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OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS DISTRICT I

Case No. 2018-AP-614-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL WADE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JANET PROASIEWICZ PRESIDING

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. Wade's Sixth Amendment right to effective assistance of counsel was violated because his trial attorney had an actual conflict of interest when representing Wade and that conflict of interest materially affected the representation.

In its response brief, the State claims: (1) Wade's trial counsel did not have an actual conflict of interest (Res. Br. 5) and (2) even if Wade's trial counsel did have a conflict of interest, it was waived. (Res. Br. 8). The State's arguments fail.

First, Wade's trial counsel, Attorney Tishberg, did have an actual conflict of interest. The State relies on *State v. Cobbs*, 221 Wis.2d 101, 584 N.W.2d 709 (Ct. App. 1998). The State argues that this case is similar to *Cobb* and therefore the Court should find that there was no actual conflict of interest. The State is wrong

In *Cobb*, the defense attorney formerly prosecuted his client. Wade's case is significantly different. Attorney Tishberg did not previously prosecute Wade. He represented the victim. Wade's case is a domestic violence case. The strength of the State's case relied on N.D.'s testimony. One of the main functions of a defense attorney is to subject the State's witnesses to vigorous cross-examination.

The only thing Wade has to demonstrate is that Attorney Tishberg's conflicting interest had an adverse affect on his representation of Wade. *See State v. Villarreal*, 2013 WI App. 13, 346 Wis.2d 690, 828 N.W.2d 866; *See also State v. Love*, 227 Wis. 2d 60, 67, 594 N.W.2d 806 (1999).

Wade has demonstrated that an actual conflict existed. Attorney Tishberg in an affidavit admitted knew he had an actual conflict of interest and neither N.D. nor Wade gave informed consent to his representation in this matter. (20:1-2).

The adverse effect on the trial is evident by Attorney Tishberg's inability to vigorously cross-examine N.D. because of his competing loyalties between representing Wade and maintaining his confidentiality with N.D.

The second argument the State makes is that Wade waived any potential conflict.

The Wisconsin Supreme Court in *State v. Kaye*, 106 Wis.2d 1, 315 N.W.2d 337 (1982) and *State v. Miller*, 160 Wis. 2d 646, 467 N.W.2d 118 (1991) outline the requirements a circuit court must abide by when entering into a colloquy with the defendant about a potential conflict of interest. *Miller* and *Kaye* require the circuit court to determine whether the defendant understands the potential conflict and determine if the defendant wants different counsel. *See Kaye*, 106 Wis.2d at 14; *See also Miller*, 160 Wis.2d at 660.

The circuit court did not inquire as to whether Wade understood the conflict that existed. The court simply asked Wade if he was aware that Attorney Tishberg had represented N.D. in the past and whether Wade wanted to continue with Attorney Tishberg. The circuit court did not ask Wade whether he understood the possible negative implications of proceeding with an attorney that had previously represented the victim in his case. There was no discussion about the possibility of Attorney Tishberg's inability to effectively cross-examine N.D. because of his duty of confidentiality to N.D. The circuit court did not inquire whether Wade understood these positives and negatives. Thus, the colloquy did not constitute a proper waiver under *Miller* and *Kaye*.

The conflict of interest rendered Attorney Tishberg's representation of Wade constitutionally ineffective.

CONCLUSION

For the foregoing reasons, Wade requests this court reverse the order of the circuit court denying Wade's motion for a new trial, vacate the judgment of conviction and remand the case back to the circuit court for further proceedings.

Dated this 18th day of December, 2018

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 584 words.

Dated this 18th day of December, 2018.

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**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 18th day of December, 2018.

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