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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2018AP999-CR
Lincoln County Case No. 13-CF-157

MARK J. BUCKI,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON 7/3/14, IN THE CIRCUIT COURT FOR LINCOLN COUNTY, AND FROM THE POST-CONVICTION DECISION AND ORDER, FILED 5/2/18, DENYING A NEW TRIAL, PURSUANT TO RULE §809.30, STATS., THE HONORABLE JAY TLUSTY, PRESIDING

BRIEF-IN-CHIEF

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STATEMENT OF ISSUES

1. Was the trial court required, in this criminal prosecution, to consider whether physical evidence of corroboration of the canine evidence was required, under §907.02, Stats. and *Daubert,* before admitting the evidence?

   The trial court answered no.

2. Was admission of the canine evidence without physical corroboration erroneous under §904.03, Stats., because it was unreliable, without substantial probative value, and was unfairly prejudicial?

   The trial court answered no.

3. Was the court's error in admitting the canine evidence, without evidence of physical corroboration, harmless?

   The trial court was not asked to answer this question.

4. Should a trial court be required, under §907.02, Stats., and *Daubert*, to consider whether there were sufficient facts and data to admit canine evidence when the evidence was not otherwise corroborated by physical evidence and when admission of the evidence was sought to prove guilt?

   The trial court was not asked to answer this question.

5. Should the trial court be required to apply a clear and convincing standard to determine whether the uncorroborated canine evidence provided sufficient facts or data to find the evidence sufficiently reliable for admission into evidence?

   The trial court was not asked to answer this question.

6. Did defense counsel provide deficient performance which prejudiced their client?

The trial court answered no.

7. Does Strickland v. Washington's prophylactic "presumption" trial counsel's performance was reasonable apply to their decision to relegate to their client the decision whether to present expert testimony challenging critical prosecution evidence ?

The trial court effectively answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant requests oral argument and publication because this case presents novel issues in which the court, over objection, admitted under §907.02, Stats., and *Daubert,* evidence of canine "human remains" and "live scent" detection to establish a defendant killed his wife when no physical evidence corroborated the canine detection.

This case does not, therefore, involve only the application of well-established Wisconsin law to the facts.

Publication will direct and assist trial courts and litigants with questions involving the standards for admission of canine evidence in criminal prosecutions.

STATEMENT OF CASE

A Criminal Complaint filed on 5/14/13 charged Mark J. Bucki (Bucki) with First Degree Intentional Homicide (Count 1) for causing the death of his wife, Anita G. Bucki (Anita) on 4/26/13, in the Town of Corning, Lincoln County, contrary to §§940.01(1)(a) and 939.50(3)(a), Stats., a Class A felony; Hiding a Corpse (Count 2), contrary to §§940.11(2), and 939.50(3)(g) Stats., a Class G felony; and Strangulation and Suffocation (Count 3), contrary to §§940.235(1) and 939.50(3)(h), Stats., a Class H felony (R.1).

Following a preliminary hearing on 8/2/13, Bucki was bound over for trial (R.381, p.58).

An Information charging the same three counts alleged in the Criminal Complaint was filed on 8/5/13. On 9/20/13, the defendant was arraigned (R.15;R.382, p.4).

A motion to dismiss the Criminal Complaint following the preliminary hearing (R.22;23), pursuant to §§971.31(2) and (5), Stats., was denied on 10/1/13 (R.383, p. 17).

Following an 8-day jury trial, the defendant was convicted of the three counts charged in the Information (R.406, pp. 5-6; R.226). The jury was polled (Id., pp. 6-8). An order for pre-sentence investigation was entered (R.227).

On 7/3/14, the court imposed a life sentence on Count

1 with eligibility for release to extended supervision on 5/13/2048. The court imposed imprisonment on Count 2 of 4 years (2 IC/2 ES) and a term of imprisonment of 3 years on Count 3 (1 IC/2 ES), with both Counts 2 and Count 3 to be served concurrent with Count 1 and each other (R.409, pp.115;122). A judgment of conviction was filed (R.241; A-101).

A post-conviction evidentiary hearing on the defendant's petition for new trial (R. 267) was conducted on 7/6/17 and concluded on 8/24/17. On 5/2/18, the court denied the petition (R.374; A-105).

The Notice of Appeal was timely filed (R.375).

The Brief-in-Chief and Appendix is due, by extension, on 11/30/18.

STATEMENT OF FACTS

Prior to trial, the defense filed a motion to supress canine evidence it claimed was irrelevant, unfairly prejudicial and speculative under §904.03, Stats. (R.33). The State responded (R.37-39). This motion sought to suppress "human remains" search evidence by two cadaver dogs at the Bucki residence and surrounding property, as well as evidence from

a “live scent” search by two trailing dogs[1] on Taylor County Highway “C,” next to the marsh area where the victim’s remains were discovered on 5/10/13.

In opposing admissibility of the canine evidence, the defense argued admissability of this evidence did not require a *Daubert* evaluation of the pre-trial evidence under §907.02, Stats. It argued the evidence, while relevant, created a “novel issue in Wisconsin” and should be excluded under §904.03, Stats., because the proffer was without any corroborating evidence to establish its reliability (R.391, pp. 122-23). The State argued the evidence was relevant and §907.02, Stats. required the court to analyze the reliability of the evidence presented at the *Daubert* hearing for “both types of dogs” (Id., pp. 124, 126). In reply, the defense argued a dog handler should not be allowed to make “expert” conclusions about a canine’s alerts from a scent because it was “way beyond their scope of any expertise” (Id., 126-27).

Prior to the ruling on the admissability of the canine evidence at trial, the State agreed it would not refer to the

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[1] These “trailing” dogs are inaccurately characterized as “tracking” dogs in various pre-trial documents. Tracking dogs are principally asked to follow a “track,” rather than a specific human scent.Trailings dogs are trained to follow a specific human scent (R.387, p. 31).

"hole" discovered on a trail on the Bucki property, during the search for the victim, as a "shallow grave" (for the victim) (R.396, p. 18; R.391, pp. 31-32).

The court determined an evidentiary hearing was required to address the reliability of the canine evidence based upon the considerations established in *Daubert v. Merrell Dow Pharmaceuticals*[2] (R.90, pp.3-4; 11; 13-14).

The defense argued the scent search was also unreliable because "the scent" used to search had been contaminated by others who wore the tennis shoes used in the search (Id., pp. 128-29).

At the *Daubert* hearing conducted over two full days, the State presented testimony with documentation from four canine handlers regarding the training, certification and experience of the handlers and their dogs in tandem, and addressed potential contamination of the scent used by the trailing dogs (R. 384, p. 144). Various exhibits were received, including police reports (R. 67-69; 73-74; 81-82; 85); certificates (R. 64;75;79); training records (R. 65; 97); professional articles (R. 77; 83-84); CVs (R. 95;98); summary of dog trailing records (R. 99); and death and crime scene logs

[2] 509 U.S. 579 (1993)

(R. 100).

On 3/25/14, the defense presented testimony of Dr. Lawrence Myers, an associate professor from the College of Veterinary Medicine at Auburn University.

Dr. Myers reviewed the training and certifications of the four handlers and their dogs, as well as the reports describing law enforcement's procedure in providing scent from a tennis shoe taken from the Bucki residence to the trailing dogs to determine whether the defendant was at the location where Anita's body was found. Dr. Myers testified there was no scientific concensus when a dog can smell decomposition or when a scent leaves an area (R.387, pp. 19-20). He described how double-blind testing helps to minimize "cueing" by the handler and stated he had specific concerns with cueing in this case (Id., p. 47). Dr. Myers concluded there was no baseline reliability measure for these handler and dog teams, particularly on the basis of a lack of any records showing double-blind testing for all of the dogs as required for certification. He testified the self-reporting records for testing from the handlers also made their training certifications unreliable (Id., pp. 27-29; 53-55). Dr. Myers also found the procedure providing the human scent to the bloodhounds from the tennis shoes indicated contamination, thereby preventing

any reliable determination of which scent the dogs were following, if two individuals (or more) had worn those tennis shoes (Id., pp. 22; 38-41; 107-08). On redirect, he opined the cross-contamination which existed, together with Anita's presence in the marsh next to the highway, prevented any reliable determination which scent Polly or Missy were trailing (Id., p. 109-10).

