

STATE OF WISCONSIN
C O U R T O F A P P E A L S
District I

Case No. 2018AP000596 CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SADIQ IMANI,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON AUGUST 31, 2015, THE HONORABLE WILLIAM POCAN
PRESIDING, AND THE DECISION AND ORDER DENYING MOTIONS
FOR POSTCONVICTION RELIEF, ENTERED ON MARCH 26, 2018,
THE HONORABLE DAVID HANSHER PRESIDING, BOTH ENTERED IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF THE APPELLANT

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ISSUES PRESENTED

I. Whether the trial court had erred in denying Defendant's
Motions for Postconviction Relief with respect to prejudicial
ineffectiveness of trial counsel?

Here, Defendant had proceeded to jury trial in his Milwaukee

County trial matter, 14 CF 51. After this trial, the jury had convicted him of one Count of Armed Robbery and a second Count of False Imprisonment. Subsequently, he had filed Postconviction Motions arguing prejudicial ineffectiveness of his trial counsel. He had argued in these Postconviction Motions that his trial counsel had been prejudicially ineffective during the trial for two reasons:

(A) The trial court had allowed the State to impeach Defendant's testimony with three prior criminal convictions/adjudications. However, all three of these convictions/adjudications were unreasonably stale and should not have been allowed. Defendant had testified on June 18, 2015. The adjudication was a juvenile adjudication from 1995. This was twenty years prior to the testimony. Furthermore, there was a 1999 conviction for felon in possession of firearm for which the Defendant had received six months jail. This was sixteen years prior to the testimony. Finally, there was a misdemeanor possession marijuana conviction from 2000. This was fifteen years prior to the testimony. Clearly, Defendant had not been incarcerated. However, Mr. Haney had never sought exclusion of all three of these convictions on the basis of staleness; he only sought exclusion for the juvenile adjudication and the misdemeanor. This was prejudicially ineffective. The relevant and applicable law clearly indicates that evidence of all such prior record should be excluded if the record is stale, with clear evidence of intervening reform. Here, clearly, Defendant's lack of any criminal record, and his

presence in the community during this intervening period, is sign of such reform. The State's case was not so strong as to make this failure harmless error. This case was a credibility case. The relevant and applicable case law still requires that such decisions be rational. Here, it was not rational. Furthermore, it was prejudicial. Defendant is entitled to a new jury trial.

Trial Court Answered: No

(B) Defendant had testified in the jury trial in this matter. He had testified that he was in Mississippi at the time of the Armed Robbery. He had testified that he had received a ride to Mississippi from Heather Deckow in late July, 2013. However, Ms. Deckow had previously told law enforcement that she had not given the Defendant such a ride. She testified consistent as to such at the jury trial. Trial counsel had been informed of such information prior to Defendant's testimony. Furthermore, the State had informed counsel, before Defendant's testimony, that she would testify in rebuttal. Yet, according to the Defendant, counsel had still advised Defendant to testify. Defendant had prepared an Affidavit concerning this matter. He had submitted this Affidavit with his Postconviction Motions. According to the Affidavit, Defendant did not want to testify. However, trial counsel had advised him that he should testify. Defendant also indicates that counsel had never informed him about the content of Deckow's anticipated rebuttal testimony. Based upon the foregoing, trial counsel's conduct was ineffective. Furthermore, as previously indicated, this case was not so strong as to make this error harmless. As previously

discussed, this case was a credibility case. The trial court had essentially called Ms. Deckow's rebuttal testimony "devastating." Defendant is entitled to a new jury trial.

Trial Court Answered: No.

The Defendant had argued in his Postconviction Motions that he was entitled to a new jury trial for each individual assertion indicated above. He had also argued that, in the alternative, he was entitled to a new jury trial for the cumulative effect of counsel's multiple instances of prejudicial ineffectiveness.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

Mr. Sadiq Imani was charged in a two Count Criminal Complaint dated January 6, 2014. The two Counts charged Defendant with the following: Count One, Armed Robbery, Use of Force, Party to a Crime, contrary to Wis. Stats. 943.32(1)(a) and (2), 939.50(3)(c), and 939.05; and Count Two, Receiving Stolen Property (<\$2500), Party to a Crime, contrary to Wis. Stats. 943.34(1)(a), and 939.51(3)(a), and 939.05. The charges had alleged that Defendant had robbed a TCF Bank in the city of Milwaukee on August 2, 2013

with a handgun. The Complaint had attached Certified Copies of other documents. (2:1-13).

A preliminary hearing had occurred on January 15, 2014. At that hearing, the State had presented testimony. After the hearing, the court commissioner found probable cause and had bound Defendant over for trial. (212:14). At that time, the State had filed an Information charging the same two Counts as in the Criminal Complaint. (6:1-1). Also at that time, Defendant had entered pleas of not guilty to both Counts. (212:14-15).

On March 18, 2014, the State had filed an Amended Criminal Information. In this Amended Information, the State had added a new Count of False Imprisonment, Party to a Crime, contrary to Wis. Stats. 943.30 and 939.05, had been added as Count 3. (10:1-2).

Eventually, a jury trial began on June 15, 2015. However, prior to the trial, the State had dismissed the Receiving Stolen Property Count. (228:4-5). Robert Haney was Defendant's trial attorney. David Robles was the prosecutor.

