STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP000200-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DEDRIC EARL HAMILTON, JR.,
Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Ellen R. Brostrom Presiding, and from an Order Denying Postconviction Relief, the Honorable Mark A. Sanders, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. Mr. Hamilton's motion contained sufficient factual allegations to entitle him to an evidentiary hearing on his claim that trial counsel performed deficiently.

The State claims that Mr. Hamilton's motion did not adequately state why trial counsel should have consulted an expert to evaluate Mr. Hamilton for risk factors that could lead to a false confession. (Response Brief at 12). The motion alleged that trial counsel should have been aware that the confession was the most damning piece of evidence against Mr. Hamilton given the known tendency of jurors to believe that nothing short of torture could be expected to lead an innocent person to confess, particularly to a crime as vile as child sexual assault. Mr. Hamilton's motion alleged that trial counsel was aware that aside from the admission produced by his interrogation, Mr. Hamilton had steadfastly maintained his innocence. (83:14-15). Furthermore, the motion described the deceptive techniques employed by the detective and alleged that trial counsel's review of the interrogation video should have alerted her to the fact that the interrogator had used subtly coercive tactics to extract a confession and the need for an expert to evaluate her client to determine whether he had characteristics that would render him particularly vulnerable to those tactics. (83:13).

Additionally, the motion proffered the proposed testimony of Keith Findley. The motion stated that Attorney Findley would testify to his opinion that trial counsel's performance was constitutionally deficient. He would have testified that under the circumstances of this case, reasonably prudent trial counsel would have presented evidence regarding the phenomenon of false confessions and would have had her client evaluated and presented the testimony of an expert such as Dr. Thompson regarding her client's extreme suggestibility and compliance. (83:16).

The State argues that Attorney Findley's testimony would have been inadmissible. (Response Brief at 14, 19). The State cites *State v. Pico,* 2018 WI 66, ¶¶ 40–47 (June 15, 2018), which was decided after Mr. Hamilton filed his initial brief. The Court in *Pico* held that expert testimony about the reasonableness of trial counsel's performance is inadmissible at a *Machner* hearing because the reasonableness of trial counsel's performance is a question of law — a matter upon which the Court is the only expert. *Id.,* at ¶ 45. The State is correct to the extent that under *Pico*, Attorney Findley's opinion that trial counsel performed deficiently would not be admissible.

However, the Court in *Pico* allowed that *Strickland* expert testimony is admissible at a *Machner* hearing "to the extent the expert focuses on factual matters and does not offer his opinion on the reasonableness of trial counsel's conduct or strategy."

Id., at ¶ 47. Four Justices joined a concurring opinion that explained:

> When a circuit court determines the testimony of a *Strickland* expert would be helpful, the expert may testify as to what actions a reasonable attorney could take in the same or similar circumstances. These include "factual matters" such as alternate actions the defendant's lawyer could have taken and different strategies defense counsel could have employed. The expert lawyer may also testify regarding the existence of alternative strategies available to defense counsel under the particular facts and circumstances of the case.

Id., at ¶ 58, R. Bradley, J. concurring.

Attorney Findley's proposed testimony encompassed far more than an opinion that trial counsel performed deficiently. Under *Pico*, Attorney Findley would have been permitted to testify to factual matters pertaining to the representation. Mr. Hamilton's motion stated that Attorney Findley would testify that at the time trial counsel was preparing for trial in this case it was well known among the community of attorneys representing the criminally accused that false confessions were a leading contributor to wrongful convictions. Attorney Findley would have testified to the wealth of literature, studies, and training materials available that would have been revealed to an attorney conducting even superficial research in this area. (83:15).

The motion more than adequately alleged that reasonable trial counsel would have been alerted to the need to challenge the statement's admissibility, or at least its reliability, and the potential basis for doing so.