The State presented rebuttal testimony from Rex Stockham, an agent assigned to the forensic canine program with the Federal Bureau of Investigation (FBI). Stockham said proper storage of a scent object prior to its presentation to a trailing dog is important. He said the best practice would be to use a glass jar, which had not been used here (Id., pp. 216-17). Stockham also described the necessity to use a "dismissal list" for trailing dogs at the search site so the dogs can dismiss every person who potentially had contact with the object (Id., pp. 217-18; 233). Stockham said, if multiple individuals had worn the same tennis shoe, it would be difficult to tell which scent the dog was trailing at the homicide scene (Id., p. 235). Finally, Stockham said he would be unable to assess whether any of the dogs would meet his or federal standards without personally testing the dogs (Id., p. 249).

On 4/4/14, the court made various rulings regarding

admissibility of the canine evidence. The court first determined this testimony was "expert," not lay, testimony, and so the revisions to §907.02, Stats., effective 2/1/11, adopting the *"Daubert* reliability standard," were applicable (R.392, p.4). The court described the requirements of the new rule, including that expert testimony must be based on "reliable principles . . . reliably applied to sufficient facts and data" (Id., p. 5). The court explained the burden of proof was on the proponent by the proponderance of the evidence (Id., pp. 5-6). The court found this evidence was relevant under §904.04, Stats., and was not substantially outweighed by the danger of unfair prejudice under §904.03 Stats. (Id., pp. 7-8). The court then qualified the four canine handlers as experts and found these experts had relied on sufficient facts and scientific data to qualify as experts (Id., pp. 14-16).

The court identified the seven factors it would consider in determining whether the canine evidence was admissible (Id., p. 17). The court found the technique and theory has been generally accepted in 38 states for trailing dogs, and five states for cadaver dogs and, therefore, generally accepted in the scientific community (Id., p. 22). In sum, the court found the proffered testimony was based on reliable principles and methods for both cadaver and trailing dogs and the motion to

admit the evidence would be granted and the motion to suppress denied (Id., pp. 26-27; A-105).

Finally, the court found consideration of corroborating physical evidence required by the majority of the other states (Id., pp. 36-41; 43) was not a necessary part of the *Daubert* analysis (Id., p. 44).

The court then ruled on other various pre-trial motions brought by both parties excluding other act evidence and admitting Anita Bucki's statements and e-mails to others, including the defendant (Id., pp. 111-13; 134-39;141).

A jury was chosen without objection (R.394, p. 190).

In opening statement, the prosecution concluded with the description and results of the work of the four canines at the Bucki property and at the marsh (Id., pp. 223-225). The defense concluded by challenging the work of the canines (Id., pp. 240-41).

At trial, a sheriff's dispatcher described Bucki's calls to the Lincoln County Sheriff on 4/21/13 and 4/26/13 regarding Anita's spousal property rights and then her disappearance. The Wisconsin State Patrol described forensic preparation of the maps depicting the Bucki's 84-acre Lincoln County homestead east of Taylor County marsh where Anita was eventually found (R.400, pp. 14-16; 31; 35-36; 39; 41; 43).

Julie Zietlow, a close friend of the victim, described Anita's move back from Minnesota on 4/21/13 and how she stayed with Zietlow until about 8:30 p.m. on 4/25/13 (Thursday), when Anita left to return to the farm to give her marriage a last chance (Id., pp. 50-54). Zietlow described Anita's clothing and said she measured 5 foot, 1 inch (Id., p. 76). She said Anita never responded to Zietlow's last e-mail sent Friday morning at about 9 a.m.

Dr. Donald Simley, a forensic dentist, testified he identified the female body found in Taylor County as Anita Bucki (Id., pp. 107-08).

Investigator Steffenhagen, described the collection of evidence during execution of a search warrant, including the tennis shoes (exhibit 55) which provided the "scent" eventually presented to the trailing dogs (Id., pp.119-20; 139-41; 175; 197).

Angela Matson described her relationship with Bucki which began only weeks before his wife disappeared. She described texts between them late on 4/25/13 and said she called Bucki on Friday at 6:31a.m. regarding her need to find an apartment and move away from her husband and their residence in Gleason, WI. (Id., pp. 225-226; 229-230;243; 245-246; 249).

Aemus Balsis, a Taylor County detective, testified he met with the neighbors (Sprotte), who had spotted the victim's body in the marsh while walking along the highway and called police. He said the body was found wearing a blue bathrobe in one foot of water (Id., pp. 288; 291-92).

Dr. Michael Stier testified he performed an autopsy on the female found in the Taylor County marsh and described bruising to the victim's throat consistent with strangulation, along with seven sharp-force wounds to her chest causing her death (R.398, pp.16-19; 21-22). He said she was stabbed, while probably "lying on her back," without "necessarily much" bleeding (Id., pp. 32-34, 37-38).

Solon McGill described the efforts of his dog, Izzy, certified as a cadaver dog, with the investigation in Lincoln County on 4/30/13 (Id., pp.56-57; 84-85). The officer described Izzy's alert to the "disturbed earth" on the ATV trail. A search of the ponds near the Corning Town Hall by Izzy generated an alert without any explanation where the human remains might have come from, other than the witness opined how swampy and watery the area was (Id., p. 105).[3]

[3] McGill acknowledged the alert was possibly in response to the possibility "farmers had buried still-born babies in that area" (Id.).

McGill testified, even though Izzy alerted to the "ATV peg" and a swab indicated there were no human remains on the peg, the alert was not a false positive because there was "no scientific evidence that the sample removed (on the swab) was what she was alerting to" (Id., pp. 109-10). McGill conceded Izzy had only found human remains on one of the four searches in his experience (Id., p. 112).

On redirect, McGill testified how an "actual flow of water" near the ponds explained how the odor of human remains can move "some distance" from the location of the human remains. (Id., pp. 122-23).

Jeanne Frost testified she was a "master trainer" for "human remains detection" dogs (Id., pp. 126-27). She identified her "training summary" and report and agreed Trixie was "not perfect." (Id., pp. 128; 131; 136). She testified false negative alerts are affected by "how the area was handled," the "environment" involved and a " lot of factors" (Id., pp. 135-36). She described Trixie's alerts to the tarp; foot rest on the ATV in the garage; the ATV cart; burn barrel; and the missing carpet section in the residence (Id., pp. 143-45). She testified Trixie did not (like Izzy) alert to the floor bed in the pickup truck (Id., p. 141).

Joanne Disher described her work with bloodhounds

looking for missing persons (Id., pp. 166-67; 170-71). She said she took her purebred bloodhound with AKC certification, “Pollie”, to Taylor County on 5/10/13 to see “if I could place Mark Bucki’s scent at that scene” (Id., pp. 172;177-78;187).

Louise Horn described being provided a grey tennis shoe with Ziplock bags “on each end of the tennis shoe,” from a brown paper evidence bag, and then presenting gauze to her bloodhound, Missy, from the tennis shoe. (Id., pp. 207-08; 213).

On cross-examination, Horn said, if multiple people had worn the tennis shoes, the live scent would have been the predominant scent from the person who wore the shoe “most often” (Id., pp. 223-24). On recross-examination, Horn testified individuals who live in the same house combine their scents. (Id., pp. 227-28).

