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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

**APPELLATE CASE NO. 2018AP000074-CR
WAUKESHA COUNTY CASE NO. 2016CM000960**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN P. BOUGNEIT,

Defendant-Appellant.

**ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE WAUKESHA COUNTY CIRCUIT COURT AND ORDER
DENYING POSTCONVICTION RELIEF ENTERED IN THE
WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE
MICHAEL P. MAXWELL, PRESIDING**

**BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT**

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STATEMENT OF THE ISSUE

1. Did trial counsel commit prejudicially deficient performance by failing to adequately present the testimony of a key defense witness at trial?

Answer by Circuit Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Counsel believes the parties' briefs will adequately address the issue raised in this appeal and therefore, John Bougneit (hereinafter "Bougneit") does not request oral argument. This is a one judge panel, so publication is not available pursuant to Rule 809.23(1)(b)(4) and (4)(b), Wis. Stats.

STATEMENT OF FACTS AND THE CASE

A. The complaint and trial.

The State charged Bougneit with one count of Fourth Degree Sexual Assault, contrary to §940.225(3m), Wis. Stats. (1:1) The complaint basically alleged that Bougneit engaged in various acts of sexual contact with an eighteen year old friend of the family, RL. *Id.* It also alleged the assault occurred on or about Wednesday, December 29, 2015, while RL was sitting on a couch watching television at Bougneit's residence that evening. *Id.* RL

alleged that she was sitting on the same couch as Bougneit and his wife, Melissa Bougneit, during the incident. *Id.*

While watching television, the RL alleged that Bougneit began touching her under her shirt, and eventually touched her breasts. *Id.* She also alleged Bougneit moved his hand from her shirt to her underwear. *Id.* at 2. According to RL, Bougneit put his hand beneath her underwear and rubbed near her vagina. *Id.* She also alleged that Bougneit tried to put his finger in her vagina, but she resisted. *Id.*

RL reported the assault to her family after she was picked up by her sister from the Bougneit residence that same evening. *Id.* The only other person in the room besides Bougneit and RL was Melissa Bougneit.

Bougneit denied the allegations and the matter ultimately proceeded to a two day jury trial which began on September 13, 2016. (75:1; 76:1). RL testified to essentially the same basic sequence of events as referenced in the criminal complaint. (75: 17-29). Bougneit's trial counsel called Melissa Bougneit as a witness to rebut the allegations by RL. (75: 45). Melissa testified that she never observed her husband touch RL inappropriately in any way the entire time they watched television together on the evening in question. (75: 48-49).

The state's cross-examination of Melissa Bougneit largely centered on the timing of her awareness of the sexual assault allegations against her husband and the account of the incident she gave to the police on January 30, 2016, in the form of a one page typewritten statement she prepared in anticipation of their meeting. (75: 49-54; App. 104). Melissa's statement was admitted into evidence during the state's cross-examination and is reproduced in the Appendix. (75:54; App. 104).

Specifically, the State attempted to impeach Melissa's credibility on the basis that her statement referenced an awareness of the sexual assault allegations involving her husband long before she was interviewed by the police and before a time when she should have known about the precise nature of the police investigation. During the middle of the State's cross of Melissa Bougneit on this fact, she responded that she had learned of certain details about the alleged assault before her meeting with the police from a "Victoria":

STATE: Prior to going in to see the officer, did you have a different conversation with the officer?

MELISSA BOUGNEIT: I didn't have a conversation with him.

STATE: Is it fair to say January 30th is the first time you spoke with Officer Kriser?

MELISSA BOUGNEIT: Yes.

STATE: Is it fair to say based on your recollections that a couple days prior to this conversation with Officer Kriser was the first you learned about RL's sexual assault allegation against your husband?

MELISSA BOUGNEIT: Yes.

STATE: If I'm doing my math correctly, on or around January 28, 2016 was the first you're aware that a month prior she is saying he touched her?

MELISSA BOUGNEIT: No, it was closer to the middle of January. It's just this time we actually got to sit down.

STATE: I want to make sure I'm being fair. It took a couple weeks after you first spoke with Mukwonago police officers to actually type up and submit your written statement; is that accurate?

