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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP000074-CR
Waukesha County Circuit Court Case Nos. 2016CT960

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN P. BOUGNEIT,

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION AND THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT-APPELLANT POSTCONVICTION RELIEF, IN WAUKESHA COUNTY, THE HONORABLE MICHAEL P. MAXWELL, PRESIDING

THE BRIEF AND OF THE PLAINTIFF-RESPONDENT, STATE OF WISCONSIN

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

This appeal falls within *Wis. Stat. Sec. 752.31(2)*, thus, the resulting decision is not eligible for publication. Moreover, the issue in this appeal may be resolved through the application of well-established law, therefore, oral argument will not be necessary.

STATEMENT OF THE CASE AND FACTS

I. Procedural Status of the Case.

The Appellant, John P. Bougneit, was charged in Waukesha County, with Fourth Degree Sexual Assault of R.L.L. (DOB: 10/3/97), contrary to *Wis. Stat.* § 940.225(3m). On September 13, 2016, the Appellant, represented by Attorney Daniel P. Fay (Attorney Fay), proceeded to a two day jury trial before the Honorable Michael P. Maxwell. On September 14, 2016, the jury found the Appellant guilty of Fourth Degree Sexual Assault. On October 27, 2016, Appellant was sentenced to four months jail, imposed and stayed for twelve months of probation with several conditions. On October 31, 2016, Notice of Intent to Pursue Post-Conviction Relief as well as a Motion for Stay of Sentencing Pending Appeal was filed by Attorney Craig M. Kuhary. On November 1, 2016, the Judgment of Conviction was entered. On November 8, 2016, the Honorable Michael P. Maxwell granted Appellant's motions and stayed the sentence pending appeal. On September 28, 2017, Appellant proceeded on a Motion for Post-Conviction Relief. On December 22, 2017, the Honorable Michael P. Maxwell entered an order and decision denying Appellant's Motion for Post-Conviction Relief. Appellant subsequently filed a timely Notice of Appeal on January 10, 2018.

II. Statement of the Facts.

A. The Complaint

During the evening of December 29, 2015, R.L.L. stated that the Appellant and his wife Melissa Bougneit, (Mrs. Bougneit) took her out for dinner. *(R. 1:2).* After dinner they all returned to the Appellant's house and watched a movie. During the movie R.L.L. sat on the couch between the Appellant and Mrs. Bougneit. Id. After the movie ended, the three then watched a television series. *Id.*

The Appellant began touching R.L.L.'s leg under the blanket covering her. *(R. 1:3).* At some point during this television series, the Appellant moved his hand from her leg to her shirt. *Id.* He began moving his hand under her shirt, touching her breasts. *Id.* The Appellant then moved his hand from R.L.L.'s shirt to her underwear at which point he rubbed near her vagina. Id. Subsequently, the Appellant tried to put his finger into R.L.L.' vagina, but R.L.L. clamped her legs shut. *Id.* All of this touching occurred under a blanket that the Appellant and R.L.L. were sharing. *Id.*

During this time, R.L.L. received a text message from her sister C.L. that she was on her way to pick up R.L.L. Id. Shortly thereafter, R.L.L. announced that her sister had arrived. *Id.* Subsequently, the Appellant adjusted R.L.L.'s bra and underwear. Id. R.L.L. then proceeded to get into her sister's vehicle and started to hysterically cry. *Id.* C.L. then drove to the Walmart where their father was working third shift. C.L. told their father what had just happened, and together, the three of them drove directly to the Mukwonago Police Department to report the incident. *Id.*

Furthermore, at the time of the incident, the Appellant was 48 years old and R.L.L. had just turned 18 years old. *Id.* At no point during this incident did R.L.L. consent to the Appellant touching her in this manner. *Id.*

B. The Trial

The Appellant denied the allegations in the criminal complaint and the matter proceeded to a two day jury trial. The trial began on September 13, 2016. R.L.L. testified to the same events as the allegations listed in the criminal complaint. *(R. 72:16-32).*

