he was only able to reach one of three potential witnesses and that he notified Mr. Dixon of his inability to reach the potential witnesses. (R44 P5-L 18) The trial court resolved this dispute in Mr. Wait’s favor, stating that it would “take Mr. Wait’s word he tried to reach the witnesses.” (R44 P3-L 22) Mr. Dixon also stated before the court that he

already had substitute counsel he could contact to take over his representation. (R44 P4-L 12)

However, the trial court found this to be insufficient, as substitute counsel would not have been prepared to immediately try the case. (R44 P4-L 2)

Ultimately, the trial court denied Mr. Dixon's request for substitute counsel. (R44 P6-L 1) In denying this request, the trial court reasoned that Mr. Wait had made sufficient efforts to secure the witnesses for trial and that Mr. Dixon himself could have made efforts to locate the witnesses prior to trial. (R44 P4 and 5) Further, the trial court also cited timeliness concerns given that the court had an interest in maintaining its calendar and that the prosecution was prepared to begin trial with its own witnesses, which included the alleged victim. (R44 P5-L 18) The trial court then barred Mr. Dixon from raising any alibi defense during trial as the prosecution failed to receive appropriate notice that such a defense was being raised. (R44 P17-L 20)

Ultimately due to his dissatisfaction with Mr. Wait's representation up to that point, Mr. Dixon elected to proceed with the trial pro se. (R44 P13-L 16) However, the trial court allowed Mr. Wait to remain in an advisory capacity to answer any question from Mr. Dixon. (R44 P16-L 5) Such a gesture was of no value because Mr. Dixon didn't trust attorney Wait and the relationship was soured. At trial, the only testimony offered by the defense was Mr. Dixon's own testimony as to the events in question. (R46 P5-L 18) At the conclusion of trial, a jury found Mr. Dixon to be guilty of violating an injunction in connection with the June 16th incident, of violating an injunction and disorderly conduct in connection with the August 13th incident, and found him not guilty on the remaining charges. (R49 P2-L 9) As a result, Mr. Dixon was sentenced to twenty-one months of confinement at the House of Corrections. (R28)

ARGUMENT

I. The Trial Court Failed to Conduct Proper Inquiry Into Mr. Dixon's Request for Substitute Counsel as it Failed to Make An Adequate Inquiry, Mr. Dixon's Request Was Timely, And the Lack of Communication Between Counsel and Client Prevented an Adequate Defense From Being Raised.

This Court should find that the trial court abused its discretion in failing to grant Mr. Dixon's request for substitute counsel, because it failed to make an adequate inquiry into Mr. Dixon's complaints. Additionally, the trial court should have granted Mr. Dixon's request as it was shortly after the conflict with his counsel manifested. Further, the lack of communication between Mr. Dixon and his counsel was so great that it prevented an adequate defense from being made at trial.

Reviewing courts must look at a number of factors in determining whether a trial court abused its discretion in denying a defendant's request for substitute counsel. *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89, 91 (1988). As stated by the Supreme Court of Wisconsin in *Lomax*, those factors include: "(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *Id.* at 359.

A trial court's decision on whether to allow a defendant's counsel to be dismissed and replaced is a discretionary one. *Id.* Such a decision will only be upheld on appeal if it is shown that the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Anderson v. Onsager*, 155 Wis. 2d 504, 513, 455 N.W.2d 855 (1990). Further, in making that discretionary decision, trial courts should balance society's interest in the efficient administration

of justice and the defendant's constitutionally protected right to counsel. *Lomax*, 146 Wis. 2d at 360.

The mere failure of a trial court to properly consider a defendant's request for substitute counsel is not justification alone for the grant of a new trial. *Id.* at 363-364. Rather, the reviewing court should conduct an analysis on its own to determine whether the trial court should have granted that request. *Id.* (citing *State v. Kazee*, 432 N.W.2d 93, 146 Wis.2d 366 (Wis., 1988)). ...A new trial is justified if the reviewing court finds that the trial court abused its discretion in failing to grant the defendant's request for substitute counsel. *Id.* at 365.

a. Adequacy of the Trial Court's Inquiry.