MELISSA BOUGNEIT: About a week, a week and a half.

STATE: So you did have an earlier conversation with Officer Kriser before January 30th?

MELISSA BOUGNEIT: He called but I didn't have a conversation with him.

STATE: But you spoke briefly with him?

MELISSA BOUGNEIT: Just that he had called, yeah.

STATE: And during that conversation presumably you learned that RL was saying that your husband John touched her, right?

MELISSA BOUGNEIT: I learned that from Victoria.

STATE: You learned of that from Victoria?

MELISSA BOUGNEIT: Yes.

STATE: That didn't have anything to do with the Mukwonago Police Department?

MELISSA BOUGNIET: They aren't the ones that told me.

STATE: And when did Victoria tell you that RL was saying John touched her?

MELISSA BOUGNEIT: A couple days prior to the police officer calling us.

STATE: So we are absolutely clear, the middle of January is when you first learned about this?

MELISSA BOUGNEIT: Yes.

STATE: Can we say January 15th roughly?

MELISSA BOUGNEIT: I would say roughly.

STATE: Is it fair to say roughly about 16 days after this occurred you learned that RL was saying that John had touched her?

MELISSA BOUGNEIT: Sixteen days after it allegedly occurred, yes.

(75:49-50)

Melissa Bougneit was never asked by either party to identify “Victoria” by last name and the jury never learned of her connection to the case during the trial. The first question asked by the jury asked during their deliberations was “who is Victoria?” (28:1; 76:11; App. 105). The jury was ultimately instructed by the court to rely upon their collective memories of the testimony and any evidence admitted during the trial. (76:12; 28:1).

During closing argument, the State portrayed Melissa as an “over testifier”- remembering seemingly trivial details about the evening of the alleged assaults no one else should have been able to remember a month later when she was eventually questioned by the Mukwonago police. (76:7-9; 55: 4-6). The State expressed incredulousness over her knowledge of the details and indicated that she most likely fabricated her statement in an attempt to

prevent shame and humiliation for her family. (76: 7-9). The jury later returned a verdict of guilty on the count as charged. (27).

B. Post-conviction litigation.

Following his conviction, Bougneit filed a post-conviction motion asserting he had been denied effective assistance of counsel due to trial counsel's failure to rehabilitate the credibility of Melissa Bougneit's testimony at trial. (55:1-15; App. 106-109). In Melissa's affidavit, which was attached to Bougneit's post-conviction motion and stipulated to for the purposes of the subsequent *Machner*¹ hearing, Melissa Bougneit identified "Victoria" as Victoria L, RL's mother. (55:10; App. 106). She further outlined the nature of their relationship and the fact that they considered each other good friends. *Id.* In fact, they were close enough that Melissa and John Bougneit were named godparents of Victoria's daughter, KL, the younger sister of RL. *Id.*

She further stated that she attempted to reach out on Facebook to Victoria L shortly after New Years of 2016 because she wanted to share a photo of Clay Matthews with her as she knew she was a big fan of his. (55:10-11; App. 107) They had previously been Facebook friends but when she

¹ *State v. Machner*, 92 Wis. 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

attempted to send the photo to Victoria her name no longer showed up on her friend list. Puzzled by this, Melissa sent several texts to Victoria's daughters, CL and RL, in an effort to find out why this was the case. *Id.* Melissa received a vague response from RL to the effect that her mother wasn't on Facebook very much anymore. *Id.*

At that point, Melissa began to suspect that she had done something to Victoria to harm their relationship. *Id.* Melissa eventually received a text from Victoria on or about January 15, 2016 at approximately 7 P.M. The message asked Melissa to meet her at Mt. Olive Church at 7:30 P.M. The message instructed her to come alone. *Id.*

Melissa met with Victoria L alone outside in the church parking lot. *Id.* At the meeting, Victoria told Melissa that she loved her and Melissa responded that she loved her as well. *Id.* Victoria L then proceeded to relay the details of the alleged assaults on RL at the Bougneit residence on the evening of December 29, 2015. *Id.* The details of the assaults provided by Victoria L to her were substantially similar to the allegations contained in the criminal complaint. *Id.*

Melissa stated she was in shock over the allegations and told Victoria L that she needed to talk to her husband. *Id.* She also told Victoria that she

found the allegations hard to believe. *Id.* They both hugged and said goodbye. (55:12; App. 107-108).

