STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case Nos. 2018AP1593-CR & 2018AP1594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO L. BELL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Orders Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable David Borowski & Carolina Stark, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

JORGE R. FRAGOSO
Assistant State Public Defender
State Bar No. 1089114

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

Attorney for Defendant-Appellant

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ARGUMENT

I. Mr. Bell is entitled to an evidentiary hearing because his trial attorney was ineffective for failing to interview and subpoena a third-party perpetrator.

Mr. Bell's postconviction motion alleged that trial counsel was deficient for failing to investigate evidence that AC had chlamydia and for failing to subpoena AC for trial. This evidence would have supported a defense that AC, not Mr. Bell, was responsible for assaulting and infecting SE. Armed with this evidence, there is a reasonable probability that Mr. Bell would not have pleaded no contest and would have insisted on going to trial.

The state contends that Mr. Bell has failed to meet his burden and that the court was correct in denying his request for a hearing. The state relies on two main assertions to support its position: that Mr. Bell "knew about the evidence supporting his claim that AC could have committed the assaults before he entered his pleas" and that "such evidence would not have been admissible at a trial." (Respondent's Br. at 2.)

A. Did Mr. Bell know about the evidence?

The state claims that Mr. Bell failed to "allege with specificity what the investigation would have revealed and how it would have altered the outcome

of the case." (Respondent's Br. at 11.) The investigation would have revealed the same evidence that postconviction counsel's investigator found: that AC was willing to testify that he was dating SE, that they were having intercourse, and that he had chlamydia. (42:5.) This information would have altered the outcome of the case by providing a direct source for SE's positive Chlamydia diagnosis. Without it, the state would have blamed SE's diagnosis on Mr. Bell through hearsay and insinuation. Defendant's postconviction motion alleged those specific facts and argued that, armed with these facts, Mr. Bell would have insisted on going to trial. (42:8.) In support of this claim, the motion presented evidence that Mr. Bell's plea was entered at a late date, he maintained his innocence during statements to the PSI author, and he stated, at sentencing, that his plea was motivated by trial counsel's failure to investigate AC. (42:8.)

The state also argues that, before entering his plea, Mr. Bell knew "that AC was having sex with SE, and that AC tested positive for Chlamydia." facts (Respondent's Br. at 11.) If true, the state continues, then trial counsel's failure to investigate AC would be of no consequence because it is not clear "what more counsel should have discovered." (Respondent's Br. At 12.)

The police reports did contain allegations that SE's mother told police that SE had "tested positive for an STD" and that she "had been having sex with" AC. (42:18.) Likewise, AC's mother told police that

AC had tested positive for Chlamydia. (42:18.) Neither SE's mother's nor AC's mother's statements would have been admissible at trial. The court expressed concern about how this evidence would be presented at trial, saying, "We can't just say some alleged boyfriend, who we don't know either, does or does not exist, had Chlamydia, thus, he naturally was an alternate source for the victim." (100:130.) This issue clearly required investigation. Postconviction counsel's investigator was the first to obtain usable evidence that AC "was dating SE," that they were "engaging in sexual intercourse," and that AC "tested positive for Chlamydia." (42:5.) This evidence came in the form of testimony from AC himself, evidence which was not available before trial because of trial counsel's deficient performance.

Trial counsel had a duty to "conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits." *State v. Mayo*, 2007 WI 78, ¶ 59, 301 Wis. 2d 642, 734 N.W.2d 115 (internal quotations omitted). The careful investigation of a case and the thoughtful analysis of the information it yields is one of the most important elements in the effective assistance of counsel. *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970). This duty to investigate extended to investigating AC as a potential third-party perpetrator. Armed with this evidence, Mr. Bell would not have pleaded no contest and would have insisted on going to trial. He will testify to that fact if granted a hearing.