In response to R.L.L.'s testimony, Attorney Fay called Mrs. Bougneit as a defense witness. *(R.72:45-57).* On direct examination, Attorney Fay highlighted the close proximity of the Appellant, R.L.L., and Mrs. Bougneit on the couch. *(R. 72:45-48).* Mrs. Bougneit adamantly denied observing the Appellant touch R.L.L. inappropriately that evening they watched TV together. *Id.*

Attorney Michael D. Thurston (Attorney Thurston), cross examined Mrs. Bougneit about when she first learned about the sexual assault allegations made against the Appellant. *(R. 72:49-50).* Mrs. Bougneit stated that she first learned of the allegations from Victoria around the middle of January. *(R. 72:49).* Furthermore, Mrs. Bougneit testified that about two weeks after she was made aware of the allegations, she drafted her statement to police. *(R. 72:53).* Moreover, Attorney Thurston, cross examined Mrs. Bougneit about her hyperawareness of the night that the assault occurred as well as the trivial details she put into her statement to police. *(R. 72:48-54).*

On redirect, Attorney Fay asked Mrs. Bougneit about why she remembered the night of the assault so vividly. *(R. 72:54).* Mrs. Bougneit testified that she remembered that night in detail because of having R.L.L. over as well as making sure that the Appellant did not fall asleep. *Id.*

During closing arguments, Attorney Thurston criticized the testimony of Mrs. Bougneit. *(R. 73:8-9).* More specifically, Attorney Thurston attacked her credibility as a witness by reading her statement, as well as calling her an over testifier. *Id.* Ultimately, the jury found the Appellant guilty of fourth degree sexual assault. *(R. 73:12).*

C. Post-Conviction Litigation

Following his conviction, Appellant filed a Post-Conviction Relief Motion asserting that he had been denied effective assistance of counsel due to Attorney Fay's failure to rehabilitate the credibility of Mrs. Bougneit. *(R. 75:1-60).* At the motion hearing, Attorney Kuhary questioned Attorney Fay about why at trial he did not ask Mrs. Bougneit about who Victoria was. *(R. 75:16).* Attorney Fay acknowledged that he did not think it was important at the time. *Id.* Moreover, Attorney Fay stated his trial strategy was to (1) discredit R.L.L.; (2) discredit the police investigation; and (3) elicit eye witness testimony from Mrs. Bougneit about how she was in the room and did not see anything transpire. *(R. 75:41).* Ultimately, the Honorable Michael P. Maxwell denied Appellants Post-Conviction Relief for ineffective assistance of counsel.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel is a mixed question of fact and law. *State v. Carter*, 324 Wis.2d 640, 657 (2010). We will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include the circumstances of the case and the counsel's conduct and strategy. *Id.* Moreover, a court will not exclude the circuit court's articulated assessments of credibility and demeanor unless they are clearly erroneous. *Id.* However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which a court reviews de novo. *Id.*

ARGUMENT

I. APPELLANT CANNOT ESTABLISH THAT ATTORNEY FAY'S PERFORMANCE WAS DEFICIENT AND AS A RESULT HE SUFFERED PREJUDICE; THEREFORE, HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILS.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under article I, § 7 of the Wisconsin Constitution, encompasses a criminal defendant's right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201 Wis.2d 219, 226-36 (1996). The Sixth Amendment right to counsel protects a criminal defendant's fundamental right to a fair trial. *Strickland*, 466 U.S. at 684-86.

Furthermore, a defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Id.* at 687. If a court concludes that a defendant has not established one prong of the test, the court need not address the other prong. *Id.* at 697.

A. ATTORNEY FAY WAS NOT DEFICIENT IN HIS PERFORMANCE FOR FAILING TO QUESTION MRS. BOUGNEIT ABOUT ATRIVIAL DETAIL.

To prove deficient performance, the Appellant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. Therefore, the Appellant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." Id. at 690.

In assessing counsels' representation, a court should presume that counsel rendered adequate assistance. *Id.*; *see also State v. Carter*, 324 Wis.2d 640, 659 (2010) ("[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate."). Further, this presumption of constitutional adequacy extends to decisions of trial strategy. *Id.* "Counsel's decisions in choosing a trial strategy are to be given great deference.... Even decisions made with less than a thorough investigation may be sustained if reasonable, given the strong presumption of effective assistance and deference to strategic decisions." *State v. Balliette*, 336 Wis.2d 358, 372-73 (2011) (citing *Carter*, 324 Wis.2d 640 at 659; *Strickland*, 466 U.S. at 690–91).