On June 19, 2015, the jury found the Defendant guilty of both Counts in the Amended Information. (235:8-9).

Sentencing had occurred on August 26, 2015. On that date, the trial court had sentenced Defendant on the Armed Robbery to twenty years initial confinement plus ten years extended supervision. On the false imprisonment, the trial court sentenced the Defendant to two years initial confinement plus two years extended supervision. The trial court ran these two Counts concurrent to each other. (236:43-44; 176:1-2; A 101-102).

Subsequently, Defendant had filed his Motions for Postconviction Relief with attachments. This filing had occurred on February 8, 2018. By these Motions, he had argued that his trial counsel, Robert Haney, had been prejudicially ineffective. This, for two reasons. The Defendant had requested an evidentiary hearing to determine trial counsel's prejudicial ineffectiveness. (191:1-20; 192:1-7; 193:1-9; 194:1-9; 195:1-9; 196:1-7; 197:1-9; 198:1-7).

After Defendant had filed his Postconviction Motions, the trial court had issued an Order for Briefing Schedule. This had occurred on February 12, 2018. (199:1-1). The State had filed its Response Brief on March 19, 2018. (201:1-11). Defendant had filed his Reply Brief on March 21, 2018. (202:1-9).

Subsequently, the trial court had issued a six page written Decision and Order denying the Motion. The court denied the Motions without granting the requested evidentiary hearing. (203:1-6); A 109-114).

Defendant filed his Notice of Appeal in a timely manner. (204:1-2).

This Appeal has been filed within the schedule set by the Court.

STATEMENT OF THE FACTS

Mr. Sadiq Imani was charged in a two Count Criminal Complaint dated January 6, 2014. The two Counts charged Defendant with the following: Count One, Armed Robbery, Use of Force, Party to a

Crime, contrary to Wis. Stats. 943.32(1)(a) and (2), 939.50(3)(c), and 939.05; and Count Two, Receiving Stolen Property (<\$2500), Party to a Crime, contrary to Wis. Stats. 943.34(1)(a), and 939.51(3)(a), and 939.05. The charges had alleged that Defendant had robbed a TCF Bank in the city of Milwaukee on August 2, 2013 with a handgun. He was masked. None of the bank employees had identified the Defendant as being the perpetrator. According to the Complaint, the police had recovered a black plastic mask in the bank's parking lot. Defendant's DNA was on the mask. Also, according to the Complaint, surveillance at Potawatomi Bingo had recovered bank money with dye. Video surveillance identified Debbie Lewis and Sultan Bradley supposedly negotiating this money. Debbie Lewis had given a custody interview with law enforcement identifying Defendant as the person who had provided her with the money. The Complaint had attached Certified copies of other documents. (2:1-13).

A preliminary hearing had occurred on January 15, 2014. At that hearing, the State had presented testimony. After the hearing, the court commissioner found probable cause and had bound Defendant over for trial. (212:14). At that time, the State had filed an Information charging the same two Counts as in the Criminal Complaint. (6:1-1). Also at that time, Defendant had entered pleas of not guilty to both Counts. (212:14-15).

On March 18, 2014, the State had filed an Amended Criminal Information. In this Amended Information, a new Count of False Imprisonment, Party to a Crime, contrary to Wis. Stats. 943.30 and

939.05, had been added. This was Count 3. (10:1-2).

Eventually, a jury trial began on June 15, 2015. This, on the Amended Criminal Information indicated in the preceding paragraph. However, prior to the trial, the State had dismissed the original Count 2 to the Amended Information. This was the Receiving Stolen Property Count. (228:4-5). Robert Haney was Defendant's trial attorney. David Robles was the prosecutor.

At trial, neither Debbie Lewis nor Sultan Bradley had testified. No bank employee had identified the Defendant as being the perpetrator. Kristine Kohler was a testifying bank employee. She had testified that she never saw the person's face. This, due to the black mask that he was wearing. (230:209). She was the only eyewitness/victim who had testified at the trial and was present during the robbery.

On the morning of June 18, 2015, the parties had discussed the defense case. At that time, trial counsel Haney had indicated that the only defense witness was the Defendant and that he was going to testify. (233:3). At that point, the State had indicated the following:

MR. ROBLES: "I had provided counsel early on - and it was with the original discovery with notes related to a witness, Heather Deckow, that the State would call in response to an alibi if Mr. Imani testifies.

And she is prepared to do that..." (233:4-5).

Trial counsel Haney had never denied receiving this discovery concerning Heather Deckow.

The trial court then conducted a colloquy with the Defendant

concerning his right to testify. Defendant had indicated that he had discussed his decision whether or not to testify with his lawyer. He had enough time to discuss that decision with his lawyer. He had indicated that he would be testifying. (233:6).

Subsequent to the colloquy, the trial court had conducted a discussion with the parties concerning the Defendant's criminal record. This discussion went as follows:

ATTORNEY ROBLES: " This is what the record reflects, and the State is going to take the position that he has two prior convictions and one adjudication; so the answer to that question should be three.

He has a prior conviction in Case No. 99 CF 3882 for felon in possession of firearm. The underlying felony is an adjudication of delinquency for burglary, and he was adjudicated delinquent on June 16, 1995.