This allegation is corroborated by the fact that Mr. Bell maintained his innocence before his plea, during his interview with the PSI author, and at sentencing. In fact, at sentencing, Mr. Bell specifically stated that he was pleading no contest because his lawyer was unprepared for trial: "I would also like to state for the record the only reason I took the plea is because my lawyer—you know, he could have done more things I asked him than what he did." (110:29-30)(emphasis added). Trial counsel needed to pursue evidence that AC was responsible for the charged assaults. Had this evidence been pursued, Mr. Bell would have insisted on going to trial. Therefore, Mr. Bell was denied the effective assistance of counsel when trial counsel failed to satisfy the duty to investigate evidence related to AC.

B. Such evidence would not have been admissible

The state's case rested, in significant part, on the fact that SE and CB tested positive for chlamydia. (109:7-8.) The state pointed out in each of the complaints that the victims had Chlamydia, and when it sought to join the cases, the state argued that both cases "involve allegations that each of the victims have contracted Chlamydia." (100:6.) The State was unable to prove that Mr. Bell had, or was treated for chlamydia. It attempted to subpoena Department of Health records to show that Mr. Bell had chlamydia, but the search came up empty-handed. (109:11.) Nevertheless, the state claimed that Mr. Bell is likely to have undergone treatment

for Chlamydia at some point because "treatment for Chlamydia is widely available" and "any antibiotic would get rid of it." (109:11.) That is why the state saw the victims' common diagnosis of Chlamydia as proof of Mr. Bell's guilt even though it acknowledged that it "can't prove the defendant had Chlamydia." (109:11.) The state theorized that there would be no other explanation for the young victims to contract the disease. (102:10-11; 109:11.)

The State cannot make chlamydia central to the case and then complain when the defense seeks to prove that the disease came from someone else. Nevertheless, the state argues that evidence of AC as an alternate source of Chlamydia is inadmissible under *Denny* and under the rape shield law. (Respondent's Br. at 12.)

1. Third-party perpetrator evidence.

Mr. Bell's constitutional right to present a defense includes the right to present evidence that a third party was responsible for the charged conduct. *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). Under the *Denny* test, the defendant must show that the third party had motive, opportunity, and a direct connection to the crime. *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999). Although the defendant must provide at least minimal evidence satisfying each of the three prongs, evidence supporting one prong may be "so strong that it will affect the evaluation of the other

prongs." *State v. Wilson*, 2015 WI 48, ¶ 64, 362 Wis. 2d 193, 864 N.W.2d 52.

Defendant's postconviction motion alleged that AC's motive to have sexual intercourse with his girlfriend was "sexual gratification." (42:6.) The opportunity prong was satisfied by evidence that AC and SE were actually having intercourse, which fact necessarily proves that he had an opportunity to have sex with SE. (42:7.) Finally, evidence that AC had Chlamydia—in light of the fact that Mr. Bell did not—supplies a direct connection between AC and both victims. (42:7.) The chlamydia diagnosis provides a strong direct connection and should be weighted heavily. All three elements of the *Denny* test were properly alleged in defendant's postconviction motion.

The state claims that a desire for sexual gratification "does not explain how that gave AC the motive to have … penis-to-vagina intercourse with SE on a couch in [her] house when she was 15 years old." (Respondent's Br. at 13). This argument is conclusory, and in so far as the state is arguing that a teenage boy who has sex with his girlfriend is not motivated by a desire for sexual gratification, the argument is in violation of common sense.

In addition, the state argues that Mr. Bell "has to prove that AC had the opportunity to commit the specific acts involving SE that are alleged in the complaint." (Respondent's Br. at 14). According to the state, the fact that AC and SE did have sex is not

enough to show opportunity; Mr. Bell would have to prove that AC had the opportunity to have sex with SE as alleged in the complaint, i.e., on a couch in her house. This argument stretches the *Denny* test beyond the bounds of absurdity. The fact that they had sex is sufficient to show opportunity to have sex on a couch in SE's house.