Melissa's affidavit goes on to state that she immediately contacted her husband and a friend and church pastor, who all later met at their residence that same evening. *Id.* She then relayed the details of RL's allegations to them and they were both stunned. *Id.* Bougneit adamantly denied the allegations and they immediately began to reconstruct a timeline for the events of December 29 and the possible motives RL might have had to fabricate the assaults. *Id.*

The Bougneit's also spoke with their son, Joseph, who was aware of certain details of RL's activities earlier that day because he had been texting back and forth with her before his parents arrived home that evening. *Id.* Melissa stated this is how she knew certain details about RL's activities at their residence before she even arrived home from work that evening. *Id.* Finally, Melissa stated in her affidavit that defense counsel was aware of both the timing of the disclosure to her family by Victoria as well as the fact that she was RL's mother as well. *Id.*

Defense counsel acknowledged at the subsequent *Machner* hearing that in his forty years of practice as a criminal defense attorney, it was

extremely unusual for the spouse of an alleged perpetrator to have been present in the same room as the victim at a time when the assault would have occurred (78:13). Since Melissa saw nothing of a sexual nature take place between her husband and RL, defense counsel considered Melissa to be an eye witness. *Id.*

Defense counsel testified that the defense strategy was to point out to the jury this “type of behavior under these circumstances is just unbelievable. We’re on a couch and the man’s wife is right there. Not the typical place to engage in improper groping by a middle-aged man.” *Id.*

Defense counsel admitted that he knew from the very beginning of his representation of Bougneit that “Victoria” was RL’s mother and a close friend of Melissa Bougneit. (78:15). When asked why he didn’t follow up on this thread, Defense counsel acknowledged that he “probably didn’t think it was important at the time. I have no explanation why I didn’t attempt to rehabilitate on that issue.” (78:16). That answer elicited the following exchange:

APPELLATE COUNSEL: You are aware again that Melissa Bougneit was your only eye witness in this case, correct?

DEFENSE COUNSEL: That’s correct.

APPELLATE COUNSEL: You're aware that her credibility was obviously very important in this case as the only true eye witness to what allegedly occurred?

DEFENSE COUNSEL: Correct.

APPELLATE COUNSEL: Looking back at the trial, would you see any benefit now in exploring how Ms. Bougneit became aware of the allegations and the fact that she became aware of them from RL's mother as opposed to some neighbor down the street that may have had second or third hand information?

DEFENSE COUNSEL: Absolutely.

APPELLATE COUNSEL: You believe that if that particular fact had been known to the jury that the source of Melissa Bougneit's awareness of what these allegations were all about and that source was Victoria L., who was Rachel's mother that may have enhanced her credibility before the jury?

APPELLATE COUNSEL: That is a definite possibility.

(78: 16-17)

Defense counsel acknowledged that Melissa's credibility also would have been bolstered if he had chosen to flesh out the events following Melissa's meeting with Victoria L, which directly caused her family to begin

an immediate reconstruction of the events of the evening within two weeks of the alleged assaults. (78:33-34). Defense counsel also admitted that had he done this, he would have been able to counter the State's assertions of incredulity over Melissa's ability to remember certain events of December 29 to the degree she did by the time she met with the police on January 30. (78:33-37).

Following briefing, the circuit court issued a written decision and order denying Bougneit's post-conviction claim of ineffective assistance of counsel (63:1-3; App. 101-103). The court concluded that Bougneit's claim was essentially an attempt to have the court substitute its judgment for the jury's as to Melissa's credibility and the impact it had on their decision in that regard. (63:3; App. 103). The court further concluded that it is "not the province of the court to supplant the jury's decision in that regard. The jury had the opportunity to view the credibility of Mrs. Bougneit, the defendant and RL and ultimately believed the testimony of RL and returned a verdict of guilt." *Id.* The court believed "this was a case of 'he said, she said' and the jury believed RL." *Id.*

Bougneit subsequently filed a timely Notice of Appeal on January 10, 2018, and this appeal was then perfected. (64:1).

THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

For Bougneit to prove his trial attorney provided ineffective assistance at trial, he must first show specific acts or omissions of counsel constituted deficient performance in that the action or inaction of counsel fell “outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). In making this determination, the court must keep in mind that counsel’s function is to make the adversarial testing process work in the particular case. *State v. Pitsch*, 124 Wis. 2d, 628, 633, 369 N.W.2d 711, 714 (1985).

There is a presumption that counsel’s conduct fell within the wide range of reasonable professional service. *See Strickland*, 466 U.S. at 689. However, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limits of the investigation. *Id.* at 691.

However, strategic choices “resulting from lack of diligence in preparation and investigation are not protected by the presumption in favor

of counsel.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision, rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. *See Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

The test for the prejudice prong is whether trial counsel’s errors deprived the defendant of a just result. *Id.* at *State v. Pitsch*, 640-41, 369 N.W.2d at 718. The ultimate focus is on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at *State v. Pitsch*, 642, 369 N.W.2d at 719. Of chief concern is whether there was a breakdown in the adversarial process that our system counts on to produce just results. *Id.* This is not an outcome determinative standard. *Id.* Even if there was sufficient evidence to sustain the conviction, when a defendant’s constitutional rights are violated because of counsel’s deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined. *Id.* at *State v. Pitsch*, 645-46, 369 N.W.2d at 720.

A. TRIAL COUNSEL COMMITTED PREJUDICIALLY DEFICIENT PERFORMANCE DUE TO THE FAILURE TO ADEQUATELY PRESENT KEY DEFENSE WITNESS MELISSA BOUGNEIT’S TESTIMONY.

Because “Victoria” was never completely identified at trial, the defense could not articulate a plausible theory how Melissa would have known she would ultimately be questioned by the police about the sexual misconduct charges involving her husband. Further, this disconnect also caused her testimony on the timing of her awareness of the alleged assaults to be less believable than it would have been otherwise since the source was RL’s mother herself.

Given the fact that Victoria L told Melissa about the assault less than two weeks after it allegedly occurred, it would have been more plausible for her to have remembered certain details of that day as opposed to one month later, when she was eventually questioned by the police. It also would have offered a plausible explanation why Bougneit and Melissa would have begun to construct a timeline for the events of that day almost immediately after they learned of RL’s allegations.

As it stood, the failure to disclose Victoria’s full identity could have led the jury to make three possible assumptions, none of which are good for the defense. First, the jury could have assumed Melissa knew about the precise details of the nature of the police investigation before her meeting with them because she actually witnessed the assaults. In other words, she

already knew the allegations involved sexual touching of RL by her husband because she saw them occur. Second, and equally damaging, is she could have learned of the details of RL's allegations earlier because Bougneit disclosed them to her.

The final possible assumption is that Melissa simply made up a fictional "Victoria" as a way to counter any claim that she should not have been able to know the precise nature of the police investigation at the time she prepared her typewritten statement. No matter which route the jury chose, Melissa Bougneit would have been perceived by them to be a less than trustworthy source.

Not surprisingly, the only question asked by the jury during their deliberations was "who was 'Victoria'?" (28:1). Obviously, it mattered to the jury who "Victoria" was and potentially how reliable her information would have been in order to properly assess Melissa Bougneit's *own* credibility, especially since Melissa was the only other person in the room (to be precise, *the same couch*) as RL and her husband at the time of the events. The jury was ultimately instructed to rely upon their collective memories of the testimony and any evidence admitted during the trial. *Id.* Unfortunately, due to defense counsel's failure to adequately identify Melissa's source and

provide additional critical contextual support for her, they had absolutely nothing more to work with.