In reviewing a circuit court's denial of a motion for substitute counsel, a reviewing court must first determine whether the circuit court conducted an adequate inquiry into the defendant's complaints. *See State v. Jones*, 2010 WI 72, 326 Wis. 2d 380, 797 N.W.2d 378. In *State v. Jones*, the reviewing court determined that the circuit court had conducted a proper inquiry by giving the defendant the chance to explain his disagreement with counsel and worked to remedy problems concerning the defendant's access to evidence. *Jones*, 2010 WI at ¶31.

A trial court may be excused from making a full inquiry into a defendant's complaints if the defendant fails to offer evidentiary support for those complaints. *Lomax*, 146 Wis. 2d at 361. As the court in *Lomax* discussed, when "a defendant repeatedly makes such requests without any further evidence of the attorney's incompetency or conflict, the trial court may summarily conclude without a full inquiry that the request is merely a ploy to disrupt the trial process." *Id.* at 361. In that case, the circuit court was found to have conducted an inadequate review after it failed to make any investigation into comments by the defendant that he was unsatisfied with his counsel. *Id.* Conversely, the reviewing court in *State v. Jones* found the circuit court's inquiry

was adequate given that the court engaged with both defendant and counsel as to why a conflict existed, and helped to resolve a problem stemming from the defendant's inability to review a piece of evidence. 2010 WI at ¶31.

Here, the trial court's inquiry into Mr. Dixon's complaints was inadequate. Similar to the defendant in *Lomax* who made repeated comments regarding his discontent with his counsel, Mr. Dixon directly informed the circuit court of his dissatisfaction with his counsel and his desire to seek substitute counsel. (R44 P3-L 5) While the circuit court made basic inquiry into why Mr. Dixon was dissatisfied with his counsel, unlike the court in *Lomax* that failed to investigate the defendant's comments at all, the court failed to fully investigate Mr. Dixon's claims that his counsel was not communicating and failed to contact important witnesses. Rather, the circuit court accepted Mr. Dixon's defense counsel's assertions as fact and found that counsel made sufficient efforts to contact the witnesses and remain in contact with Mr. Dixon regarding those efforts.

While Mr. Dixon did not present any evidence of his counsel's failure to contact both himself and his witnesses, Mr. Dixon's comments before the court should have indicated that such evidence existed and could likely be accessed if needed. Mr. Dixon's statements before the court, namely that he repeatedly called his counsel and left voicemails, demonstrates not only that such evidence exists, but that such evidence could be easily presented and quickly reviewed by the court to settle any lingering debate.¹ The trial court failed to make any inquiry regarding such records such as asking counsel for documentation to support any claim that attempts to contact the witnesses were actually taken or looking at counsel's billing records to see if they support contact efforts were taken. The court should have taken basic effort to create a factual

¹ Although the record is silent to the type of phones used by Mr. Dixon and his counsel, the trial court could have easily made an inquiry as to the types of phones used and the ability for relevant records to be accessed at the time Mr. Dixon raised his complaints. The trial court failed to do so.

basis on the record to support its decision one way or another. Instead, the court just took Attorney Wait at his word spontaneously given without any supporting evidence to insure the accuracy of the position. At the same time, the court did the exact opposite with Dixon's assertions by summarily discounting the same without any investigation into the merits or the same.

When making the inquiry, the court failed to take into consideration the defendant's total surprise that no witnesses were spoken to or subpoenaed for trial. Something that a defendant should have expected would have been accomplished by his counsel, or at the very least, there should have been communication between counsel and client to apprise the client of any difficulties in getting the witnesses. That way a client could have been put into a position to make an informed choice on how to proceed at trial instead of being blindsided in the ninth hour by his own counsel saying no witnesses were subpoenaed. What makes this so problematic is that there was no time to practically secure the witnesses on the day of trial.

Therefore, for the foregoing reasons, the circuit court's inquiry into Mr. Dixon's request for substitute counsel was merely superficial, disingenuous and therefore inadequate.

b. Timeliness of the Request for Substitute Counsel.