The state also argues that "the undisputed facts that SE and AC were having sex, and that AC had chlamydia" do not satisfy the direct connection prong because they fail to connect AC to the specific allegations in the complaint. (Respondent's Br. at 14). The combination of the following facts provides a direct connection to AC that the state is otherwise blaming on Mr. Bell: AC had Chlamydia, SE had Chlamydia, and Mr. Bell did not have Chlamydia. That is a direct connection.

The state variously points out that Mr. Bell did not argue for the admissibility of *Denny* evidence to counter the allegations that Mr. Bell "touch[ed] SE's vagina over her clothes when she was seven years old" or that he sexually assaulted CB. (Respondent's Br. at 13-14.) The defendant does not need to prove either of these things. It was the state's decision to charge both allegations by SE in one complaint, and it was on the state's motion that the cases against SE and CB were joined for trial. The fact that AC had Chlamydia presents a source for SE's Chlamydia diagnosis, a diagnosis which the state intended to blame on Mr. Bell. The admissibility of the *Denny*

evidence does not have to rebut every allegation against Mr. Bell, only the one it is intended to rebut.

The state argues that Mr. Bell has failed to establish that evidence related to AC creates a "legitimate tendency" that AC committed the crimes. (Respondent's Br. at 13 (*citing State v. Wilson*, 2015 WI 48, ¶¶ 52, 64, 362 Wis. 2d 193, 864 N.W.2d 52).) The legitimate tendency test asks "whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." *Denny*, 120 Wis. 2d at 624. Here, the evidence related to AC is presented to show an alternate source of SE's Chlamydia. AC would testify not only that he had had sexual intercourse with SE but that he had Chlamydia. This evidence is not so remote in time, place or circumstance that a direct connection cannot be made. The evidence is admissible under *Denny*, and this court should remand for a *Machner* hearing to determine whether trial counsel possessed any strategic reason for failing to pursue this evidence.

2. Rape shield law.

The proffered evidence, though inadmissible under the rape shield law, would be admissible under *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). The evidence "is not outweighed by the state's compelling interest to exclude [it]" and it satisfies the five factors in *State v. St. George*, 2002 WI 50, ¶¶ 19-20, 252 Wis. 2d 499, 643 N.W.2d 777. The state does not present a compelling interest to exclude the

evidence, and it does not seem as though one exists. (Respondent's Br. at 18). Further, the state concedes the first two factors of St. George but argues that the evidence is not "highly relevant," that it is not "necessary to [Mr.] Bell's defense," and that its prejudicial effect "vastly outweigh[s] its probative value." (Respondent's Br. at 17.)

As argued above, the evidence is "relevant to a material issue" and "necessary to the defendant's case" by virtue of the same fact: the state made Chlamydia central to its case. It mentions Chlamydia in both of its complaints against Mr. Bell, and when arguing for joinder, the state asserted that both cases "involve allegations that each of the victims have contracted Chlamydia." (100:6.) The clear implication is that they contracted Chlamydia from the same source, but the state now challenges the introduction of evidence pointing to a source other than Mr. Bell.

The state also argues that admitting the evidence in this case would violate the purpose of the rape shield law, which is to "protect victims of sexual assault from themselves becoming the focus of scrutiny during trial." In Interest of Michael R.B., 175 Wis. 2d 713, 727, 499 N.W.2d 641, 647 (1993). However, evidence that AC and SE had sexual intercourse would be introduced for the limited purposes of showing a source for the Chlamydia and to provide an alternative source for SE's sexual knowledge. The evidence is not offered to make SE the focus of scrutiny; in fact, by introducing the evidence through AC's testimony, the focus of the

evidence would be on AC, no SE. Moreover, limiting instructions could be utilized to prevent misuse of the evidence by the jury. See Pulizzano, 155 Wis. 2d at 652-53.