He then has a conviction for possession of THC in Case No. 00 CF 5315."

...

ATTORNEY HANEY: "And, your Honor, I believe that the - I believe that the number of convictions for the purposes of impeachment, I would ask the court, to number one, limit it to his adult record and, two -"

THE COURT: "And what is the statutory or case law authority on this point?"

ATTORNEY HANEY: "I believe that the Statute says that we have to talk about the number of convictions or adjudications.

I believe that there is discretion that under the totality of the circumstances that the circuit court can do what is commonly known as the ten-year rule or its own discretion as to whether or not the conviction is something that necessarily is one that would go to the heart of whether or not it would affect credibility.

And as an example, I've had many times where a criminal conviction for a traffic offense, although it's criminal traffic, courts have said - various trial courts have said, no, I'm not going to count that for this -

this purpose.

I see the misdemeanor marijuana case from 15 years ago in that light, as well as the juvenile matter from 20 years ago.

I do not - although the felony is a 1999 felony, it is an adult conviction. It is a felony. And I don't make any claim that I think that that should be properly excluded by the court's discretion."

THE COURT: "All right. I am gonna use three. The delinquency is what resulted in our felon in possession because of the delinquency charge, so they're sort of tied together and - under the circumstances I would agree with you if this was sort of a traffic type matter of some sort and it was old enough, I might exercise my discretion in that regard, but beyond traffic, I don't normally do that.

And of course, last time I looked we were still in state court, so it is discretionary, not any sort of absolute time rule is used in the federal system."

ATTORNEY HANEY: "Correct."

THE COURT: "So, therefore, the number we will be using will be three." (233:7-9).

The felony conviction at issue was a felon in possession of firearm conviction dated December 10, 1999. He had received six months House of Corrections time. Furthermore, the misdemeanor conviction, which was the most recent conviction, was dated August 18, 2000. He had received thirty days at the House of Corrections. (193:Exhibit 2). Hence, prior to Defendant's testimony, he had been crime and incarceration free for fifteen years.

The Defendant had testified on his own behalf. He testified that he was in Horn Lake, Mississippi on August 2, 2013. (233:11). He testified that he went to his girlfriend named Heather on July 28th and asked her if she would take him down south and that he would pay her \$150 if she would do it. She agreed. (233:17).

Defendant also testified that he had been convicted of three prior crimes. (233:23).

On cross-examination, Defendant's testimony concerning his alibi and transport down to Mississippi went as follows:

Q: "And you left to go down south, according to your testimony, at the end of July, 2013?

A: Yes.

Q: And the means of you getting down south that you recall is you got a ride from a person named Heather?

A: Yes, a good friend for years; and she had - has another friend that she grew up off in the neighborhood, little rough neighborhood; and she grew up in the neighborhood, which I always took care of her, a rock star, make sure nobody messed over here, yes, she's a good friend.

Q: And Heather's name is Heather Deckow who lived at that point in time in the area of I believe 48th and Medford?

A: Yes, that's the neighborhood that I used to run around the neighborhood, yes.

Q: And when you went down there, you went to Horn Lake, Mississippi with Heather?

A: When she grabbed me down there Horn Lake, Mississippi, yes, that's correct.

Q: So Heather drove you down to Horn Lake, Mississippi. ..." (233:32-33).

The State called Heather Deckow on rebuttal. The relevant portion of this examination went as follows:

BY ATTORNEY ROBLES: "Ms. Deckow, I'm gonna ask you some questions relating to the timeframe of late July, early August, probably a little into the fall of 2013. In that

time frame did you know someone by the name of Sadiq Imani?

A: Yes.

Q: Do you see that person in court today?

A: Yes.

Q: Could you describe where he is seated and what he is wearing today?

A: He's the gentleman seated to your left wearing the blue striped long sleeve.

ATTORNEY ROBLES: I would ask the record to reflect the identification of the defendant.

...

THE COURT: All right. The record will so reflect.

...

Q (ATTORNEY ROBLES): How long had you known him in the timeframe of late July, early August of 2013?

A: To be honest, I have known him since I was a young kid from the neighborhood.

...

Q: Would he have known your last name?

A: Yes.

...

Q: And did you leave Milwaukee, Wisconsin either at the end of July or at the beginning of August, 2013?

A: I did.

Q: And who did you leave with?

A: I left with my children, my stepson to be and my at the time fiancé.

...

Q: When did you leave?

A: In the first week of August.

...

Q: And that first week of August, you left Milwaukee and where did you go?

A: I went back home to Horn Lake, Mississippi.

Q: Was the Defendant with you when you went to that location?

A: No." (233:76-80).

...

MR. HANEY: ...when was the next time after you moved to Horn Lake, Mississippi that you saw Mr. Imani?

A: It was either late August or early September?

Q: Of what year?

A: Of 2013.

...

Q: Where was that?

A: It was at a Kroger's grocery store in Horn Lake, Mississippi.

...

Q: And - and you're saying that you did not give him a ride to that location or to Horn Lake from Milwaukee?

A: That's correct.

...

Q: Did you have occasion to talk to police officers prior - let's say prior to this week Milwaukee police officers with regard to the question as to whether or not you had ever given Mr. Imani a ride to Horn Lake, Mississippi?

