

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018AP1665-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

CHESTER J. MASS,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
FILED ON JUNE 26, 2015, AND THE ORDER
DENYING POSTCONVICTION RELIEF FILED ON
JULY 3, 2018, IN THE KENOSHA COUNTY CIRCUIT
COURT, THE HONORABLE CHAD G. KERKMAN,
PRESIDING.
KENOSHA COUNTY CASE No. 2013CF1394

DEFENDANT-APPELLANT'S BRIEF
AND SHORT APPENDIX

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STATEMENT OF THE ISSUE

In a case involving whether a shooting was an accident or intentional, whether Chester Mass received ineffective assistance of counsel where his trial counsel failed to obtain the opinion of a forensic pathologist who would have countered the State's expert that Mass' explanation of the offense was not possible?

The circuit court concluded that trial counsel did not perform deficiently because Mass gave differing explanations about the shooting and the expert Mass presented at the postconviction motion hearing was not significantly different than the State's expert at trial, and therefore the claim of ineffective assistance was denied.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mass would welcome oral argument if it would assist the panel to understand the issue presented or answer any unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Mass does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well-settled rules of law and controlling precedent, with no call to question or qualify said precedent. Thus, this case is likely not appropriate for publication and no such request is made.

STATEMENT OF THE CASE

Chester Mass was charged with first degree intentional homicide by the use of dangerous weapon

for the shooting of Heather Adamski¹. (1:1-4); (9:1). The shooting occurred at Mass' residence in the early morning hours of December 4, 2013. (1:1-2). Mass' brother Justin Mass called the police who responded by surrounding the house. (1:1-2). Eventually, Mass left the residence in custody. (1:2). Mass explained to police that Heather was shot by accident. (1:2). A jury trial subsequently commenced.

Jury Trial Proceedings

During opening statements, the prosecutor explained his view that the evidence would show the shooting was not an accident. (211:86-95). In particular, the prosecutor told the jury that Mass told police that Heather was playing with the gun and he grabbed it from her while she faced forward bent over, and the gun went off. (211:90-91). But, according to the prosecutor, Dr. Brian Peterson would tell them the bullet did not enter the back of her head, but the top portion and it went straight down. (211:91). The prosecutor told the jury that the positioning was consistent with Mass firing the gun while Heather was performing oral sex on him. (211:91-92).

Justin Mass was the first witness. (211:98). He testified that the night of the shooting he went with Mass to purchase guns to protect his house. (211:100-04, 113, 142). As Mass would explain later in the trial, he did so because criminals in the neighborhood had threatened him. (213:5-8). Mass also believed he had been setup after a recent incident where he was assaulted on the street while holding a lot of cash. (212:221).

After getting back to Mass' house from purchasing guns, Justin went to sleep. (211:105, 113). Justin woke up to his brother shaking him awake saying that Heather had been shot. (211:113-14).

¹ Mass was also charged with felon in possession of a firearm, but this charge was not contested. (1:1); (9:1); (211:96).

Justin could see her body in his brother's bedroom. (211:113-16).

Justin helped his brother move the body so that paramedics could get to her and try CPR. (211:156, 159). Justin had the thought that his brother might kill him too or set him up for what happened. (211:115-16). When his brother was not looking, Justin ran off. (211:114-16). When Justin was away from the house, he called the police. (211:123-24).

When asked if he thought Mass shot Heather because he believed Heather set him up over his assault on the street, Justin said no. (211:109-10, 155). Justin explained that Mass was on too many drugs to plan it out. (211:155). Justin was also aware that Mass had taken Heather and Heather's daughter to a hotel recently due to Mass' fear about their safety. (211:155-56).

When the police responded to Mass' house, Mass resisted leaving the house at first. (211:207-08). Lieutenant Bill Beth testified about the process of taking Mass into custody. (211:207-08). Beth explained that Mass was "really agitated," and talked nonstop. (211:216). The officers believed there were weapons in the house, so they established a perimeter and made efforts to have Mass come out peacefully. (211:208-09, 219-20). There was also a concern that Mass was going to kill himself. (211:214-15). Eventually, Mass peacefully left the house and taken into custody. (211:222).

Lieutenant Beth testified that before he exited the house, Mass said the shooting was an accident. (211: 214, 218). Specifically, Heather was performing oral sex and when they went to change positions, Mass took the gun out of her hand and the gun went off. (211:218). He wasn't aware that the hammer was pulled back. (211:218). Mass said the bullet hit her in the back of the head. (211:218).

Sergeant James Beller was one of the officers who interrogated Mass. (211:174-75). Mass told him about purchasing guns the night of the shooting for protection. (211:176). In fact, Mass said he had asked Heather if she wanted a gun. (211:191-93). Mass explained that he wanted to have sex, so he sent a text to Heather that he was throwing out her stuff. (211:177). When she came over, they engaged in sexual activity and were playing with the gun. (211:177). He told the officers that she gave him oral sex and then they changed positions, with Heather facing away, and that is when the gun went off. (211:195-96).