Defense counsel candidly admitted he knew the details about how the alleged assaults were revealed to Melissa as well as her source prior to trial. (78:33-37). He also candidly admitted that he may have dropped the ball by not fleshing out Melissa's source and the facts behind them in an effort to blunt the attack on her credibility by the State. *Id.* Defense counsel's decision at trial not to pursue these lines of examination did not appear to have been made for any other tactical or strategic reason, and as a result constituted deficient performance.

The trial court, in its written decision and order, held that it could not ultimately address the issue of whether defense counsel's errors prejudiced Bougneit's trial because that would require the court to weigh Melissa's credibility against the other witnesses who also testified. (63:3; App. 103). Citing *State v. Thiel*, 2003 WI 111, Wis.2d 571 665 N.W. 2d 305, at ¶90, Bougneit argued in the supplemental brief to his post-conviction motion that the court was not required to weigh the credibility of Melissa Bougneit in order to answer this question. (62:6). Instead, Bougneit maintained the court was required, in order to assess whether Bougneit was prejudiced by defense

counsel's errors, to decide whether our confidence in the reliability and outcome of the verdict was affected by them. *Id.*

Bougneit believes this necessarily requires the court to engage in an analysis as to whether the context information about "Victoria" would have made Melissa more credible to a reasonable jury, without passing judgment on the court's *personal* belief in her proffered testimony. A critical but important distinction in the issue before the court.

Bougneit believes the facts before the court are analogous to ineffective assistance claims brought for the failure to call a witness and present testimony at trial. Specifically, in *State v. Jenkins*, 2014 WI 59, 355 Wis.2d 180 848 N.W.2d 786, our supreme court found defense counsel deficient for failing to call a witness who could have contradicted the State's eyewitness in a homicide case. *Id.* at ¶48. As in this case, the defense counsel in *Jenkins* had no reasonable trial strategy for not calling the witness. *Id.* at ¶47. See also *Toliver v. Pollard*, 688 F.3d 853, 862 and *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006).

The court in *Jenkins* found the error prejudiced the defendant as well because the State's case relied almost completely on the testimony of the one

eyewitness. *Id.* at ¶52. The court also held that the lack of any physical evidence factored into the totality of the circumstances on the prejudice prong as the case would likely become a credibility contest between the proffered defense witness and the state's eyewitness. *Id.* at ¶59. Although the proffered testimony of the defense witness was not without inconsistencies, the court cited *State v. Guerard*, 2004 WI 85, 273 Wis.2d 250, 682 N.W.2d 12, for support of the principle that perceived weaknesses in the witness's testimony would have been a factor for the jury to consider, not the court, and they would have had to determine the weight and credibility to assign to the statement. *Jenkins*, at ¶65.

Similarly, in this case the State relied almost entirely on the testimony of one eyewitness: RL. Like *Jenkins*, there was no physical evidence linking Bougneit to the offense. As the trial court aptly surmised in its decision this was a "he said, she said" case. (63:3). This was a credibility case much like the one in *Jenkins* and it hinged on the credibility of the eyewitnesses of which Melissa Bougneit was one. As a result, defense counsel's failure to adequately present her testimony and respond to the State's resulting attack on her credibility materially prejudiced Bougneit's defense.

CONCLUSION

For these reasons, Bougneit asks this court to vacate his conviction and remand this matter for a new trial. *See State v. Zimmerman*, 2003 WI App 196, PP34, 47-49, 266 Wis. 2d 1003, 669 N.W.2d 762.

Dated this 9th day of May, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 3,772 words.

/s/ James R. Walden, Jr.

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Craig M. Kuhary (SBN 1013040)

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the 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 9th day of May, 2018.

/s/ James R. Walden, Jr.

James R. Walden, Jr.(1009136) for
Craig M. Kuhary (SBN 1013040)

CERTIFICATION OF MAILING AND SERVICE

I hereby certify that ten copies of this brief and appendix was delivered on May 8, 2018, with a third party carrier for delivery to the Clerk of the Wisconsin Court of Appeals.

Dated this 9th day of May, 2018.

/s/ James R. Walden, Jr.

James R. Walden, Jr.(1009136) for
Craig M. Kuhary (SBN 1013040)