A: I was asked about it.

Q: When were you asked about it?

A: Possibly a year and a half ago.

Q: And do you recall - Do you recall the name of the officer you spoke to?

A: Detective Anderson. (233:83-85).

...

BY ATTORNEY ROBLES: And you never drove the defendant, Sadiq Imani, down to the area of either Memphis or Horn Lake, Mississippi at the beginning of August or the end of July, 2013, did you?

A: I did not." (233:88-89).

Defendant's Motions for Postconviction Relief had indicated that the State had provided Defendant's Postconviction attorney with the information that it had provided to the defense prior to trial regarding Heather Deckow. The State's cover email had indicated such providing. This information had included her prior record as well as memo book notes concerning Detective Anderson's interview with her. The last pages of this memo book had corroborated her testimony. They had indicated that she had driven

back down to Mississippi the first week of August, she believes the 5th. This was a day or two after her friend's daughter's one year old birthday. She knew the Defendant as Red. He had orange or reddish hair. The last time that she saw him was in Mississippi Horn Lake in mid-late August at a Kroger's grocery store. She had not seen him for two years. She knew that he had a friend, cousin or girl down there. Gatlin and her two children along with his child did drive back with her to Mississippi. (191:10:194:Exhibit 3).

As previously indicated in this Brief, trial counsel had never indicated at trial that he had never received the memo books included in Exhibit 3 of Defendant's Postconviction Motions.

Defendant had provided a sworn Affidavit. He had attached this Affidavit to his Motions for Postconviction Relief. This Affidavit had indicated that, prior to the trial, Mr. Haney had indicated that he had wanted the Defendant to testify during the trial as to his side of the story. This testimony would be consistent with his statement to law enforcement. He had informed law enforcement that he had obtained a ride to Mississippi with Heather Deckow prior to the date of the bank robbery and that he was in Mississippi during the time of this bank robbery. However, Defendant had indicated that each time that counsel had raised the issue of testifying, Defendant had indicated that he did not want to testify. He had so informed counsel multiple times during the time preceding the jury trial. He did not want to testify because his alibi witness, Barbara Lewis, would testify. This testimony would negate any need

for him to testify. However, during the trial itself, Haney had informed the Defendant that Lewis would not be testifying. He did so on the morning that Defendant was expected to advise the court of his decision as to whether or not he would be testifying. Haney informed the Defendant that he would, therefore, need to testify as to his alibi. Hence, only then did Defendant agree to testify. Defendant testified consistent with his statement to law enforcement.

The Affidavit had further indicated, very importantly, that prior to Defendant's testimony at trial, trial counsel Haney had never informed Defendant that law enforcement had interviewed Heather Deckow concerning the alibi. Haney had never informed the Defendant that he had interview notes concerning this interview. Haney had never informed the Defendant that she had materially rebutted his alibi. Haney had never informed the Defendant as to anything related to her expected testimony, based upon these interview notes. Had his attorney advised him of such information, Defendant would not have testified. If not for Mr. Haney's representations that Defendant should testify, he would not have testified at trial. He testified solely based upon Mr. Haney's representations. (192:10-11; 195:Exhibit 4).

Subsequently, the trial court had instructed the jury that it could consider the Defendant's prior criminal convictions because it bore upon his credibility as a witness. (234:22-23).

On Closing Argument, the State had relied heavily upon Heather Deckow's rebuttal testimony. The State had argued that she had

materially rebutted his testimony concerning not knowing her last name, as well as his transportation down south. The State had indicated that this rebuttal "...in terms of the evidence is the evidence that compels a verdict of guilty." (234:50-51).

On rebuttal Closing Argument, the State also reargued that Defendant's sole defense was his alibi, and that Heather Deckow had blown that out of the water. This corroborates a conclusion that he had lied. (234:103-105). Furthermore, the State indicated that Defendant had three prior criminal convictions that it could consider for purposes of credibility versus Heather who came in to court and testified. (234:114).

On June 19, 2015, the jury found the Defendant guilty of both Counts in the Amended Information. (235:8-9).

The Postconviction Motions had indicated that CCAP had indicated that the jury had begun its deliberations on the afternoon of June 18, 2015 at 3:44 p.m.. They did not reach a verdict until almost 11:30 a.m. the next morning. This is a period of four hours and fifteen minutes. (192:12; 196:Exhibit 5). This is a lengthy amount of time. Clearly, this was not a "clear cut open and shut" case.

Sentencing had occurred on August 26, 2015. At that time, the trial court had indicated that the alibi was one of the bigger alibi failures that it had ever seen. Defendant had given a story which had been very, very, credibly rebutted by the witness who followed to indicate that he was not telling the truth. (236:40).

On August 26, 2015, the trial court sentenced Defendant on the

Armed Robbery to twenty years initial confinement plus ten years extended supervision. On the false imprisonment, the trial court sentenced the Defendant to two years initial confinement plus two years extended supervision. The trial court ran these two Counts concurrent to each other. (236:43-44; 176:1-2; A 101-102).