Finally, the state argues that defendant's application of the Pulizzano exception is novel because there are no published cases "holding that defendants can use the exception in the way that he wants to use it." (Respondent's Br. at 16 (*citing State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 23; *State v. McMahon*, 186 Wis. 2d 68, 84–85, 519 N.W.2d 621 (Ct. App. 1994).) Neither *Lemberger* nor *McMahon* apply to this case. Mr. Bell alleges that trial counsel was deficient for failing to investigate, not for failing to raise a "novel argument." *Lemberger*, 374 Wis. 2d 617, ¶ 18 (*quoting Basham v. United States*, 811 F.3d 1026, 1029 (8th Cir. 2016)). Although "ineffective assistance of counsel cases [are] limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue," the duty to investigate AC was clear. *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994).

Trial counsel performed deficiently by not investigating and subpoenaing AC. The proffered evidence would have been admissible at trial, and armed with this evidence, Mr. Bell would have insisted on going to trial. This court should remand for a *Machner* hearing.

II. Mr. Bell is entitled to an evidentiary hearing because CB's recantation is newly discovered evidence warranting plea withdrawal.

The state argues that Mr. Bell's second issue fails to meet the test for newly discovered evidence. (Respondent's Br. at 20-21 (*citing State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997); *State v. Ferguson*, 2014 WI App 48, ¶ 24, 354 Wis. 2d 253, 847 N.W.2d 900).) Newly discovered evidence constitutes a manifest injustice—and warrants the withdrawal of a plea—when the following conditions are met:

1. The evidence was discovered after conviction;
2. The defendant was not negligent in seeking evidence;
3. The evidence is material to an issue; and
4. The evidence is not merely cumulative;

State v. McCallum, 208 Wis. 2d 463,473,561 N.W.2d 707,710-11 (1997).

Mr. Bell concedes the state's argument that the allegations are relatively "sparse" (Respondent's Br. at 21), but that is because CB is a minor and her mother did not allow postconviction counsel's investigator to speak to CB directly. However, the state's concerns regarding the motion's sparsity address the credibility of the recantation, and that is the purpose of the evidentiary hearing.

The postconviction motion alleged sufficient facts to warrant a hearing. It relied on a statement by TB, CB's aunt, that she has had contact with CB multiple times and that CB told her the following:

1. Her father did not sexually assault her,
2. She was encouraged to blame her father by AC, and
3. AC is actually the person who had sexual contact with her.

(79:3.)

TB would also be expected to testify that CB's mother urged CB to accuse Mr. Bell as a way to get him out of her life so she could pursue other interests. (79:4.) At a hearing, CB would be questioned regarding these matters.

According to TB, CB's recantation happened approximately five years after the conviction, so the first three conditions are met. (79:6.) With regard to the fourth condition, Mr. Bell argues that CB's subsequent recantation is not merely cumulative because CB is considerably older and has maintained her dad's innocence for a substantial period of time—the fact that she remains consistent in claiming his innocence five years later and much closer to adulthood provides context that makes this recantation more than merely cumulative. (79:6.)

When the newly discovered evidence is a recantation, the recantation must be corroborated by other newly discovered evidence. *McCallum*, 208 Wis.

2d at 473-74. The corroboration requirement is met if there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 477-78.

The motive for CB's recantation—that the person who actually assaulted her is also the one who told her to accuse Mr. Bell—is new. The threat implied in this situation is a meaningful one and provides a familiar motive for making an initial false statement. Moreover, the question of whether the recantation is internally consistent is one that cannot be answered until CB testifies under oath, so it cannot be a threshold questions regarding whether Mr. Bell should be granted a hearing. (79:8.) This court should remand the case for an evidentiary hearing on the newly discovered evidence.

CONCLUSION

Dated this 7th day of June, 2019.

Respectfully submitted,

JORGE R. FRAGOSO
Assistant State Public Defender
State Bar No. 1089114

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

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,989 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of June, 2019.

Signed:

JORGE R. FRAGOSO
Assistant State Public Defender