Second, when deciding on a request for substitute counsel, courts must consider the timeliness of such requests. While last minute motions for substitute counsel are discouraged, a defendant's motion does not fail the timeliness requirement simply because it is made on the eve of trial. *Lomax*, 146 Wis. 2d at 361-362. Instead, courts should seek to balance the second and third factors based on the particular circumstances of the specific case. *See Id.* at 362, (acknowledging that "it is possible that the conflict between the defendant and counsel arose on the day of trial and therefore the request for change of counsel was timely."). Therefore, a

motion for substitute counsel is timely if it is made at the time when it becomes apparent that defense counsel cannot continue to be effective in its representation as the result of a total lack of communication with the defendant. *See State v. Boyd*, 2011 WI App 25, ¶8, 331 Wis. 2d 697, 797 N.W.2d 546.

In the present case, Mr. Dixon brought his request for substitute counsel before the trial court shortly after it became apparent that his defense counsel failed to secure any of the witnesses for trial. Given the total lack of communication between counsel and Mr. Dixon, such a revelation could not have occurred until the two were present for trial. As such, Mr. Dixon's motion for substitute counsel meets the timeliness requirement established by *Lomax* given the total breakdown of communication between him and his counsel despite it coming so close to the start of trial. *See Lomax*, 146 Wis. 2d at 361-362. Further, after making known his desire to fire his existing counsel, Mr. Dixon stated that he was prepared to contact substitute counsel immediately to take over his representation. A delay would have still been required to allow that substitute counsel to conduct the necessary diligence in contacting the potential witnesses. However, in having substitute counsel "ready to go," Mr. Dixon demonstrated that his intent was not merely dilatory but instead was to secure effective representation for his trial given legitimate concerns over his then-current representation.

Ultimately, because Mr. Dixon made his request for substitute counsel once it became apparent that his defense counsel could not be effective in his representation as the result of conflict between the two, his request should not have been denied based on timeliness.

c. Lack of Communication Preventing an Adequate Defense.

Third, the court must determine whether the conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an

adequate defense and frustrated a fair presentation of the case. *See Boyd*, 2011 WI App at ¶13. Further, as discussed by the court in *Boyd*, more than a mere disagreement over strategy is necessary to make a finding of this third factor. *Id.* That court found that the record lacked any evidence “of a conflict that made counsel's continued representation *untenable*,” *Id.* (emphasis in original), and denied his motion for substitute counsel when Boyd told the court the main conflict between the two was “basically” over trial strategy. *Id.*

Here, unlike the defendant in *Boyd* who communicated with his counsel on a number of occasions, Mr. Dixon and his trial counsel met to discuss the case on only one occasion, with no other contact between the two taking place. While Mr. Dixon and his counsel disagree as to who is to blame for the lack of communication, with each party claiming to have made unreturned phone calls to the other, what is clear is that the parties failed to communicate about key aspects of Mr. Dixon’s case. Because of this complete lack of communication between the two after their initial meeting, Mr. Dixon was unaware of his defense counsel’s inability to contact his desired witnesses until the date of trial. Further, the main source of conflict for Mr. Dixon was his defense counsel’s failure to secure these witnesses for trial and, unlike *Boyd*, was not a more minor disagreement over trial strategy. This failure limited Mr. Dixon’s defense to only his own testimony and undoubtedly frustrated the fair presentation of his case by denying him the support of additional alibi witnesses. Therefore, because Mr. Dixon and his defense counsel failed to communicate beyond their initial meeting, and because this not only prevented an adequate defense but also frustrated a fair presentation of the case, this Court should find that the third *Lomax* factor has also been satisfied.

Further, while trial counsel complained of an inability to reach Mr. Dixon to discuss the case, any failure to communicate is the result of counsel’s minimal attempts to contact his client

given Mr. Dixon's captive state prior to trial. It is much more reasonable for trial counsel to set up an opportunity to speak with the captive Mr. Dixon than it is to expect Mr. Dixon to be able to reach his counsel during the limited windows during which he is allowed to make such phone calls. Standard practice for counsel in cases with such captive clients dictates that the attorney is the one with the responsibility to set up times to discuss the case. Therefore, Mr. Dixon should not be faulted for failing to respond to his trial counsel's communication when it is much easier and more reasonable for the counsel to make that contact.