Subsequently, Defendant had filed his Motions for Postconviction Relief with attachments. This filing had occurred on February 8, 2018. By these Motions, he had argued that his trial counsel, Robert Haney, had been prejudicially ineffective. This, for two reasons. First, Defendant had argued that trial counsel had been prejudicially ineffective for failing to object to the use of the 1999 felony conviction for impeachment purposes with respect to the Defendant's testimony. Second, the Defendant had argued that trial counsel had been prejudicially ineffective for advising him to testify as to his alibi. This, because his alibi had been thoroughly negated by the State's rebuttal witness, Heather Deckow, which trial counsel had known would happen prior to Defendant's testimony. Defendant had requested an evidentiary hearing to determine trial counsel's prejudicial ineffectiveness. (191:1-20; 192:1-7; 193:1-9; 194:1-9; 195:1-9; 196:1-7; 197:1-9; 198:1-7).

After Defendant had filed his Postconviction Motions, the trial court had issued an Order for Briefing Schedule. This had occurred on February 12, 2018. (199:1-1). The State had filed its Response Brief on March 19, 2018. (201:1-11). Defendant had filed his Reply Brief on March 21, 2018. (202:1-9).

Subsequently, the trial court had issued a six page written

Decision and Order denying the Motion. The court denied the Motions without granting the requested evidentiary hearing. (203:1-6); A 109-114).

In the Decision and Order denying Postconviction Motions, the trial court had conclusorily indicated, with respect to the 1999 felony conviction, that there was no reasonable probability that the court would have excluded the most serious felony conviction if Defendant had objected to its use. However, this conclusion did not discuss the relevant and applicable case law to the contrary. Furthermore, this law does not support such a conclusion.

Furthermore, with respect to Defendant's second Postconviction argument, that of trial counsel's prejudicially ineffective advice to the Defendant to testify about his alibi, the Decision and Order had essentially concluded that the decision to testify had been the Defendant's. Furthermore, this Decision and Order had indicated that the evidence had been overwhelming, thereby making any argued error harmless. However, once again, this Decision and Order had ignored Defendant's factual and legal position that this decision to testify had been based upon prejudicially ineffective advice from his trial counsel. Furthermore, this Decision and Order had erred in concluding that any such error had been harmless. The trial evidence had clearly and materially contradicted such a conclusion.

Defendant filed his Notice of Appeal in a timely manner. (28:1-2).

ARGUMENT

I. TRIAL COUNSEL HANEY WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE PRIOR FELONY CONVICTION. FURTHERMORE, HE WAS PREJUDICIALLY INEFFECTIVE FOR IMPROPERLY ADVISING THE DEFENDANT TO TESTIFY EVEN THOUGH MR. HANEY KNEW OF DECKOW'S ANTICIPATED TESTIMONY. DEFENDANT IS ENTITLED TO A NEW JURY TRIAL. THIS, FOR EITHER EACH INDIVIDUAL FAILURE, OR THE CUMULATIVE EFFECT OF BOTH FAILURES. THE TRIAL COURT'S DECISION AND ORDER DENYING POSTCONVICTION MOTIONS DOES NOT ADEQUATELY REBUT THESE ARGUMENTS.

A. The Constitutional Standard and Procedural Requirements

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I, Section 7, of the Wisconsin Constitution, which guarantee a Defendant a fair trial and effective assistance of counsel. The test for ineffective assistance of counsel is two pronged. First, the Defendant must demonstrate that his trial counsel's performance was deficient; and second, the Defendant must demonstrate that the deficient performance prejudiced him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668 (1984); State vs. Sanchez, 201 Wis.2d 219, 227-228, 548 N.W.2d 69 (1996). In order to show prejudice, the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State vs. Sanchez, 201 Wis.2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694. This showing of prejudice does not rise to a level of beyond a reasonable doubt or even by a preponderance of the evidence. State vs. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992), citing State vs. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711 (1985).

Once the Defendant shows prejudicial ineffectiveness of his counsel in his Motion papers, then the trial court must conduct an evidentiary hearing to determine whether or not counsel's representation was deficient and fell below an objective standard of reasonableness. State vs. Machner, 92 Wis.2d 797 (Ct.App. 1979); State vs. Curtis, 218 Wis.2d 550 (Ct.App. 1998).

The Court of Appeals will not second-guess a reasonable trial strategy, but the Court may conclude that an attorney's performance was deficient if based upon an "irrational trial tactic." State vs. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

The cumulative effect of multiple trial counsel prejudicially ineffective omissions and errors materially may undermine the confidence in the outcome of a jury trial and warrant a new trial. State vs. Thiel, 264 Wis.2d 571, 665 N.W.2d 305 (2003).

B. Defense Counsel's Failure to Object to the Use of Defendant's Prior Felony Criminal Conviction for Impeachment Purposes was Prejudicially Ineffective. The Trial Court's Decision and Order Fails to Adequately Rebut this Conclusion. It Must be Reversed.

The fact of a witness's prior convictions and the number thereof is relevant evidence because the law in Wisconsin presumes that one who has been convicted of a crime is less likely to be truthful than one who has not, and the number of convictions is relevant on the issue of credibility because the more often one has been convicted, the less truthful he is presumed to be. State vs. Gary M.B., 270 Wis.2d 62, 676 N.W.2d 475 (2004); Nicholas vs. State, 49 Wis.2d 683; 183 N.W.2d 11 (1971); Scott vs. State, 64

Wis.2d 54; 218 N.W.2d 350 (1974); Tyacke vs. State, 65 Wis.2d 513; 223 N.W.2d 595 (1974); State vs. Smith, 203 Wis.2d 288, 553 N.W.2d 824 (Ct.App. 1996).