The State does not cite *State v. Van Buren*, 2008 WI App 26, 307 Wis. 2d 447, 746 N.W.2d 545, which is a case that should be addressed. In *Van Buren*, the defendant argued that his trial attorney provided ineffective assistance when he failed to present the testimony of a false confession expert. The State argued that failing to adduce expert testimony when the admissibility of that testimony is not firmly established can *never* be ineffective assistance.[1] *Id.,* at ¶ 18. This Court noted but did not adopt the State's reasoning. Instead, the Court observed that there had been only one case in Wisconsin fifty years prior in which such testimony had been found to be admissible. *Id*., at ¶ 19. Given that, the Court determined that it "could not hold that the failure to introduce such testimony falls below prevailing professional norms." *Id*.

Van Buren is distinguishable from this case. First, Van Buren was granted a *Machner* hearing. *Id*., at ¶ 16. He was given an opportunity to present testimony regarding what information would have

[1] The State cited *State v. McMahon,* 186 Wis.2d 68, 84, 519 N.W.2d 621 (Ct.App.1994), in which the Court said that a criminal defense attorney "is not required to object and argue a point of law that is unsettled."

been available to alert reasonably diligent trial counsel to the existence of this issue. He did not do so. It appears that he simply presented the false confession expert testimony that he claimed trial counsel should have presented. Four years passed between the decision in *Van Buren* and the trial in this case. Awareness of the problem of false confessions and the existence of expert testimony to address it has steadily grown. Even the existence of the *Van Buren* decision changed the legal landscape and contributed to the body of information available to Mr. Hamilton's trial counsel.

At a hearing, Mr. Hamilton would have presented testimony that at the time of the trial in this case the problem was well-known in the legal community, and there was a wealth of training being conducted and information available to criminal defense lawyers about the availability of this avenue of attack. Whether counsel performed deficiently is a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A hearing is necessary to determine whether, given the information available to counsel at the time, she performed deficiently by not seeking the aid of an expert. *Van Buren* cannot be read to create a *per se* rule that failing to present expert testimony on false confession issues cannot be deficient performance. *See*, *Roe v. Flores-Ortega*, 528 U.S. 470, 470, 120 S. Ct. 1029, 1031 (2000) (A *per se* rule is "inconsistent with *Strickland*'s circumstance-specific reasonableness requirement.").

The State further claims that Mr. Hamilton's motion is deficient for failing to *name* the experts that trial counsel should have consulted. (Response Brief at 13). To secure a hearing, it is only necessary that the motion include facts that allow the court to meaningfully assess the defendant's claim. *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 584, 682 N.W.2d 433, 441. Mr. Hamilton's motion asserted that at a hearing Attorney Findley would testify that there were expert witnesses available to perform testing and give testimony when defense counsel in this case was preparing for trial. The State cites no authority for the notion that Mr. Hamilton can be denied a hearing on the motion for failing to name them in advance.

The State also claims that Mr. Hamilton's motion did not sufficiently allege why the detective's "limited use of misrepresentation" was coercive or improper police conduct. (Response Brief at 14). First, Mr. Hamilton takes issue with the State's use of the word "limited." As stated in Mr. Hamilton's motion, the detective repeatedly confronted Mr. Hamilton with the imaginary DNA evidence. (83:1-2). The State acknowledges that police misrepresentation during questioning is relevant to the voluntariness determination. (Response Brief at 15). Indeed, police use of deception alone is enough to require that the court balance the police techniques against the personal characteristics of the accused. *See State v. Triggs*, 2003 WI App 91, 17, 264 Wis. 2d 861, 873, 663 N.W.2d 396. This requires a hearing.

Second, Mr. Hamilton's motion described other "powerful psychological techniques" that the detective used that were subtly coercive. (83:11, 14). The motion explained that these techniques were components of the "Reid technique" designed to induce confessions.2 A hearing is required to allow the court to weigh those tactics against Mr. Hamilton's personal characteristics.