In sum, because the circuit court's inquiry into Mr. Dixon's request for substitute counsel was inadequate, because that request was timely given the specific circumstances of the case, and because the total breakdown of communication prevented an adequate defense from being made, this Court should find that the circuit court abused its discretion in denying Mr. Dixon's request for substitute counsel.

II. Defense Counsel's Failure to Investigate and Call an Alibi Witness at Trial Represents Ineffective Assistance of Counsel as it Constitutes a Failure to Meet an Objective Standard of Reasonableness and Directly Prejudiced Mr. Dixon at Trial.

The failure by defense counsel to properly investigate and call alibi witnesses falls below any objective standard of reasonableness for representation, and in doing so prejudices the defense's ability to receive a fair trial with a reliable result. *See State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786. Here, Mr. Dixon's defense counsel's performance was deficient in preparing for trial because that counsel failed to secure Mr. Dixon's alibi witnesses for trial and failed to keep Mr. Dixon adequately informed of the status of his case, namely the availability of those key witnesses. Further, Mr. Dixon was directly prejudiced by that deficient performance, as Mr. Wait's failure to secure the potential witnesses prevented Mr. Dixon from

presenting any witness testimony other than his own at trial. For these reason, this Court should grant Mr. Dixon's claim for ineffective assistance of counsel.

Under the Sixth Amendment of the U.S. Constitution, all individuals charged with a crime are entitled to not only legal counsel, but also effective assistance of that counsel. *State v. White*, 2004 WI App 78, ¶10, 271 Wis. 2d 742, 680 N.W.2d 362 (citing (*Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 1984)). This right to effective assistance of counsel is crucial to protecting the fundamental right of all defendants to a fair trial as it ensures that the defense's interests are adequately represented at trial. *Strickland*, 466 U.S. at 685-686. In order to prove ineffective assistance of counsel, a defendant must establish two elements: (1) that the defendant's trial counsel's performance was deficient, and (2) that the defendant was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. Trial counsel's performance is deficient when it falls below an objective standard of reasonableness. *Id.* at 688. Further, trial council's deficient performance becomes prejudicial if there is a reasonable probability that, but for counsel's errors, the trial's outcome would have been different. *Id.* at 694.

Should a defendant establish both elements required of a claim for ineffective assistance of counsel, the remedy afforded that defendant "should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 (1981). Here, the failure of trial counsel occurred prior to trial, as he failed to secure witnesses in support of the legal strategy being used. Therefore, the appropriate remedy in such a case where defense counsel's actions presented the defendant from raising a full defense at trial would be the grant of a new trial to allow Mr. Dixon to call such witnesses in his defense. *See White*, 2004 WI App ¶9.

Here, the failure of trial counsel to both secure key witnesses and keep Mr. Dixon informed as to the status of his case falls below any reasonable standard judging performance. Additionally, based on what Mr. Dixon disclosed regarding the content of the potential witness testimony, it is likely that the admission of the testimony would have resulted in a different result at trial. Therefore, this Court should grant Mr. Dixon's claim for ineffective assistance of counsel against his trial counsel.

a. By failing to diligently pursue potential alibi witnesses, and by failing to keep Mr. Dixon informed as to the status of his case, Mr. Dixon's defense counsel's performance was deficient as it fell below an objective standard of reasonableness.

Courts use an objective standard of reasonableness to determine whether defense counsel was able to offer effective assistance. *Jenkins*, 2014 WI at ¶36. Defense counsel can fall short of that objective standard of reasonableness through either an affirmative act or through a failure to act. In determining whether defense counsel's performance has fallen below such a standard, the defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Cooks*, 2006 WI App 262, ¶33, 297 Wis. 2d 633, 726 N.W.2d 322 (citing *Strickland*, 466 U.S. at 687).

In *State v. Jenkins*, the Wisconsin Supreme Court found that to meet such a reasonable standard, defense counsel needed to call witnesses that had the potential to support the defendant's narrative and contradict the prosecution's case. 2014 WI at ¶¶42-44. There, defense counsel knew of an eyewitness to the alleged crime whose testimony would contradict the prosecution's case, but failed to call that eyewitness at trial. *Id.* at ¶42. The court found that, in failing to call those potential witnesses at trial, the performance of the defense counsel in question was deficient given his knowledge of the potential testimony and its potential to support the trial strategy employed by defense counsel. *Id.* at ¶44. According to that court, defense

counsel's failure to call a known witness of the crime in question fell below any objective standard of reasonably effective assistance expected of counsel. *Id.* at ¶47.