All criminal convictions have some probative value regarding truthfulness. State vs. Kuntz, 160 Wis.2d 722; 467 N.W.2d 531 (1990). In Kuntz, the Wisconsin Supreme Court had determined that even one prior conviction had some probative value regarding truthfulness. State vs. Kuntz, 160 Wis.2d 722 at 753.

In Gyrion vs. Bauer, 132 Wis.2d 434; 393 N.W.2d 107 (Ct. App. 1986), the Court of Appeals found that the matter of prior convictions of crimes, under Wis. Stats. 906.09, was so important to a witness's credibility that a mistrial was warranted when this Statute was improperly used. Gyrion vs Bauer, 132 Wis.2d 434 at 439. This holding shows that impeachment by use of prior convictions of crimes under Wis. Stats. 906.09 is an extremely important tool to attack a witness's credibility.

Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Wis. Stats. 906.09(2); State vs. Gary M.B., 270 Wis.2d 62 at 77. In considering whether a conviction should be excluded under the balancing test the circuit court should consider the lapse of time since the conviction and the rehabilitation of the person convicted. Id. at 78; State vs. Kuntz, 160 Wis.2d 722 at 752; State vs. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct.App. 1995).

In Kruzycki, the Court of Appeals had concluded that a twelve

year old conviction was legally appropriate for impeachment of the Defendant. However, the key to the admissibility was that Kruzycki had been incarcerated for almost the entire period of those twelve years. The Court had agreed with the trial court's reasoning that he had been confined for lengthy periods and had not "been around to reform." This factor showed his lack of reform. State vs. Kruzycki, 192 Wis.2d 509 at 525-526.

Here, clearly, the felony conviction was extremely old. It was far older than the twelve year old conviction in Kruzycki. Furthermore, unlike in Kruzycki, Defendant had been out of custody, and logically engaged in law abiding conduct for all of that time, except for thirty days incarceration for the 2000 misdemeanor conviction. Also, the fifteen year old felony conviction had warranted only six months incarceration. Clearly, all of these factors warrant a conclusion that the trial court had abused its discretion in allowing admission of this conviction. This, even though this conviction was for a felony. Trial counsel was ineffective for failing to object to this conviction.

Further, trial counsel's failure to object to the prior adult felony conviction was prejudicial. As indicated, the case law clearly states that any conviction is highly relevant to a witness's credibility. Also, this case law indicates that the greater the number of the convictions, the greater the effect on credibility. Hence, the difference between two and three prior convictions is material. Here, the State had pounced on that number of three convictions during its rebuttal closing argument. This, in

comparison to Heather Deckow's credibility. The trial court had also instructed the jury that Defendant's prior criminal convictions were relevant to his credibility.

Finally, trial counsel's error in failing to object was not harmless. This case was far from a "slam dunk." Debbie Lewis did not testify. No evidence had tied the Defendant to this money found at Potawatomi. So, no one testified that Defendant had admitted to robbing the bank. No one had testified that he or she had seen Defendant himself wear the mask inside of the bank. No one inside of the bank had identified Defendant as the bank robber. Here, without such a link, Defendant could arguably have tried the mask outside of the bank at some time prior to the armed robbery. The connection between Defendant and him wearing the mask inside of the bank was purely circumstantial. There was no corroborating fingerprint evidence. Clearly, the jury had difficulty in reaching a verdict. They were out for over four hours. This, despite the presence of Defendant's DNA in the mask. However, as discussed, the State had argued that Defendant's credibility was highly suspect due to three prior convictions. Based upon the totality of the evidence, clearly, the State's argument concerning Defendant's prior record was material. The jury instruction concerning Defendant's convictions bolsters this argument. Defendant's prior record was highly material in this present matter.

Here, the trial court's Decision and Order has not provided any relevant and applicable law, either statutory or case, with respect to the issue of whether or not trial counsel had been

prejudicially ineffective for failing to object to the overly prejudicially stale felony conviction. Contrary to the Decision and Order, both the case law and the statutory law clearly indicate that the number of convictions/adjudications is highly relevant to the credibility of a witness. Furthermore, the Decision and Order has failed to provide any case law or statutory law for its conclusion that, simply because a witness had previously been convicted of a serious felony, such a conviction must, by law, always be admissible for impeachment purposes. Such a conclusion is not the law. Contrary to the Decision and Order, this affect on credibility had a legal effect on the verdicts. As indicated by the relevant and applicable law, this law clearly shows that the number of convictions/adjudications has a legal affect upon a witness's credibility. As the trial court had concluded at the sentencing hearing, Heather Deckow's effect on the Defendant's credibility had been devastating. Furthermore, regardless of such affect, the jury had still been out for a substantial period of time. Hence, this is well established case and statutory law. The trial court has failed to rebut, or even acknowledge, this law.