Jason Rademacher testified his uncle, Bucki, canceled their visit to the auction at 8:14 a.m. on 4/26/13, claiming “two women issues” (R.401, p. 16).

Clint Bucki testified how his mother was upbeat in a telephone call the day before she went missing (Id., p. 45). He described how their cat, “Scruffy”, urinated on the carpet in the middle bedroom and how parts of the carpet had been removed (Id., pp. 52-53).

Clint testified the grey tennis shoes introduced into evidence (Exhibit 55) were his. He said he last used the tennis shoes on 4/13/13 on a visit to his parents' residence, while helping his "mother load up the U-Haul" (Id., pp. 60-61).

On recross-examination, he was asked if his mother "was in the habit of slipping on whatever shoes were available." The court sustained the State's objection on grounds it was "beyond the scope" of the redirect (Id., p. 67).

DOJ Special Agent Nicholas Pendergast described the "sharp edges" of the "disturbed area" in a "wooded and bit swampy area" on the Bucki property, which appeared to have been recently dug to about two feet or more. (Id., pp. 71; 74-75).

Pendergast responded (to a juror's question) that any evidence the ATV trail was "driven on," leading toward the disturbed area on the evening of Anita's disappearance, was only from law enforcement vehicles (Id., pp. 84-85).

DOJ Special Agent David Forsythe described his dispatch to investigate a body found in a marshy area in Taylor County in the "middle of nowhere" with "standing water in the ditches" (Id., pp. 125-27). He described requesting bloodhounds and later receiving (from Detective Steffenhagen) a bag with "male tennis shoes" from the Bucki residence for

the search.

Lincoln County Sheriff Detective Chad Collingsworth described his response to a “missing person” call at the Bucki residence and how the driveway had been freshly graded between the garage and house. (Id., 402, pp.156-58; 160-61).

Collingsworth identified a photo of the disturbed area, taken 5/1/13, after police started digging (Id., pp. 106; 108-11;114). He described the disturbed area as having been an area between 2-3 feet wide, by 5-6 feet long, and excavated to a depth about 6-10 inches down “until we started hitting rocks” (Id., pp.186;191-92).

Lincoln County Sheriff’s Detective Brian Kingsley testified regarding the execution of the search warrant and the collection of evidence. He said the tennis shoes needed two plastic bags for each shoe because he did not have a bag large enough for each shoe before putting both unsealed shoes in a paper bag and taping it with evidence tape (Id., pp. 244-45; 248; 251; 271).

Lincoln County Deputy Sheriff Randy Rouleau testified there were no tire impressions in the gravel driveway from the Camry next to the garage (R.403, pp. 10; 14-15).

DOJ Agent Bradley Kust testified regarding his interviews with Bucki on 4/30/13, and described how Bucki

never asked about his wife on his way to the police station or how his wife died after Anita's body was found (Id., pp. 46-47; 49-50).

Lincoln County Detective Thomas Barker described the police interview with Bucki on 4/29/13 (Exhibits 138-140) with clips 1-12, 14 and 16-18 played for the jury (Id., pp. 103-110).

Detective Mark Gartmann testified he interviewed Bucki on 4/26/13. (R.404, p. 133). He said the victim left behind, in the residence, her white, puffy winter coat (Id., p.208).

The State rested (Id., p. 243).

The defense motion to dismiss was denied (R.405, pp. 6-7;12;14).

The defense called various Wisconsin Crime Lab (WCL) technicians to testify regarding their investigations.

Raymond Lenz, a trace evidence technician, said there was no physical evidence examined which either "tied Mr. Bucki to the death of his wife or excluded him" (Id., pp. 20; 22).

DNA Analyst, Bart Naugle, testified he examined swabs submitted for DNA testing and there was no DNA testing which included or excluded the defendant as the killer and there was no evidence of sexual assault (Id., pp. 29; 35-36; 40). He said bleach and cleaning materials will destroy human DNA (Id., pp. 39-40).

WCL Fingerprint Analyst, Anna Sorrenson Schmitz, said she visited the crime scene on 4/30/13 and 5/1/13 to search for physical evidence involving the missing person, including blood stains (Id., p. 46). She indicated there was nothing in her investigation of the physical evidence which included or excluded the defendant as the killer (Id., pp. 63-64).

The defense informed the court it would not call Dr. Myers as a witness for the defense (Id., p. 88).

The court accepted the defendant's waiver of his right not to testify (Id., p. 128).

On 4/15/14, Bucki testified and described how he had not been working because a work injury prevented heavy lifting (R.411, p.10). He told the jury the disturbed area was on his ATV trail and denied the disturbed area was his attempt to dig a grave for Anita's body (Id., pp. 27). He said the only work he did near this area was to fill in a hole with ant hill dirt in 2012 on the ATV trail (Id., p. 28).

He said he moved Anita's car that morning to clear space for his nephew's truck and dragged the driveway two days before her disappearance (Id., pp. 55-56; 64).

On cross-examination, he agreed Anita had made statements she was going to Angie's husband, Jesse, about Bucki's relationship with Angie (Id., p. 88). On redirect, he said

there was no reason for him to kill Anita. (Id., p. 112).

The defense rested (Id., p. 114).

The court rejected the defense cautionary instruction which included language stating dog alerts alone could not be substantive evidence of guilt (Id., p. 133). The court said it would give a special defense instruction but without language the canine evidence required corroboration for the jury's consideration (Id., pp. 136-37).

The court then instructed the jury (R.410, p. 158).

At closing, the State told the jury there were "more than 40 items of circumstantial evidence in this case" which supported the prosecution theory it was Bucki who murdered his wife on 4/25/13 or early 4/26/13 (Id., p. 179). The prosecution described the importance of the canine "alerts" (Id., pp. 201-04; 210-11; 220). The State conceded it did not have physical evidence to support its theory (Id., p. 219) and argued no one else had a motive to kill Anita (Id., pp. 226-27).

The defense argument focused on the lack of any physical evidence connecting the defendant to his wife's death (Id., p. 230). The defense argued, from all of the samples taken from the locations where the dogs alerted, no evidence of the victim's remains was detected (Id., p. 232). The defense theorized Anita could have left her home in a "car," given the

existence of her scents which “ended at the driveway” (Id., pp. 232-43).

The jury returned guilty verdicts the following day on the three counts in the Information (R.406, pp. 3; 5-6). The court entered judgment on the verdicts (Id., p. 9).

In the post-conviction process, the court denied petitioner’s post-conviction discovery motion (R.254) finding, if this evidence had been discovered pre-trial, the outcome of the trial would not have been different (R.412, p. 22)

On 10/20/16, the court granted an evidentiary hearing on Claims I-A, B, C, D, and F in the petition for new trial (R.267) and denied a hearing on Claim I-E. (R.414, p. 30)

At the hearing on 7/6/17, the defense submitted testimony from both trial counsel regarding their considerations in failing to present expert canine testimony.

The petitioner submitted into evidence the affidavit (R.267, Exhibit A) and testimony of Dr. Myers who was available to testify at trial. The defense proffered his pre-trial testimony (R.415, pp. 184-185; 188; 316) in support of his opinion, based upon the canine training records and certifications, as well as the contamination evidence, “the alerts were, to a reasonable degree of professional certainty, not reliable to any known degree” (R.415, p.185; Affidavit pp.

4-5).

Bucki's son, Clint, testified he came home with his tennis shoes in 2010 after basic training and left them at home (Id.,168). He said he told his father's lawyers his mother wore his tennis shoes during the 2010 visit home (Id., p. 170-71).