The State's argument is based mostly on its contention that whatever tactics the detective used had no coercive *effect* on Mr. Hamilton because he did not confess. According to the State. Mr. Hamilton "stuck to his story." (Response Brief at 15). The State has chosen to run with the circuit court's pronouncement that Mr. Hamilton's statement was not a confession at all.

After repeated denials of wrongdoing by Mr. Hamilton, the interrogating detective said his interpretation of Mr. Hamilton's statements was that he had touched D.H.'s vagina over her clothes. (14:18:03). Finally, Mr. Hamilton reluctantly conceded that he touched D.H. on her vagina over her clothes. (14:18:15-14:18:40). He said that during the incident, he "tapped her on her little stuff," which he explained was her vagina. (14:20:20). He then added,

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[2] The State makes the strange claim that Mr. Hamilton's postconviction motion "made no mention of the Reid Technique." (Response Brief at 20). Actually, the motion contains a significant discussion of it and refers to attachments containing yet more explication. (83: 11; 84: 7).

"It was all in one motion though." (14:24:15). He said he didn't know what he was thinking and that he "went stupid." (14:24:38).

Mr. Hamilton's concession that he touched D.H.'s vagina cannot reasonably be viewed as anything but a damning admission. It was simply not plausible that Mr. Hamilton accidentally touched D.H.'s vagina while patting het butt. When he was steered into an admission to touching her vagina, he was admitting an improper touching. Nonetheless, the State boldly asserts that Mr. Hamilton's statement was "a protestation of innocence, not an admission of criminal liability." (Response Brief at 16). Later, the State claims that Mr. Hamilton "maintained his innocence throughout." (Response Brief at 20). The interrogating detective and the prosecutor who tried this case would be very surprised to hear that.

The interrogating detective testified that during the interrogation Mr. Hamilton admitted three or four times to "touching [D.H.'s] vagina, rubbing on her vagina over her clothes." (114:7). In closing, the prosecutor characterized the video interrogation this way:

> And on the tape you were able to observe not just what he said but how he said it and what he did when he said it. Do you feel you made a mistake, Detective Wells asked. I definitely feel like I made a mistake. Again, hanging his head. I definitely feel like I made a mistake. Did you touch her butt over her clothes? Yeah. Did you

> touch her vagina over her clothes? Yeah. Later on; I touched her little stuff. I felt like committing suicide. He covered his eyes with his shirt. I don't know whether he was crying or not. face with his shirt and the very last thing he said. He covers his face with his shirt and the very last thing he said before we turned the video off; I went stupid. I don't know. I went stupid.

(114:60). Regarding the need to prove that the touching was for sexual gratification, the prosecutor said, "We know he touched her vagina. He didn't touch her elbow. He didn't touch her arm pit, he didn't touch around her vagina. He touched her vagina. (114:61).

Neither the detective nor the prosecutor at trial had any doubt that Mr. Hamilton's statement contained an admission that was helpful to the State and harmful to Mr. Hamilton. The State's claim to doubt this now rings hollow. For Fifth Amendment purposes, an "incriminating response" is any response that the prosecution may seek to introduce at trial. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980), n. 5. As the Court observed in *Miranda*:

> No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may

> be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution.

Miranda v. Arizona, 384 U.S. 436, 476–477, 86 S.Ct., 1602, 1629.

The State then makes the beyond hyper-technical claim that Mr. Hamilton's motion was deficient because it did not specifically state whether the jury heard his admission. (Response Brief at 16). It did, of course. (113:45-47; 114:60). In the postconviction motion, Mr. Hamilton claimed that trial counsel should have challenged the admissibility of the statement or presented evidence at trial to challenge its reliability, that the statement was the most damning piece of evidence against Mr. Hamilton, and that the prosecutor relied heavily on the statement in closing. (83:19). The motion asserted that "[t]he credibility of the accusation was questionable, but the jury was left with no reason to question it given Mr. Hamilton's unchallenged and unexplained confession. (83:19). This fairly conveys that the statement was, in fact, presented at trial. The State's argument here, much like its argument that the motion was deficient for failing to *name* the experts that were available in 2012, is an example of the kind of "gotcha" approach that the State and some circuit courts too often use to try to deny a hearing on a properly pled ineffective assistance claim.