Here, the Decision and Order court has simply, and without a supporting basis, concluded that there was no reasonable probability that the trial court at trial would have excluded the most serious conviction in the Defendant's record. However, the Decision and Order has failed to discuss that the relevant and applicable case law clearly indicates that the lapse of time since a conviction and the rehabilitation of the person convicted is

clearly relevant to the required balancing test pertaining to the admissibility and use of a prior conviction. Contrary to the Decision and Order, there is no "bright line" standard that mandates that all prior burglary convictions, no matter how old, are always admissible for the purpose of impeachment. However, the Decision and Order has not even attempted to rebut this factual or legal argument.

The Decision and Order has also indicated that Defendant had failed to show any probability of a different result by the jury if the jury had not heard the conviction at issue in these Postconviction Motions. The Decision and Order has indicated that there was no reasonable probability that the prior convictions or adjudication had contributed in any material way to the guilty verdicts. However, once again, Defendant has discussed the evidence in this case, and how his credibility was highly relevant to his testimony, and the case in general. Defendant has also discussed how the remainder of the State's evidence was not so overwhelming so as to make his credibility irrelevant. As Defendant had discussed in his Postconviction Motions, and above, this case was far from overwhelming. Hence, as the facts in this present case had shown, trial counsel's ineffectiveness in failing to object to the felony conviction at issue here was prejudicially ineffective. The Decision and Order had materially erred in concluding otherwise.

Here, the Decision and Order's attempt to rebut Defendant's Postconviction Motion concerning his prior record had been merely conclusory. The Decision and Order had failed to provide any

supporting legal or factual basis. The Decision and Order has provided no case or statutory law rebutting Defendant's abundance of relevant and applicable law. Furthermore, the Decision and Order has failed to provide any factual basis to rebut Defendant's argument that trial counsel's failure was prejudicially ineffective.

For the aforementioned reasons, this Court should reject the Decision and Order's conclusion concerning Defendant's prior criminal record. Based upon the foregoing, trial counsel's failure to object to the prior felony conviction was prejudicially ineffective. An evidentiary hearing is required for this issue with a new jury trial resulting.

C. Defense Counsel's Advice in Advising Defendant to Testify as to his Alibi was Prejudicially Ineffective. Counsel had Actual Knowledge that the Alibi Defense Would Fail. Defendant is entitled to a New Jury Trial. The Decision and Order Has Failed to Adequately Rebut this Conclusion. It Must be Reversed.

Trial counsel who gives improper advice may be prejudicially ineffective. State vs. Lentowski, 212 Wis.2d 849, 569 N.W.2d 758 (Ct.App. 1997). A trial counsel must advise the Defendant with complete candor concerning all aspects of the case. This includes a candid assessment of the probable outcome. A.B.A. Standards for Criminal Justice, Chapter 4: The Defense Function, August 1990, Standard 4-5.1(a).

A trial counsel who fails to adequately and appropriately advise a Defendant about the implications of that Defendant's testimony may be prejudicially ineffective. A trial counsel's error that

allows a Defendant's credibility to be undermined materially infects the entire trial. Such an error may occur with respect to the Defendant's testimony. When credibility is a central issue in a case, such an error has a pervasive effect on the inferences to be drawn from the evidence and alters the entire evidentiary picture. State vs. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711 (1985).

In Pitsch, Defendant had testified on his own behalf. This was against trial counsel's advice. On direct examination, trial counsel had asked the Defendant how many times he had been convicted of a crime. Defendant had answered "two." However, on cross-examination, the prosecutor had established that he had nine convictions. State vs. Pitsch, 124 Wis.2d 628 at 631-632. Pitsch had previously informed trial counsel that he had two convictions. This was erroneous. The Supreme Court had indicated that, had trial counsel properly investigated Defendant's prior record, he could have more adequately counseled him and might have been more persuasive in dissuading the Defendant from taking the stand in his own defense. Id. at 638. The Supreme Court had cited Strickland vs. Washington for the proposition that, because of the significant damage to Defendant's credibility, and that this was a credibility case, the confidence in the result was undermined because of a breakdown in the adversarial process. This, even though there was sufficient evidence to support the conviction. Hence, there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The Supreme Court remanded the matter for a new trial. Id. at 644-646.

The fact that the Defendant had testified against trial counsel's advice was not relevant.

Here, trial counsel had improperly advised the Defendant to testify on his own behalf concerning the alibi. Defendant initially did not want to testify. Even more aggravating, trial counsel had actual knowledge that Heather Deckow would destroy the Defendant's testimony prior to trial. Prior to trial, the State had provided counsel the actual discovery that showed that she would destroy his testimony. The State so indicated prior to his testimony. Trial counsel did not rebut this indication at trial. Furthermore, the State had warned the Defendant and trial counsel, prior to his testimony, that she would testify. Most importantly, Defendant did not know of the substance of this anticipated testimony. This, because trial counsel had not so informed him. Hence, the material error falls squarely on the shoulders of the trial counsel.

Furthermore, trial counsel's error in misadvising the Defendant concerning his alibi testimony had thoroughly destroyed his testimony and his entire credibility. The State had repeatedly emphasized this destruction, and how it showed that Defendant had lied, multiple times during its Closing Argument. As discussed in Pitsch, even a case that contained sufficient evidence, under such circumstances as present both here and in that case, deserves a new trial. However, as previously discussed, the State's case in this present matter was not so strong so as to support any form of argument that this error was harmless. Unlike Pitsch, one cannot conclude here that Defendant would have been convicted absent trial

counsel's error. Here, the State had repeatedly compared Defendant's credibility to that of Deckow's. The State had repeatedly drawn the conclusion to the jury that Defendant was a liar. Hence, this present matter is a much stronger case for reversal than Pitsch.