Here, as was the case in *Jenkins*, where defense counsel did not call witnesses that would have corroborated the defendant's story, defense counsel failed to call witnesses that at least had the potential to support an alibi defense from Mr. Dixon. Just as the defense counsel in *Jenkins* was found deficient for this failure, the defense counsel in the instant case is similarly deficient for failing to secure Mr. Dixon's witnesses for trial given the potential for their testimony to aid the defense. Further, by failing to secure these witnesses prior to trial in the present matter, defense counsel diminished Mr. Dixon's ability to raise an affirmative alibi defense at trial and introduce testimony that would have directly opposed the prosecution's case. Instead, Mr. Dixon could merely testify that he was not at the scene of the crime on the dates in question, but could give no further specifics regarding his location. By failing to secure these witnesses and in turn undercut any trial strategy surrounding them, Mr. Dixon's defense counsel fell well below any objective standard for reasonable performance.

The failure of counsel to call key witnesses constitutes deficient performance if that decision was not part of a reasonable defense strategy or that witness testimony would not have changed the result of the trial. *Jenkins*, 2014 WI at ¶45. In the present case, just as the court found in *Jenkins*, at ¶46, nothing in the record suggests that defense counsel failed to call Mr. Dixon's witnesses a reasonable strategic purpose. Instead, Mr. Dixon contends that the failure by his defense counsel arose from a lack of diligence. As established by Wisconsin's Rules of Professional Conduct for Attorneys in Supreme Court Rule 20:1.3, counsel is required to "act with reasonable diligence and promptness in representing a client." Such a standard undoubtedly

includes locating key witnesses and keeping the client informed of the success or failure of those efforts.

Even if defense counsel was diligent in his efforts to secure Mr. Dixon's witnesses for trial, his performance should still be considered deficient for the lack of communication Mr. Dixon maintained with his client. Under Wisconsin Supreme Court Rule 20:1.4(3), counsel is required to "keep the client reasonably informed about the status of the matter." As discussed above, defense counsel failed to keep Mr. Dixon reasonably informed of matters pertaining to his case by waiting until the day of trial to tell Mr. Dixon that he was unable to secure the witnesses' testimony. As such, defense counsel's failure to communicate with his client a matter central to the defense demonstrates another failure to meet an objective standard of reasonableness in his representation.

Therefore, because Mr. Dixon made his defense counsel aware of the existence of potential alibi witnesses, and because his defense counsel failed to either contact or secure those witnesses for trial, defense counsel's performance falls well below any objective standard of reasonableness. Therefore, Mr. Dixon is able to satisfy the first element required of a defendant bringing a claim for ineffective assistance of counsel by establishing his defense counsel's performance as deficient.

b. Counsel's failure to communicate with Mr. Dixon and secure his witnesses for trial likely altered the outcome of the case and therefore was prejudicial to Mr. Dixon.

Deficient performance of defense counsel alone is not enough to establish a claim for ineffective assistance of counsel, but also requires a finding that that performance was prejudicial to the defendant. *Jenkins*, 2014 WI at ¶¶49-50. To establish that the defendant was prejudiced by counsel's deficient performance, the defendant must affirmatively show that there is a reasonable probability that the trial's result would have been different but for counsel's deficient

performance. *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

While there is nothing in the record touching on exactly what the testimony from Mr. Dixon’s witnesses would have contained, Mr. Dixon stated at trial that he wished to use their testimony to make an alibi defense. Assuming that the witnesses were in fact able to offer such testimony, it would have supported Mr. Dixon’s argument that he was not at the scene of either the June 16th or August 13th incidents.