On 8/24/17, Bucki testified. He said he always believed Dr. Myers would testify at trial and always believed it would help him (R.416, pp. 70-71). He explained how he had not worn the tennis shoes used for the scent since "late summer, early fall" of 2012 (Id., pp. 78-79). He described how his post-conviction review of the discovery CDs proved his ATV and its round tires, rather than law enforcement's UTV and its flat tracks, were not present on the path near the disturbed dirt on the day or evening his wife disappeared (Id., pp. 83; 92-92). He identified a summary (R.330) of law enforcement photographs (R.332-33;337-46) corroborating this testimony, along with a photo of the tennis shoes positioned in a common area in his residence (R.328).

The court's decision denying the petition for new trial found trial counsel's performance was not deficient and Bucki was not prejudiced and denied the motion (R.374, pp.21;23; A-148).

ARGUMENT

I. ADMISSION OF THE CANINE EVIDENCE AT TRIAL WAS ERRONEOUS AND NOT HARMLESS ERROR.

A. Standard of Review

This Court recently addressed how it would review a circuit court's admission of expert testimony for compliance with the *Daubert* reliability standard codified in §907.02(1), Stats. It held the appellate court would review this determination both independently as a question of law and also under the erroneous exercise of discretion standard. *See* Seifert v. Balink, 2017 WI 2, ¶¶18;88, 372 Wis.2d 525, 888 N.W.2d 316.

Once satisfied the circuit court applied the appropriate legal framework, the appellate court will review whether the circuit court properly exercised its discretion in determining which factors should be considered in assessing reliability and in applying the reliability standard to a determination whether to admit or exclude evidence under §907.01(1), Stats. Seifert, ¶90.

B. The Admission of Canine Evidence Was Erroneous Under Both §§904.03 and 907.02, Stats., and *Daubert,* When the Court Failed to Consider Physical Evidence of Corroboration in Assessing Its Reliability and Its Resulting Unfair Prejudice.

In ruling on the admissibility of cadaver and trailing dog evidence, the trial court relied on and applied the factors outlined in §907.02, Stats., and the holding of Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Our Supreme Court recently adopted the *Daubert* standard for assessing the admissibility of expert testimony and found trial courts should act as gatekeepers, rather than fact finders, in ruling on the admissibility of all expert opinions. Seifert, ¶¶59-60. Additionally, the Court found trial courts may rely on and apply the language of §907.02, Stats., and held it would only overturn a trial court's exercise of discretion in admitting or disallowing an expert opinion if it was erroneous. Id., ¶18.

The *Seifert* court adopted *Daubert's* reliability standard which "entails a preliminary assessment of whether the reasoning or methodology is scientifically valid." Id., ¶61 (*quoting* Daubert, pp. 592-93). A number of factors may be considered by trial courts in determining the reliability of expert testimony and opinions, which include:

1. Whether the methodology can and has been tested;

2. Whether the technique has been subjected to peer review and publication;

3. The known or potential rate of error of the methodology;

4. Whether the technique has been generally accepted in the scientific community;

5. Whether the expert is proposing to testify about matters growing naturally and directly out of research conducted independent of the litigation, rather than conducted for purposes of testifying;

6. Whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

7. Whether the expert adequately accounted for obvious alternative explanations;

8. Whether the expert is being as careful as she would be in her regular professional work outside her paid litigation consulting; and

9. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Siefert, ¶¶62-63.

The *Seifert* court went on to hold circuit courts are not limited or required to apply the above-listed factors and may conduct a reliability analysis with wide latitude and should be given considerable leeway in reaching a reliability finding for purposes of ruling on the admissibility of expert testimony Id., ¶¶64-65 (*citing* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142, 152 (1999)). In describing the application of *Daubert* as "a flexible inquiry," the *Kumho* court explained "too much depends on the particular circumstances of the particular case at issue" to impose hard and fast rules for the reliability

determination. Seifert, ¶64 (*citing* Kumho, ¶150). Thus, the circuit court may consider some, all, or none of the *Daubert* factors. Seifert, ¶65.

The defense moved to preclude[4] admission of all testimony from dog handlers authenticating the canine alerts as evidence of guilt at trial on the grounds (a) it had not previously been admitted in Wisconsin courts; (b) the probative value was substantially outweighed by the danger of unfair prejudice under §904.03, Stats.; and (c) the evidence did not meet the standards of admissibility as outlined in *Daubert*.

As the defense motion explained, cadaver and trailing dogs differ from drug dogs in their roles during the criminal investigation process. Thus, additional or different factors for admissibility of this evidence for these respective canines were required. In fact, the admissibility of evidence from narcotic sniffing dogs under *Daubert* to establish probable cause is well established because a well-trained dog's alert establishes a fair probablility–all that is required for probable cause–either drugs or evidence of a drug crime will be found. *See* Florida v.

[4] "Motion to Suppress All Evidence Pertaining to Cadaver Dogs and Tracking [sic] Dogs" (R.33).

Harris, 568 U.S. 237, n. 2 (2013).[5]

Specifically, the defense motion asserted:

> In drug cases, the evidence obtained from the dog is used to establish probable cause for a search and seizure. However, when it comes to cadaver dogs and tracking dogs, the evidence obtained from the dogs is used in court to speak directly to the guilt or innocence of a party (R.33).

The crux of the defense motion was to argue the functional differences between the canine evidence in the Bucki prosecution and narcotic-sniffing dogs should require something more for determining the reliability of the canine evidence when proffered to convict an individual of a crime, especially when the standards were so unreliably and inconsistently satisfied by the four dogs and their handlers, based on the testimony of both expert witnesses who testified at the *Daubert* hearings.[6] Because Bucki contested whether the dogs performed reliably in their controlled settings, the court should have weighed whether corroboration was

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[5] Even in a Fourth Amendment context, Justice Souter warned the "infallible dog" is a "creature of legal fiction." Illinois v. Caballes, 543 U.S. 405, pp. 410-11 (2005) (Souter, dissenting).

[6] FBI agent Stockham testified he could not find these dogs reliable based on the incomplete training records; lack of certification ("Polly"); concerns about variation in training aids ("Izzy"); and two of the four dogs were not "double-blind tested" ("Izzy"; "Polly")(R.386, p. 11). Indeed, the State's post-hearing brief, filed 1/23/18, argues the training records were "not totally deficient," which posits a standard arguably below the reliability standard for admission of evidence under §907.02, Stats.(R.368, p.11).

necessary before admitting the evidence.

The "reliability" difference from their respective roles and, correspondingly, admissibility thresholds for the narcotic-sniffing, cadaver and trailing dogs is significant. It is significant in that a probable cause finding, for example, based on a narcotic dog sniff, is never evaluated in hindsight, based on what a search does or does not turn up. Florida v. Harris, p. 248. When test data is unreliable and canine evidence is proffered to prove guilt within a due process framework, the admissability threshold and factors under §907.02, Stats., must be evaluated with wider latitude and more leeway. Kumho, Id. Bucki argues the critical reason for this "wider" reliability analysis is the lack of any ability in the scientific community to determine to what a cadaver or trailing dog alerts. As Dr. Myers testified, the alerts were "not reliable to any known degree." Therefore, the wide latitude and leeway discussed in *Kumho* required the trial court to consider whether there were sufficient facts or data, including corroboration, for admission of the evidence.

Cadaver and trailing dog evidence has been determined admissible on a case-by-case basis in the majority of

jurisdictions, applying a variety of standards, including *Frye*[7] and *Daubert*. The threshold for admissibility appears to be whether the State can present enough "foundational" evidence to satisfy a multi-prong test.

Multi-prong tests for the admissibility of trailing dog evidence are varied. *See* State v. Wilson, 180 Conn. 481, 429 A.2d 93, 96 (Conn. 1980) (admissibility requires trail not be contaminated); McDuffie v. State, 482 N.W.2d 234, 237 (Ct. App. Minn. 1991) (admissible if used only to corroborate other evidence); People v. Centrolella, 305 N.Y.S.2d 460, 463 (N.Y. Misc. 1969) (admissible if tracking conducted during reasonable weather conditions, including humidity and temperature). The majority of the numerous trailing dog cases have admitted the evidence, while a minority of jurisdictions have not.