The trial court's Decision and Order concerning the issue regarding trial counsel's advice to the Defendant that he should testify as to his alibi is merely conclusory and lacks any relevant argument. These deficiencies are both factual and legal. These deficiencies are similar to the deficiency in the Decision and Order's prior argument concerning Defendant's prior criminal record.

In the present matter, the Decision and Order has relied upon the summary conclusion that the Defendant had made a knowing and voluntary decision to testify. True, the trial court had conducted a colloquy with the Defendant. However, the Decision and Order has failed to rebut, or even discuss, that Defendant had provided a Sworn Affidavit with his Postconviction Motions concerning this decision. (195:Exhibit 4). This Affidavit had clearly indicated that his decision was based upon ineffective advice from his trial counsel. Defendant had told his counsel on multiple occasions that he did not want to testify. However, trial counsel had advised him that he should. This, after Defendant could not provide any other alibi witnesses. Furthermore, as indicated in this Affidavit, trial counsel had never discussed the already provided discovery concerning how Heather Deckow would destroy the Defendant's alibi.

Prior to the Defendant's testimony, trial counsel had never discussed this discovery with the Defendant. As the trial court had indicated at the sentencing hearing, her testimony was devastating. Hence, Defendant's testimony was based upon ineffective advice from his trial counsel. The Decision and Order had ignored all of these facts. Contrary to the Decision and Order, this advice was unreasonable. The Decision and Order had materially erred in concluding otherwise.

Here, the Defendant had previously believed that Ms. Deckow would support his alibi. This belief was why he had testified that she was his alibi and that she had provided him with a ride during the relevant time period. Hence, the reasonable conclusion is that the prosecutor's indication at trial had not provided any motivation or reason for him not to testify. Here, the prosecutor's indication that Ms. Deckow would testify had failed to provide any oral detail of the contents of this discovery. Accordingly, the Decision and Order had failed to rebut the conclusion that Defendant would not have testified, much less about his alibi, had trial counsel provided him with the information that counsel already had possessed concerning her testimony. As discussed herein, trial counsel had a legal duty to advise the Defendant about Deckow's anticipated testimony, as counsel had already learned from the State. This, especially because trial counsel had urged the Defendant to testify about this alibi. Contrary to the Decision and Order, this failure, and the subsequent encouragement for Defendant to testify, had been ineffective.

Here, the Decision and Order has indicated that Defendant has failed to show that trial counsel's ineffectiveness was prejudicial. On the contrary, as discussed in the preceding argument and in this present Brief, the State's case was not so strong as to make his alibi testimony "disaster" meaningless and harmless error. The Decision and Order has indicated that Defendant's DNA was found on the mask. However, the Defendant has provided reasonable alternative arguments for this presence. Furthermore, the Decision and Order has indicated that the "...money stolen during the robbery had been traced right back to the Defendant..." However, this is an erroneous conclusion. As discussed, neither Debbie Lewis nor Sultan Bradley had testified. A review of the trial transcripts has revealed no evidence that the money stolen during the robbery, and recovered at Potawatomi, had been traced to the Defendant. Accordingly, there had not been sufficient evidence at trial connecting Defendant to this stolen money. Hence, contrary to the Decision and Order, the State's case was not so strong and so overwhelming as to make trial counsel's ineffectiveness harmless error. The jury had been out for a fairly significant length of time. Trial counsel's ineffectiveness was prejudicial.

As discussed herein, the Decision and Order has failed to adequately rebut Defendant's position that trial counsel was prejudicially ineffective for improperly advising the Defendant to testify about his alibi. Furthermore, the Decision and Order has provided no sufficient factual or legal basis to support this

position. An evidentiary hearing is necessary. At such a hearing, trial counsel would need to testify as to his reasoning, if any, concerning this issue. The Decision and Order has failed to adequately rebut such a conclusion.

Based upon the foregoing, trial counsel's conduct in misadvising the Defendant to testify concerning his alibi defense was prejudicially ineffective. There was no sound trial tactic for this failure. The Decision and Order is materially erroneous. It must be reversed. An evidentiary hearing is required, with a new jury trial resulting.

CONCLUSION

Based upon the reasons presented within this Brief, the trial court had erred in denying Defendant's Postconviction Motions. Trial counsel had been prejudicially ineffective for both argued reasons in this Brief. This Court should reverse that Decision and Order and remand this matter for an evidentiary hearing, with a new jury trial resulting.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Sadiq Imani, 2018AP000596 CR conforms to the rules contained in Wis. Stats. 809.19 (8) (b) (c) for a Brief with a monospaced font and that the length of the Brief is thirty three (33) pages.

Dated this 15th day of May, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

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 Wis. Stats. 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

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 first names and last initials 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 this 15th day of May, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant's Appellant's Brief in the matter of State of Wisconsin vs. Sadiq Imani, Case No. 2018AP000596 CR is identical to the text of the paper Brief in this same case.

Dated this 15th day of May, 2018, in Waukesha, Wisconsin.

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