Consequently, in assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

The Appellant argues that Attorney Fay was deficient in his representation by failing to identify who Victoria was during trial. *(App. Br. 15).* The Appellant contends that failing to disclose the identity of Victoria led to a distortion in how Mrs. Bougneit learned of the sexual assault allegations, thereby weakening her credibility. *Id.*

Attorney Fay's performance at trial was more than constitutionally adequate. Attorney Fay has wealth of experience given his forty years practicing

law as well as conducting over a thousand trials. *(R. 75:18-19).* Thus. to combat the testimony of R.L.L., Attorney Fay called Mrs. Bougneit as a defense witness. *(R. 72:44-57).* On direct examination, Attorney Fay highlighted the close proximity of Mrs. Bougneit to the Appellant and R.L.L.. *(R. 72:45-48).* Attorney Fay then highlighted the fact that Mrs. Bougneit never observed the Appellant touch R.L.L. inappropriately that evening. Id. Furthermore, Attorney Fay on redirect asked Mrs. Bougniet about why she remembered the night of the assault so vividly. *(R. 72:54).* In addition,

All of these tactics by Attorney Fay were in an attempt to establish Mrs. Bougniet as a credible witness. However, based on the verdict, it is clear that Mrs. Bougniet's testimony was not credible to the jury. That being said, the Appellant seems to overstate the importance of how the identity of Victoria would have established Mrs. Bougneit as a more credible witness. The identity of Victoria is a rather trivial detail that would have lent little to no credence to the credibility of Mrs. Bougneit.

Criticism of trial tactics is, often enough, identical with the second guessing known to football coaches and baseball managers. *Johnson v. State*, 39 Wis.2d 415, 418 (1968). Monday morning quarterbacks and hot stove leaguers always would have won the game in which they did not participate. *Id.* Moreover, a lawyer in a criminal case is not expected to steer every ship into the harbor of dismissal. *Id.* The weight of the cargo carried often makes that impossible. *Id.*

[The fact] [t]hat a different pilot might have pursued a different course, at best, proves only that hindsight is easier than foresight. *Id.*

The Appellant in this case is rather critical of Attorney Fay's decision not to question Mrs. Bougniet about the identity of Victoria because he did not think it was important at the time. *(R. 75:16).* However, in doing so, the Appellant ignores Attorney Fay's noteworthy trial strategy to (1) discredit R.L.L.; (2) discredit the police investigation; and (3) elicit eye witness testimony from Mrs. Bougneit about how she was in the room and did not see anything transpire. *(R. 75:41).*

Attorney Fay's trial strategy is given great deference and should not be compared to what a different attorney might have done in the same circumstance. It is always easier to criticize a trial strategy in hindsight, following an unfavorable verdict. However, the Court should make every effort to eliminate the distorting effects of hindsight and reconstruct the circumstances of counsel's challenged conduct to evaluate the conduct from counsel's perspective at the time.

In doing so, the Court should find that Attorney Fay's decision not to question Mrs. Bougniet about the identity of Victoria is a rather trivial detail that had little to no effect on her credibility. Moreover, the Court should find that Attorney Fay's conduct does not fall outside the wide range of acceptable representation. More specifically, the Court should find that Attorney Fay's trial tactics do not amount to deficient performance under the *Strickland* analysis. Thus, if the Court concludes that the Appellant has not established the deficient

performance prong under the Strickland analysis, the Court need not address the prejudice prong. *Strickland*, 466 U.S. at 697.

B. THE APPELLANT WAS NOT PREJUDICED BY ATTORNEY FAY'S DECISION NOT TO QUESTION MRS. BOUGNIET ABOUT A TRIVIAL DETAIL BECAUSE THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

If the Court finds that there was deficient performance on the part of the trial attorney, it must then examine whether trial counsel's performance prejudiced the Appellant. *Strickland*, 466 U.S. at 687. In order to demonstrate prejudice, the Appellant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 693. Therefore, the Appellant must show something more than the fact that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the Appellant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Carter*, 324 Wis. 2d at 670. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Stated simply, an Appellant must show that trial counsel's errors were so serious that the Appellant was deprived of a fair trial and reliable outcome. *Strickland*, 466 U.S. at 687.