Defense counsel’s failure to call a witness to testify at trial is prejudicial to the defendant if such a failure is not part of a reasoned trial strategy on the part of defense counsel. *Cooks*, 2006 WI at ¶¶64-65. In *State v. Cooks*, the Wisconsin Court of Appeals decided that defense counsel’s failure to call alibi witnesses was prejudicial when no other evidence was offered to corroborate the defendant’s own alibi testimony. 2006 WI at ¶¶62-63. That court found that the Cook’s trial strategy was to raise an alibi defense, that the omitted witness testimony would have supported that defense, and that no other evidence was offered to corroborate Cook’s account. *Id.* at ¶63. Therefore, because the presence of witness testimony would have offered considerable support of Cook’s account, a reasonable probability existed that the presence of that testimony would have affected the result of the trial, making defense counsel’s decision not to call alibi witnesses was in fact prejudicial to the defendant. *Id.*

Similarly, Mr. Dixon’s strategy at trial was to raise an alibi defense, which his potential witnesses would have been able to support this defense with their testimony, and no other evidence was offered to support such a defense at trial. While Mr. Dixon ultimately chose to represent himself at the onset of trial, he made that decision as a result of his defense counsel’s failure to call corroborating witnesses. Simply put, defense counsel’s failure to offer effective

assistance of counsel leading up to trial left Mr. Dixon's ability to raise a full and effective defense severely crippled regardless of who argued the case before the jury. Nothing in the record exists to suggest that the failure to call Mr. Dixon's witnesses was the result of a reasoned trial strategy. Instead, the failure was a direct result of Mr. Dixon's defense counsel's deficient performance in pursuing and investigating those witnesses prior to trial. As such, not only is defense counsel's performance deficient in the instant case, but also was prejudicial to Mr. Dixon's defense by depriving him of a fair trial that had a reliable result.

In sum, because Mr. Dixon is able to establish both that defense counsel's performance was deficient, and that counsel's deficient performance was prejudicial to Mr. Dixon's defense, this court should grant Mr. Dixon claim for ineffective assistance of counsel and award him a new trial.

CONCLUSION

For the foregoing reasons, this Court should find that the Trial Court failed to insure that Dixon's constitutional rights were preserved when it denied Dixon's motion for substitution of counsel, and a new trial date should be set in the interest of justice. Additionally, this Court should find that Dixon's motion for ineffective assistance of counsel should have been granted based on the deficient performance of counsel, its prejudicial effect on Mr. Dixon and the courts failure to properly explore Dixon's claims of lack of contact between his counsel and him and Dixon's witnesses. Therefore, this Court should set aside the verdict in the above case and grant Mr. Dixon's request for a new trial based upon the facts set forth in this case.

Dated at Brookfield, Wisconsin on this 11th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

CERTIFICATIONS

Form and Length of Certification - Brief

I certify that this brief conforms to the rules contained in Wis. Stat. s.809.18 (8)(b) & (c) for a brief produced with a proportional Times New Roman font. The length of this brief is 4926 words. Dated at Brookfield, Wisconsin on this 11th day of December, 2017.

By: _____
Mitchell Barrock

Form of Certification - Appendix

I certify that this brief conforms to the rules contained in Wis. Stat. s.809.19 (2)(a) & (b) for appendix produced with a proportional Times New Roman font. Dated at Brookfield, Wisconsin on this 11th day of December, 2017.

By: _____
Mitchell Barrock

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I certify that I have filed an electronic copy of this brief under s. 809.19(12), and that the test of the electronic copy of this brief is identical to the paper copy. Dated at Brookfield, Wisconsin on this 11th day of December, 2017.

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Mitchell Barrock

Appendix Certification

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 one or more initials or other appropriate pseudonym or designation 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 at Brookfield, Wisconsin on this 11th day of December, 2017.

By: _____
Mitchell Barrock

Affidavit and Certificate of Filing

I certify that I mailed an original and 9 copies of the attached brief by first class mail, postage prepaid on December 11th, 2017 to:

Wisconsin Court of Appeals; Office of the Clerk
110 E. Main Street, Ste. 215
P.O. Box 1688
Madison, WI 53701-1688

and

I certify that I mailed 3 copies of the attached brief by first class mail, postage prepaid on December 11th, 2017 to:

District Attorney's Office Milwaukee
821 W. State Street
Milwaukee WI 53233

By: _____
Mitchell Barrock

APPENDIX

Judgment of conviction 4/13/17 Case # 16CF2789

Judgment of Conviction 4/13/17 Case # 16CF3737