The few reported cases addressing the admissibility of cadaver dog evidence have all found the evidence admissible, but with limitations *See* Clark v. State, 140 Md. App., 781 A.2d 913, 933 (Md. 2001) (water flowing from cadaver site affects reliability of alert location).[8]

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[7] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[8] Case annotations for both types of dogs are found in ALR 5th 563 (2000).

There are no reported cases in Wisconsin, however, addressing the admissibility of canine evidence for either cadaver or trailing dogs in Wisconsin.

In People v. Gonzalez, 218 Cal. App.3d 403, 412, 267 Cal. Rptr. 138 (Cal. Ct. App. 1990), the court said the admissibility and weight of dog trailing evidence required a level of corroboration to validate the canine evidence because of the possibility it was inaccurate. The defendant's conviction was reversed, in part, because there was no piece of unambiguous corroborative evidence supporting his conviction. *See also* State v. Loucks, 98 Wash.2d 563, 656 P.2d 480, 482 (1983) (dangers inherent in use of canine evidence can be alleviated by corroborating evidence); People v. McPherson, 85 Mich. App. 341, 271 N.W 2d 228, 230 (1978) (tracking dog evidence must be supplemented by corroborating evidence confirming defendant's identification).

A minority of states have held trailing dog evidence is never admissible because it is too unreliable. People v. Tyler, 363 Ill App.2d 166, 974 N.E.2d 963 (Ill. App. Ct. 2012) (trailing dog evidence inadmissible but defense forfeited error); People v. Cruz, 162 Ill. 2d 314, 643 N.E.2d 636 (1994) (bloodhound evidence inadmissible to establish any factual proposition in a criminal prosecution); Brafford v. State, 516 N.E.2d 45 (Ind.

1987); State v. Storm, 125 Mont. 346, 238 P.2d 1161, 1178 (1951) (bloodhound evidence "unsafe" and dogs' "limitations must be recognized in courts of justice, if not elsewhere"); Brott v. State, 70 Neb. 395, 97 N.W.2d 593, 595 (1903). The rationale of the courts which hold canine evidence is never admissible is based upon the courts' belief guilt "should be established by other evidence." People v. Griffin, 48 Ill. App.2d 148, 153, 198 N.E.2d 115 (Ill. App. Ct.1964).

Bucki does not contend the canine evidence was inadmissible for both dogs because the methodology applied was wrong or dog handlers were without the specialized knowledge to testify as experts.

Rather, the canine alerts for human remains should have been precluded in this case because, without a foundational factor of corroboration for these alerts, the handler's opinion testimony was too subjective and, therefore, of limited probative value in determining whether the alert reliably identified the odor of a substance removed, or of a similar substance simply unrelated to the crime. Without corroboration with physical or forensic evidence, this scant probative value for the alerts produced substantially unfair prejudice in determining the defendant's guilt, in violation of §904.03, Stats. *See* Walsh v. Wild Masonry Co., Inc., 72

Wis.2d 447, 456, 241 N.W.2d 416 (1976) (evidence of alcoholic degenerative impairment of the plaintiff's judgment had limited probative value, far outweighed by possible prejudice).

In finding the canine evidence admissible based on seven *Daubert* factors, the court erroneously determined consideration of a corroboration factor would not be applied because it was *not required* by *Daubert* (R.392, p. 44).This erroneous application of the law ignored the "sufficient facts or data" component of §907.02(1), Stats., for admissibility, and the "wider leeway" of *Kumho*, in finding evidence of physical corroboration of the alerts was not required for the court's reliability assessment under *Daubert*. The court was required to consider whether corroboration was an additional foundational factor, serving as "competing" evidence in determining whether this evidence was sufficiently reliable for admission. Florida v. Harris, Id.[9]

The appellant asserts the failure of the State to establish corroboration for the alerts and the sufficient facts or

[9] Analagously, corroboration is required in addressing related evidentiary matters, including the reliability of hearsay evidence in criminal trials. *See* Makeal v. Butler, 783 F.3d 882, 894, 907-08 (7th Cir. 2015); Sinkfield v. Brigano, 487 F.3d 1013, 1017-18 (6th Cir. 2007).

data upon which the expert opinion testimony could rest made the evidence (a) significantly less reliable and probative than if it had been corroborated; and (b) more unfairly prejudicial, given the fact sophisticated forensic professionals, together with their scientifically-advanced testing procedures, could not corroborate the alerts supporting the prosecution's theory of guilt. It was then left only to the cadaver dog handlers, based on their training and experiences with their dogs, to opine relevant evidence must have once been present, even when canine professionals concede mistakes are more common with false positives.

The lack of corroboration introduced inadmissible speculation, and possible juror confusion, whether the human remains alerts supported a verdict of guilty or were related to nothing more than the human remains of individuals deceased at some prior unknown point and deposited at some nearby watery location, which "moved" to the Bucki property by virtue of its underground and overground watery flow. In this context, the profferred expert opinion testimony did not "hold together based on logic or common sense." *See* 29 C. Wright& V. Gold, Federal Practice and Procedure: Evidence §6267, n.17.

The critical disconnect between the alerts and the lack of any corroboration established the cadaver alerts were

unreliable for admission in two other important respects. One, the cadaver canines could not even agree on whether there were indications of human remains on the floor bed of Bucki's truck, which the State believed transported Anita's body to the marsh.[10] Two, the State effectively conceded the alert to the shallow grave was possibly a result of a human remains scent "not connected to the case," given the watery conditions. Izzy's unreliable alert was also unfairly prejudicial because Bucki's ATV never traveled the trail to the "shallow grave" on the date of Anita's disappearance. As law enforcement testified, Bucki's ATV did not make any tracks on the hill while law enforcement vehicles searched for Anita's "remains."

Bucki's claim the court was required to consider corroboration for trailing dog alerts by physical or forensic evidence, as "sufficient facts or data" under §907.02, Stats., along with the wider latitude standard for consideration of the foundational factors, is supported in several respects by the holding of Brooks v. People. 975 P.2d 1105 (Colo. 1999), In *Brooks*, the court held there must be some foundation

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[10] The parties never argued, and the court never addressed, whether any canine evidence should, or could, be somehow limited in any respect without, at least, consistent responses from both dogs within each discipline. *See* State v. Wainwright, 18 Kan. App.2d 440, 856 P.2d 163, 168 (Kan. App.1998) (bloodhound evidence admissible where it is corroborated by other independent evidence).

presented before bloodhound evidence is to be admitted. Id., p. 1114.

In *Brooks*, the court held the "general acceptance" standard in *Frye* did not apply because the canine expertise was not based on, or derivative of, hard science. Correspondingly, the *Brooks* court held evidence of scent tracking did not constitute scientific evidence subject to the scientific validating factors of *Daubert*.

Critically, the *Brooks* case held canine tracking should be excluded under Federal Rules 403 and 702 (§§904.03 and 907.02, Stats.) as too prejudicial when not corroborated by other independent evidence. The court determined the evidence was not subject to *Frye* or *Daubert* because the court could not know, as Dr. Myers testified, how dogs track a particular scent and so this "tracking" is not derivative of hard science. Brooks, pp. 1111-12. Brook's conviction was upheld only because tracking by the hound, with the scent from the footprints in the snow, was corroborated by police officers who saw the burglar run away from the burglary in the snow.[11] Brooks, pp. 1114-15 (trailing dog evidence not admissible as

[11] Additional corroboration was provided when the tracking dog, "Yogi," ultimately tracked defendant Brooks to a vehicle under which he was found hiding by police with his burglarious tools and the burglarized property and arrested.

unfairly prejudicial where not corroborated by other independent evidence).

