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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**

**REPLY BRIEF OF
DEFENDANT-APPELLANT**

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ARGUMENT

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

A. TRIAL COUNSEL COMMITTED PREJUDICIALLY DEFICIENT PERFORMANCE DUE TO THE FAILURE TO ADEQUATELY REHABILITATE KEY DEFENSE WITNESS MELISSA BOUGNEIT'S CREDIBILITY REGARDING THE CIRCUMSTANCES OF HER AWARENESS OF THE CHARGES AGAINST HER HUSBAND.

The defense agrees with the state that defense counsel's trial strategy should ordinarily be given great deference. *See* Brief of Plaintiff-Respondent at 9; *See also Strickland v. Washington*, 466 U.S.668, 690, 104 s. Ct. 2052, 80 L. Ed.2d 674 (1984). In addition, the defense also agrees with the state that defense counsel's strategy to (1) discredit R.L. (2) discredit the police investigation; and (3) elicit eyewitness testimony from Melissa Bougneit about how she was in the room and did not see anything transpire was a sound one. *Id.*

The parties diverge on the significance, however, of trial counsel's failure to present the testimony of Melissa Bougneit as it relates to the circumstances behind her awareness of the accusations by R.L. against her

husband and her family's response to it. The state views defense counsel's failure to identify the source of her awareness ("Victoria") as a "trivial" detail that had "little or no effect" on Melissa's credibility. *Id.* This assertion is flawed for several reasons.

First, the state ignores the vigorous cross-examination of Melissa at trial and the repeated expressions of incredulity over her assertions that she was "hyperaware" and "hypervigilant" about the details of the events on the evening in question. (75:49-51). It was during this examination that Melissa disclosed the fact that she had first learned about R.L.'s allegations from "Victoria" within two weeks of the incident and several weeks before she eventually met with the Mukwonago police. *Id.*

Although defense counsel partially attempted to rehabilitate Melissa's credibility on redirect about the uniqueness of the evening as it related to other events, such as the poor behavior of her son towards R.L. that day, it did not fully explain *why* she had reconstructed the events so thoroughly in the first place by the time she met with the police. (75:54). The proffered testimony outlined in Melissa Bougneit's affidavit would have provided that necessary context and counter any attacks on her ability to remember the details of the events on the evening of the alleged assault.

Second, it is important because Melissa learned about the accusations against her husband directly from R. L.'s own mother, a source who would have been more likely to know the details of R.L.'s allegations than someone who would have been less close with her daughter. Third, Victoria was one of Melissa's closest friends, which would have made it more likely that she would have shared details with Melissa as opposed to someone whom she did not know as well.

Finally, and perhaps most importantly, because of the above facts, it would have been more plausible for the jury to believe that Melissa's meeting with R.L.'s mother would have prompted the Bougneit's to begin an immediate reconstruction of the events of December 29, 2015 several weeks before they were first contacted by the Mukwonago police. (55: 12; App. 107-108). This fact alone would have offered a more plausible explanation for why Melissa would have been able to recall the details of the events that evening so clearly than those offered at trial.

Defense counsel knew prior to trial that "Victoria" was R.L.'s mother and he was also aware of the Bougneit family's response immediately following her disclosure to Melissa. (78:33-37). Counsel candidly admitted that he simply "forgot" about these facts and "dropped the ball" by not

incorporating them into his attempt to rehabilitate Melissa's credibility following the state's cross of her at trial. *Id.*

This case is analogous to *State v. Jenkins*, 2014 WI 59, 355 Wis.2d 180, 848 N.W.2d 786 where the defense failed to call and develop the testimony of a potentially corroborating witness at trial. Like a missing witness case, a line of potentially corroborating evidence was not put before the jury in this case.

In analyzing the deficient performance prong, the court in *Jenkins* first looked to whether the failure was part of a reasonable trial strategy. See *Jenkins* at ¶45. The court concluded that the record was devoid of any reasonable trial strategy. *Id.* The court noted that at the *Machner*¹ hearing, the defense counsel in *Jenkins* could not give any reason why he did not offer the testimony of a potentially corroborating witness. Accordingly, the court found counsel's representation fell below the objective standard of reasonable effective assistance. *Id.* at ¶48.

Similarly, in this case, counsel's decision to not fully introduce the factual backdrop outlined in Melissa's affidavit to establish or rehabilitate

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

her credibility was not based on any reasonable trial strategy. As stated previously, counsel candidly admitted at the *Machner* hearing that he knew about the events outlined in Melissa's affidavit and "dropped the ball" by not introducing it. (78:33-37). As a result, no deference should be given to his decision to not fully present these facts to the jury, and as in *Jenkins*, the failure to present them constituted deficient performance. *Id.*

Once again, in turning to the prejudice prong, the supreme court's analysis in *Jenkins* offers guidance. *Id.* at ¶49-66. The court in *Jenkins* reviewed the totality of the evidence at trial and how the missing testimony would have impacted it. *Id.*

Specifically, the court first noted that the state's case rested almost entirely on the testimony of one eyewitness, the alleged victim. *Id.* at ¶52. The court also found significance in the fact that there was also no physical evidence that directly tied the defendant to the crime charged. *Id.* The court quoted *Strickland* for the proposition that a verdict or conclusion that is not strongly supported in the record is more likely to have been affected by errors than one with overwhelming record support. *Id.* at ¶60, citing *Strickland*, 466 U.S. at 696. The court in *Jenkins* ultimately concluded that under these facts, counsel's performance was prejudicial to the defense. *Id.* at ¶66.

Like *Jenkins*, the state's case against Bougneit relied almost entirely on the testimony of one eyewitness: R.L. In addition, 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.

The state acknowledges that Melissa Bougneit's eyewitness testimony on the lack of any observations of her husband acting in a sexually inappropriate way with R.L. while they were all together on the couch was a cornerstone of the defense strategy at trial. (State's Brief, p.9). It therefore stands to reason that preserving Melissa Bougneit's *credibility* was equally critical to the defense as well. Put differently, what good is Melissa's testimony for the defense if her credibility is severely compromised?

The only question asked by the jury during their deliberations was "who was 'Victoria'" (28:1). It was clearly important to them in assessing the credibility of Melissa Bougneit. Due to counsel's failure to adequately identify her source and provide additional contextual support for the family's reconstruction of the events, the jury had nothing more to work with other than a first name, which truly is a trivial fact by itself.

Under these circumstances, 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 respectfully asks that this court grant the relief requested.

Dated this 17th day of July, 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 1289 words.

/s/ Craig M. Kuhary

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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 17th day of July, 2018.

/s/ Craig M. Kuhary

Craig M. Kuhary (SBN 1013040)

CERTIFICATION OF MAILING AND SERVICE

I hereby certify that ten copies of this Reply Brief was delivered on July 17, 2018, with a third party carrier for delivery to the Clerk of the Wisconsin Court of Appeals.

Dated this 17th day of July, 2018.

/s/ Craig M. Kuhary

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