The Appellant argues that the confidence in the reliability and outcome of the verdict is affected because the contextual information about Victoria would have made Mrs. Bougneit more credible to a reasonable jury. *(App. Br. 18).*

Therefore, by not presenting this information at trial, the Appellant was materially prejudiced. *Id.* To support that assertion, the Appellant believes his case is analogous to ineffective assistance of counsel claims brought for the failure to call a witness and present testimony at trial. More specifically, the Appellant cites *State v. Jenkins*, 355 Wis.2d 180 (2014), to bolster his argument.

However, the Appellant misstates the holding in *Jenkins* with regard to the prejudice prong and its effect on this case. In *Jenkins*, the defendant was convicted of several different crimes stemming from a shooting. *Id.* at 185. At trial, the State's case relied almost exclusively on the testimony of one eyewitness, the victim, because no physical evidence directly tied the defendant to the shooting. *Id.* at 199. The defense had an eyewitness who's testimony would have contradicted the State's witness. *Id.* at 200. Yet, the defense failed to offer the contradictory eyewitness testimony. *Id.* The Court opined that in such a case, contradictory eyewitness testimony supporting the defendant would have exposed the precariousness of the State's case. *Id.* Thus, there was a reasonable probability that the outcome of the trial would have been different if defense counsel would have called that witness. *Id.* at 201. Ultimately, the Court concluded that when exculpatory evidence (a contradictory witness) is not provided to the jury because of the defense attorney's deficiency, the defendant is prejudiced because the jury does not get the opportunity to evaluate the witness's credibility. *Id* at 201-204.; *see also State v. Honig*, 366 Wis.2d 681, 703 (2015); *State v. Cooks*, 297 Wis.2d 633 (2006).

Again, the Appellant overstates the importance of the contextual information about Victoria to Mrs. Bougneit's credibility. In the case at hand, Attorney Fay called Mrs. Bougneit as a witness to rebut the testimony of R.L.L. *(R. 72:45-57).* Further, Attorney Fay was able to elicit "eyewitness" testimony from Mrs. Bougneit about how she was in such close proximity to R.L.L. and the Appellant and did not see anything transpire. *(R. 72:45-48).* Further, nothing about the identification of Victoria, would rise to the level of exculpatory evidence. Thus, its absence from the original trial was not prejudicial to the Appellant.

The case at issue is entirely dissimilar from *Jenkins* as well as other cases involving ineffective assistance of counsel claims for failure to call a witness and present testimony at trial. The jury here was able to observe Mrs. Bougneit's testimony about the night of the assault and the vivid details that she remembered. Moreover, Mrs. Bougneit's testimony was explicitly contradictory to the heart of the State's case. Therefore, it is inconceivable that the contextual information about Victoria would have had any effect on Mrs. Bougneit's credibility.

Furthermore, the Appellant failed to even show how Attorney Fay's decision not to ask about the contextual information about Victoria had any conceivable effect on the outcome of the proceeding. Therefore, the Appellant has not demonstrate that there is a reasonable probability that the result of the proceeding would have been different if Attorney Fay had questioned Mrs. Bougneit about the trivial details of the identity of Victoria. Thus, the Court

should find that the Appellant failed to establish the prejudice prong of the *Strickland* analysis.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment, convicting John P. Bougneit of Fourth Degree Sexual Assault, as well as the order denying his motion for Post-Conviction Relief.

Dated this 16th day of May, 2018

Respectfully submitted,

/s/ Michael D. Thurston_____
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 19 pages and 3,369 words.

Dated this 16th day of May, 2018

Respectfully submitted,

/s/ Michael D. Thurston_____
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CERTIFICATION OF COMPLIANCE WITH RULE 809.12(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 section 809.19(12), Stats.

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 16th day of May, 2018

Respectfully submitted,

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