This Court recently agreed implicitly with the *Brooks* holding when it held opinion testimony the defendant was driving under the influence of drugs, based upon the application of the reliable methodology (DRE) protocol under §907.02, Stats., was admissible because it was corroborated with forensic evidence of toxicology testing. *See* State v. Chitwood, 2016 WI App 36, ¶45, 369 Wis.2d 132, 879 N.W.2d 786.

Moreover, the trailing dog alerts were made significantly more unreliable when they were produced by a "live scent" which had been commingled with the victim's scent and made the dogs equally likely to alert to Anita's scent as the defendant's. State v. White, 382 S.C. 265, 676 S.E.2d 684, 687 (2009) (sufficient foundation for admission of trailing evidence is established if*, inter alia,* dog placed on trail where suspect was known to have been within a reasonable time and the trial was not otherwise contaminated); People v. Cruz, Id. (danger posed from admitting bloodhound evidence is its fallibility and its potential to prejudice).

When the court determined the canine evidence would be admissible without the necessity of corroboration, it was

required to submit a cautionary instruction addressing the undue importance the jury might place on the canine evidence. *See* People v. Centrolella, p. 463 (jury must view canine evidence with the utmost caution given its slight probative value requiring other direct evidence of guilt for warranting a conviction).

The court compounded this error by substantially rejecting the defense special jury instruction, which proposed the jury consider the lack of corroboration in evaluating the canine evidence. This ruling precluded any legal obligation the jury consider corroboration as a component for its reliability determination (R.411, pp. 136-37).

Alternatively, if this Court finds the "sufficient facts or data" component of §907.02, Stats., does not require corroboration by physical evidence in a criminal prosecution, this Court should consider whether assessment of the proffered evidence requires a higher burden of proof for the reliability assessment than a proponderance of evidence. Seifert, ¶58. For example, Wisconsin courts have required a higher burden of proof for admission of evidence in cases where, as here, the evidence is sufficiently distinctive to require "a greater degree of certitude" for admission of the evidence for the jury's evaluation. *See generally* Kuehn v. Kuehn, 11

Wis.2d 15, 26, 104 N.W.2d 138 (1960) (noting in fraud cases, it has been stated the evidence should "sustain a greater degree of certitude . . . by clear, satisfactory, and convincing evidence").

Because neither double-blind testing, nor AKC certification, nor science can establish with "certitude" what it is the dogs are "alerting" to, without confirmation by the corroboration of the testing process, a preponderance of evidence standard under *Daubert* is inadequate for a determination of reliability in a criminal prosecution. Florida v. Harris, n. 3 ("best practice" in determining a dog's reliability involves testing and certification because in those procedures you know whether you have a "false positive," unlike in "most operational situations").

Just as a higher burden of proof is required for submitting an affirmative defense when an affirmative defense can be "easily fabricated" so, too, admissibilty of canine evidence, without corroboration, should be held to this higher standard because its relative subjectivity and draconian consequences implicate public policy considerations. Muench v. State, 60 Wis.2d 386, 392-93, 210 N.W.2d 716 (1973). *See also* State v. West, 2011 WI 83, ¶76, 336 Wis.2d 578, 800 N.W.2d 929 (the clear and convincing standard applies in

cases where public policy requires a higher standard of proof than in the ordinary civil action).

C. The Error was not Harmless.

Moreover, the court's decision was not harmless. In State v. Harris, 199 Wis.2d 227, 255, 544 N.W.2d 545 (1996) (*citing* State v. Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1995)), the court commented on how it had attempted to clarify the standard to be applied in Wisconsin to appellate review of harmless error. The test established in *Dyess* includes "whether of ommission or comission, whether of Constitutional proportions or not, the test should be whether there is a reasonable possibility that the error contributed to the conviction." The *Dyess* court said "a court should be sure that the error did not affect the result or had only a slight effect." Dyess, p. 540. Correspondingly, a defendant is not entitled to a new trial, if the error excluded or admitted was harmless. State v. Nieves, 2017 WI 69, ¶17, 376 Wis.2d 300, 897 N.W.2d 363; State v. Hunt, 2014 WI 102, ¶29, 360 Wis.2d 576, 851 N.W.2d 434 (whether an error was harmless is based on the "totality of the circumstances").

The court's decision admitting the canine evidence of the cadaver and trailing dog alerts, without corroboration, was

not harmless and it is the State's burden to show it is "clear beyond a reasonable doubt a rational jury would have found the defendant guilty absent the error." State v. Deadwiller, 2013 WI 75, ¶41, 350 Wis.2d 138, 834 N.W.2d 362.

The unreliable cadaver alerts inside the Bucki residence and nearby equipment allowed the State to argue Anita was killed in her house and her husband was necessarily the killer. Two, admission of the cadaver alerts allowed the State to argue Anita was moved throughout her property, for her disposal. Three, admission of the cadaver dog alerts allowed the prosecution to argue Bucki killed Anita in their house and transported her body, despite the extensive examination of the team of evidence technicians from the WCL who found no scientific evidence Anita was killed in her house. Four, the decision admitting the trailing dog alerts in Taylor County allowed the State to argue Bucki dumped Anita in the marsh, even though any alert was equally likely to be from Anita's scent as it was Bucki's. These alerts were *per se* unreliable, given Pollie's introduction earlier in the investigation to Anita's scent; the cross-contamination of the scent from the shoes at the Bucki residence; and the failure to dismiss Anita's scent at the marsh for both hounds.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH PREJUDICED THEIR CLIENT.

A. Standard of Review

In *State v. Johnson*, the Wisconsin Supreme Court determined the standard of review for the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact. State v. Johnson, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990) (*citing* Strickland v. Washington, 466 U.S. 668 (1984)).

In reviewing a post-conviction court's decision determining counsel was not ineffective, the trial court's "underlying findings of what happened" will not be overturned unless clearly erroneous. Johnson, p. 127 (*quoting* State v. Pitsch, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985)); §805.17(2), Stats. The ultimate determination whether counsel's performance was deficient and prejudicial to the defense are questions of law which this Court reviews independently. Johnson, p. 128.

B. Law

In order to determine whether trial counsel provided ineffective assistance of counsel (IAC), either before or during trial, the defendant must satisfy a two-part test. First, he must

show his counsel's performance was deficient. Second, he must prove the deficient performance prejudiced the defense. Strickland, p. 687; Pitsch, p. 634 (*citing* §805.17(2), Stats.). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. Strickland, p. 668.

Further, with respect to prejudice, the defendant must show counsel's deficient performance was sufficient to undermine confidence in the outcome. Strickland, p. 687. The aggregate of counsel's defective performance, as here, can also act to prejudice a defendant. State v. Thiel, 2003 WI 111, ¶59, 264 Wis.2d 571, 665 N.W.2d 305.

C. Counsel's Failure to Present and Argue Expert Witness Testimony at Trial to Challenge the Reliability of the Canine Evidence Was Deficient and Prejudicial.

At the post-conviction hearing, counsel described the various considerations in not calling Dr. Myers to testify at trial, particularly the defense concern the State would have been able to rebut his testimony with testimony from FBI Agent Stockham, who had testified for the State in the pre-trial hearings. Counsel agreed, however, Stockham's testimony provided the defense with "some good points" (R.415, pp. 20-21). Counsel also conceded Dr. Myers' proffered trial testimony

would have assisted the defense over a broad spectrum of issues (Id., pp. 13-19; 27;40).