Mr. Hamilton's postconviction motion sufficiently alleged that trial counsel performed deficiently to require a hearing on the matter.

II. Mr. Hamilton's motion contained sufficient factual allegations to entitle him to an evidentiary hearing on his claim that trial counsel's deficient performance caused prejudice.

The State also claims that Mr. Hamilton's motion does not sufficiently allege prejudice to require a hearing. The State relies on D.H.'s testimony and the results of the medical examination.

The State correctly observes that there were redness, some abrasions, and a bruise in D.H.'s vaginal area. The examining nurse described this as "more redness than we would normally see" and "not a normal finding." (114:20-26). The nurse described her observations as "consistent with" D.H.'s report. However, although she considered it unlikely, she acknowledged that the injuries could be caused during normal playing. (114:28). The nurse indicated that the redness she observed could have "endless causes." (114:34). She was unable to say that the injuries she observed were caused by a sexual assault. (114:37). This evidence was supportive of D.H.'s story. However, it was certainly not enough to prove guilt beyond a reasonable doubt by itself. A conviction in this case always depended upon the jury believing D.H.'s account.

The State alternately describes D.H.'s testimony as "compelling" and "powerful." (Response Brief at 11, 17). The State does not say *how* the testimony was either of those things. In reality, the testimony was often spiritless and at times quite problematic.

As asserted in Mr. Hamilton's motion and in his initial brief, D.H.'s video-recorded statement for the most part had a rote, toneless quality. The statement also contained the strange reference to D.H.'s sister's sexual assault that occurred when D.H. was asked how she felt during the assault and answered with a description of how her sister told her *she* felt during her own assault. (17:01:26). When D.H. testified in person, she first denied that anything more than a hug happened, then repeatedly stated that she "forgot" what happened. It took considerable effort for the prosecutor to get D.H. on message. (112:41-43). When reminded of her video-recorded statement to the officer, she gave the strange response, "I remember telling her something else, but I forgot what I said." (112:41). Then there are the strange references to her repeatedly rubbing her temples to try to remember. (112:46, 50). The State does not explain what about the testimony was compelling or powerful.[3] Are we meant to simply

[3] It is possible that there was something about D.H.'s live testimony that was compelling or powerful that is not apparent from the transcript. If so, it is unknown to the State, (continued)

assume that whenever a child gives testimony alleging victimization, it must be compelling or powerful because a child gives it?

In reality, this trial was not a slam-dunk for the State. While the jury could certainly choose to believe D.H.'s testimony, it could also have justifiably chosen not to. As discussed in Mr. Hamilton's motion and initial brief, there were reasons to question D.H.'s account. Mr. Hamilton's unchallenged and unexplained admission to improper touching relieved the jury of the burden of deciding whether D.H.'s account was credible. If trial counsel had gotten the statement excluded or, failing that, presented expert testimony to explain how Mr. Hamilton could have come to make that admission even if it was false, there is a reasonable probability that the outcome would have been different.

Mr. Hamilton's postconviction motion adequately alleged that trial counsel's failure to adequately address the statement contributed to the conviction and was prejudicial. He is entitled to an evidentiary hearing.

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undersigned counsel, and the judge who denied Mr. Hamilton's motion without a hearing, none of whom heard the testimony.

CONCLUSION

Mr. Hamilton asks that this Court vacate the order of the circuit court denying his motion for postconviction relief and remand the case for an evidentiary hearing on all of the issues presented in his postconviction motion.

Dated this 3rd day of August, 2018.

Respectfully submitted,

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov

Attorney for Defendant-Appellant

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 2,988 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 3rd day of August, 2018.

Signed:

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PAMELA MOORSHEAD
Assistant State Public Defender