In terms of prejudice, the failure to present Dr. Myers' testimony resulted in an unreliable outcome, regardless whether the State presented any testimony from Stockham. *See* Strickland, p. 687 (defendant must establish counsel's deficient performance prejudiced him and resulted in an unreliable or fundamentally unfair outcome in the proceeding); *See also* Harris v. Cotton, 365 F.3d 552, 556-57 (7th Cir. 2004) (counsel's failure to submit victim's toxicology report was prejudicial because reasonable probability jurors would have believed defendant's self-defense claim had they known victim was intoxicated).

The defense proffer from Dr. Myers provided a critical review of the training and certifications of the four handlers and their dogs, as well as the danger of cross-contamination from the exposure of the tennis shoes to Anita's scent in various respects. Dr. Myers would have told the jury there was no baseline reliability measure for these handler and dog teams, particularly on the basis of self-reported training records and without showing double-blind testing required for certification. The proffer included telling the jury the years of the ongoing presence of the shoes in the Bucki household and the

procedure for storing the human scent from the tennis shoes indicated contamination, thereby preventing any reliable determination of which scent the dogs were following at the marsh (R.387, pp.107-110). Stockham's pre-trial testimony effectively aligned with Dr. Myers' testimony and Stockham would have been compelled to testify similarly at trial.

The proffer included how, while there is less chance of cueing when a dog is "off lead," the possibility of cueing remains and is particularly dangerous when a dog, like Izzy, has only been "single-blind" tested (Id., pp. 34-37). Dr. Myers would have addressed the fact cadaver dog "Izzy" was susceptible to cueing, given the lack of any double-blind testing when, as here, there was only a single suspect who was being investigated at his and the victim's residence and from which the victim disappeared. It was McGill's knowledge of this information prior to the search which arguably led to the false positive alert on the pickup truck which the prosecution argued was used to transport the victim's body to the swamp. Dr. Myers' proffer asserts it was Trixie, who had been double-blind tested and who did not alert to the pickup truck, who was less susceptible to cueing for an alert on the pickup truck. "Cueing" is, therefore, a reasonable explanation for the difference in canine responses to the pickup truck and, later, for Izzy's

response to the “shallow grave.”

The State argued the alerts from the two canines who were double-blind tested corroborated the alerts by the canines who were only single-blind tested. Dr. Myers’ proffer would have explained to the jury how, if the alerts from all four of the canines were not reliable “to any known degree,” double-blind testing for two of the dogs would not have established reliability to any known degree for the “un-tested” dogs (R.387, pp. 107-108).

The reason counsel’s “strategy” in not presenting any expert canine testimony was deficient and prejudicial was the complete inability of the defense to forensically challenge the reliability of the State’s canine evidence. (R. 415, pp. 15-16). Counsel’s concern admission of this canine evidence meant the “defense was in trouble,” also meant counsel was required to redress this concern with testimony from Dr. Myers (Id., p. 85).

Counsel’s perception the lack of physical evidence corroborating the canine evidence was sufficient to impeach that evidence was uninformed and deficient performance, particularly when McGill testified there was “no scientific evidence the sample removed was what she was alerting to.” Additionally, as counsel conceded, juries like “science and

dogs," even without corroboration (Id.).

This unchallenged trial testimony of the four dog handlers failed to address how the canine testing process, unlike real life searches, is *per se* corroborative because the handlers know when evidence is present, or not, during testing. In "real world" searches, there is no confirming evidence (or corroboration) for any alert except in searches for "live" individuals by "tracking dogs", or the cadaver itself, and so "real world" searches are inherently less reliable. Florida v. Harris, Id.

The proffered testimony from Dr. Myers would have forensically challenged the reliability of Izzy's alert to the "disturbed earth" on the ATV trail, especially given the possibility "farmers had buried still-born babies in that area." This challenge would have included how, when moving water is present, an alert to human remains cannot determine to whom the remains belong, or when, or how, the remains got there (R. 398, p. 105).

Dr. Myers' proffer would have confronted McGill's contention Izzy's alert to the "ATV peg" was not a false positive, even though a swab indicated there were no human remains on the peg. The proffer would have explained how even scientists do not know what a canine alerts to, effectively

making “alerts” less, rather than more, reliable as McGill suggested (Id., pp. 109-110).

Jeanne Frost said she used her dog, “Trixie,” to inspect the Bucki farm in this investigation. Dr. Myers would have explained why Trixie was “not perfect” (Id., pp. 126-28). Frost testified false positive alerts (alert without human remains) are affected by “how the area was handled,” the “environment” involved, and a “ lot of factors” (Id., pp. 135-36).

Dr. Myers’ testimony would have been particularly instructive with respect to the testimony from handler Disher, who said she took her purebred bloodhound with AKC certification, “Pollie”, to the marsh in Taylor County on 5/10/13 to see “if I could place Mark Bucki’s scent at that scene” (Id., pp. 166-67;170-72;177-78;187). Disher described Pollie’s route from north to south and on both the west and east sides of the road before going “down to the ditch by a culvert located there.”

Dr. Myers would have explained the forensic significance of Disher’s description how Pollie had earlier followed Anita’s “live scent” at the residence and how this scent may have been “picked up” from the culvert near the

location of Anita's "live scent,"[12] even after her body was removed. In addressing Disher's description how Pollie "went that far" into the ditch near where the victim's body was found, Dr. Myers would have described the significance of the dismissal procedure addressed in the *Daubert* proceedings and post-conviction hearing. He would have explained how the dismissal procedure deployed at the marsh by law enforcement was defective for failing to dismiss Anita's scent before trailing the scent on the highway. That is, he would have described how law enforcement failed to account for Anita's scent at the marsh when Pollie had been earlier presented (a) with Anita's scent at the farm; (b) in the culvert at the marsh; (c) with Anita's cross-contamination in the tennis shoe; and (d) from her having resided for several years with the tennis shoes.

Dr. Myers' testimony would have addressed Vilas County Detective Horn's ("Missy") concession it was "definitely" better to trail a scent belonging "solely" to the person whom police were looking for, and the contaminating consequences for not doing so (Id., p. 224), rather than a scent from a

[12] Pollie followed Anita's live scent to the end of the Bucki driveway to Wegner Road, suggesting the scent might have left the area "in a vehicle" (Id., pp. 188-89).

combined (household) source because individuals who live in the same house combine their scents. Based on his pre-trial testimony, Agent Stockham would have agreed.

Defense counsels' "group" decision not to call Dr. Myers to testify at trial cannot even be characterized as a "strategy", much less presumed reasonable, as required by Strickland, p. 687, when counsel effectively transferred the decision whether to call Dr. Myers to testify to their client (R.415, pp. 28-29; 31-32; 100-01). The decision by trial counsel to have their client decide whether to have Dr. Myers testify at trial was made even though Bucki had no involvement in investigating the canine evidence or in preparation of any defense to this evidence at trial. Attorney Schuster's attempt to rationalize this deficient performance by explaining Dr. Myers' testimony "may have been unnecessary" (given the lack of corroborating physical evidence) was deficient (Id., p. 29).[13] It was deficient because counsel was aware the "process" of canine detection does not necessarily require corroboration by physical evidence for any alert (except in the testing process). This is

[13] Post-conviction counsel has been unable to find a state or federal case which requires the prophylactic "presumption" a trial strategy was reasonable, as required by *Strickland*, when that strategy involved relegating their decision whether to present expert testimony at trial to the defendant, thereby insulating this "decision" against any Sixth Amendment evaluation of counsel's performance.

why counsel was aware admission of the canine evidence meant the "defense was in trouble" (Id., p. 85).

Once counsel and Bucki determined the general defense objective was, as here, acquittal, counsel has the control and responsibility to make all trial decisions in seeking acquittal. *See* State v. Eckhart, 203 Wis.2d 497, 510, 533 N.W.2d 539 (Ct. App. 1996); Jones v. Barnes, 463 U.S. 745, 751 (1983) (*citing* Wainwright v. Sykes, 433 U.S. 93 (1997)); State v. Kimbrough, 2001 WI App 138, ¶32, 246 Wis.2d 648, 630 N.W.2d 752 (counsel not IAC in failing to seek a lesser-included verdict because the evidence in support of acquittal was "not weak").

Counsel cannot reasonably assign the responsibility of the "ultimate say" to their client in the absence of their client's relevant personal experiences or vocational experiences, or education, and when the client has not insisted on having some control over or been involved in any other strategic decisions. Counsel could not even recall why Bucki agreed not to present Dr. Myers's testimony at trial. (Id., pp. 76-77; 102; 107). Instead, Bucki testified at the post-conviction hearing he had no real involvement in any of the pre-trial canine defense strategy, thought Dr. Myers would testify, and offered no particular expertise or knowledge regarding canines which

would have made counsel believe Bucki's involvement, as a part of a "team" strategy, would assist the defense (R.416, pp. 70-71). Contrary to the defendant's own perception expert witness testimony at the *Daubert* hearing was helpful, his attorney's ambivalent perception of that testimony made him "flabbergasted" (Id., p. 76).

In summary, a forensic explanation was necessary to require the jury's evaluation of the canine evidence with something more than their own endearing prior experiences with their canines.[14]

D. Counsel's Failure to Present Expert Testimony Regarding the Contamination of the Scent from the Tennis Shoes Used to Place Bucki at the Marsh Was Deficient and Prejudicial.

Bucki asserts the scent used was doomed, *a priori*, to be contaminated when the State negligently failed to employ an item of scent singular to the canine "quarry," such as clothing worn only by a defendant. State v. Barger, 612 S.W.2d 485 (Tenn. Crim. App. 1980) (bloodhound evidence, from sniffing defendant's clothes, properly admitted). It was doomed because the "live scent" article from the tennis shoe, was contaminated by the open presence of the tennis shoes

[14] *See* Illinois v. Caballes, n. 5, *infra*.

in the Bucki household. People v. Willis, 115 Cal. App.2d 379 (Cal. Ct. App. 2004) (scent evidence obtained by the use of scent transfer unit not admissible without proof correct procedures employed).

The haphazard packaging and "scent transfer" from the tennis shoes, following their removal from the Bucki residence, also created the reality the tennis shoe scent would be additionally cross-contaminated by scents from other evidence seized, including personal items seized from the house belonging to Anita. Because, as Dr. Myers testified, we don't know what combination of scents dogs smell when they alert, the jury should have heard about the proper procedures for evidence collection, transfer and storage, so the jury would have been able to evaluate whether the collection, transfer and storage of this evidence contributed to the cross-contamination of Anita's scent, as it existed on the highway and in the marsh.[15]

Even though Detective Horn unequivocally admitted "Anita's scent could have gotten onto the shoes, based on the fact that Anita lived in the house and scents of occupants can

[15] The court denied the post-conviction discovery motion seeking evidence regarding the storage procedures and potential contamination of the tennis shoes prior to their use in the marsh (R.412, p. 22).

commingle on a single article," this concession cannot fully substitute for a forensic expert's testimony why the hounds were, in fact, equally likely to be "following Anita's scent [at the marsh] as opposed to the defendant's scent."

Clint Bucki's post-conviction testimony and affidavit (Exhibit B to Petition) established his mother had access to, and use of, Clint's tennis shoes after he left them at home in September, 2010. Both the affidavit and post-conviction testimony establish Clint saw his mother wearing the shoes (R.415, pp. 165-66; 168). Clint said he believed he shared this information pre-trial with his father's attorneys (Id., p. 166), although Attorney Lex testified otherwise.

Counsel's failure to present testimony from Clint on cross-examination (rather than recross-examination) that his mother also wore the tennis shoes was deficient. This performance prejudiced Bucki because counsel was then unable to argue how it was the presence of Anita's scent which accounted for why Pollie "went that far" into the ditch (toward Anita's body) in Taylor County before allegedly "alerting" to Bucki's scent.

Counsel's testimony at the post-conviction hearing, subject to his conceded loss of memory, provided no explanation why counsel waited until recross- examination to

question Clint regarding his mother's use of his tennis shoes. Counsel's posing the question on recross belies the fact he had no reason to expect the witness to say he saw his mother wear the shoes. If, on the other hand, there had been no pre-trial discussion about Anita wearing the shoes, counsel would not have thought to ask the question, regardless whether the information might not have come directly from Clint (R.415, pp. 105-06). In fact, if the question had been properly posed during cross-examination, Clint would have described the events articulated in his affidavit and his post-conviction testimony (Id., pp. 165-66; 168).

E. Counsel's Failure to Discredit the Prosecution Theory the "Disturbed Dirt" on the ATV Trail Was a "Shallow Grave" Was Unfairly Prejudicial.

At the post-conviction hearing, counsel testified there was no need to present any specific challenge to the prosecution argument the canine "alert" on the "disturbed dirt" on the ATV trail established Bucki's attempt to bury his wife's body on his property after she was killed. Counsel characterized this evidence as "insignificant" and only a "red herring," even though the State's case included photos depicting a canine alert (pawprint) on the disturbed dirt (R.415, p. 43-44; 46).

If counsel actually believed this argument was a "red herring," reasonable performance required counsel attack the prosecution theory in closing argument and clarify how this evidence was nothing more than a red herring. *See* Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003) (*citing* Herring v. New York, 442 U.S. 853, 862 (1975)) (closing argument should "sharpen and clarify the issues for the resolution by the trier of fact"). In that context, Bucki asserts counsel were required to attack the theory with photos provided with the discovery of law enforcement's UTV "flat tracks" at the area of the disturbed dirt, along with the testimony from DOJ Special Agent Pendergast, who explained any evidence the ATV trail was "driven on" leading toward the disturbed area was only from law enforcement vehicles and not from Bucki's ATV.

Correspondingly, counsel would then have been able to argue to the jury how Izzy's alert at the disturbed dirt was further unreliable because, as Bucki's post-conviction testimony developed, there was no physical evidence Bucki's "totally different" and "round [ATV] tires" had been used to transport his wife's body up the hill toward the disturbed dirt (R.416, pp. 86-87; 92-93).

Counsel was wrong and Bucki was prejudiced because the defense passed up a chance to establish how this

"insignificant" evidence of the unreliability of Izzy's alert on the disturbed dirt undermined the reliability of other critical alerts, thereby challenging the entire prosecution theory. For example, if the alert on the disturbed dirt (and pick-up truck) was unreliable, then the reliability of the alerts on equipment located in the Bucki garage were also likely unreliable.

CONCLUSION

For all the reasons stated, this Court should vacate the defendant's conviction and order a new trial.

Dated at Wauwatosa, Wisconsin, this 28th day of November, 2018.

Respectfully submitted,

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CERTIFICATION

I certify this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Brief prepared using the following font:

> Proportional sans serif font: 12 characters per inch, double spaced; 2 inch margins on the left and right sides and 1 inch margins on the other two sides. The length of this Brief is 10,779 words.

Dated: November 28, 2018

JAMES REBHOLZ

E-FILING CERTIFICATION

Pursuant to §§809.19(12)(f) and 809.32(fm), Stats., I hereby certify the text of the electronic copy of the Brief is identical to the text of the paper copy of the brief filed.

Dated at Wauwatosa, Wisconsin, this 28th day of November, 2018.

JAMES REBHOLZ

APPENDIX CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as part of this Brief, is an appendix which complies with §809.19(2)(a) of the Wisconsin Statutes, and contains:

(1) a table of contents;

(2) the findings or opinions of the trial or post-conviction court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial or post-conviction court's reasoning regarding those issues.

I further certify that, if this Brief is from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

Signed:

JAMES REBHOLZ

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