Amy Hernandez testified about Mass and Heather's relationship. (212:8). She was married to Mass' brother, Joseph Hernandez. (212:7). She knew Mass and Heather for ten years. (212:8). Amy testified that in October, while Mass and Heather were over at her house, Mass took Joseph's gun, pointed it at Heather, and said he would kill her. (212:9, 12). Joseph later testified that the incident Amy testified about occurred while Joseph was cleaning the gun and it was empty. (212:36-37). Amy agreed too that when Mass pointed the unloaded gun, he was playing around. (212:26).

The night of the shooting, Heather came to Amy's house after leaving work. (212:12-13). She got a call from Mass and then left. (212:13). Later, in the early morning hours, Mass' brother Justin came to the house appearing scared and shaken. (212:14-15). About an hour later, Mass called Amy and asked if she knew where Justin and Heather were at that time. (212:15-16). Amy testified that he then called from Heather's phone again asking about Heather, and that Mass seemed panicky to her. (212:16-17). Amy testified that she told police that Mass explained that the shooting happened because they were fooling around with the gun and the gun went off while having

oral sex. (212:20). He also said it was an accident. (212:21).

Joseph Hernandez testified that Mass was his brother and that he knew Heather for over 10 years. (212:28-29). Joseph recalled that the night of the shooting, Mass and Justin came to his house to see if he knew where he could get a gun for his protection from people in the neighborhood. (212:34, 41). Joseph was also present later when Heather was going to Mass' house. (212:34-35). He testified that Mass had made threats to Heather many times. (212:31). He warned her not to go because he was concerned about her safety, although he did not call police. (212:40).

Witnesses Gabriel Hernandez and Tim Kramer both testified that Mass and Justin had approached them about purchasing guns. (212:45, 50). Mass purchased .22 caliber revolver and shotgun from Kramer. (212:51-54). It was the .22 caliber revolver that fired the fatal shot. (213:17-22). Firearms expert Mark Simonson testified that the .22 caliber revolver used in the shooting had a trigger pull on the light side. (212:74-76).

The State called nurse Rebecca Rodriguez to testify about an abrasion that appeared on at the top of Mass' penis. (212:142, 147). While taking swabs for testing, she noticed the abrasion. (212:146-47). She informed a detective about it and Mass was returned to her for photographs of the abrasion. (212:148-49). She noticed that it appeared to have healed. (212:149). The State asked her what it looked like, but defense counsel objected, which the court sustained. (212:150-51).

The State called Heather's mother and daughter to testify about Mass' relationship with Heather. (212:162, 169). Heather's mother Laura Marigliano testified that Heather and Mass had a relationship over a 15-year period. (212:164). They would argue and both of them would throw things. (212:165-66). She

testified that Mass would get violent as well. (212:165).

Heather's daughter P.A. testified that there was constant arguing between Mass and Heather. (212:172). She described incidents where Mass had injured Heather. (212:172). She testified that she knew about the incident not long before shooting that someone had hit Mass with a bat. (212:176) She testified that Mass had told her if he found out Heather had anything to do with it, he would kill her. (212:176-77). At the same, she testified that Mass took her and Heather to hotel for a few days. (212:177-78).

The State saved Dr. Brian Peterson as its last witness before resting its case. (212:182). Dr. Peterson testified that Heather died due to a single gunshot wound. (212:190-91). He described the entrance wound as above the ear and just in front; high on the parietal bone on the left. (212:191-93). The State asked Dr. Peterson about the fact that in one of the autopsy photographs, it appeared that the entrance was behind the ear, but Dr. Peterson explained that was because the ear had been removed. (212:193-94). Dr. Peterson explained that the trajectory was left to right and downward. (212:194). The State asked if the trajectory was back to front at all, and Dr. Peterson testified it did not move back to front. (212:194, 198).

The video of Mass' interrogation was played for Dr. Peterson and he testified that aside from the distance, what Mass explained "doesn't work." (212:197-98). Dr. Peterson explained that if Heather were facing away from Mass, the entrance would be in the back of the head and the angle would be lower. (212:198). But, the bullet did not move from back to front. (212:198). It came in from the left, went left to right, and downward. (212:198). He did not testify about whether Heather's head could be turned or tilted in a manner that could be consistent with Mass' explanation. Instead, Dr. Peterson said he could not

bend him arm to a position to make that work. (212:198). Thus, what Mass said was not possible. (212:197-98).

During cross examination, counsel asked about Heather's toxicology report and other findings indicated on the autopsy report. (212:199-205). She also asked Dr. Peterson if he could say where the body and gun were at the time of the shot, and Dr. Peterson said that he cannot, and can only answer hypotheticals. (212:206-07).

After the State rested, outside the presence of the jury, Mass informed the judge that he had spoken to defense counsel about how to address Dr. Peterson's opinion. (212:211). He explained that his prior attorney had spoken with a doctor named Robert Corliss, but defense counsel did not want to continue using Dr. Corliss or any expert at all. (212:211-12). In response, defense counsel said, "[prior counsel] Attorney Perz talked to another forensic person. They did not support a different conclusion here. So I did not retain an expert for that reason." (212:212).

Defense counsel called only Chester Mass to testify. (212:219). He explained that he had a relationship with Heather since 1998. (212:220). He agreed that they fought and argued a lot during their relationship. (212:30).

Mass recounted the day he was assaulted by someone with a baseball bat. (212:221). He also explained that Heather told him that the gang in the area had shaken the window on the house to scare Heather's daughter. (212:226). Mass decided to leave the hospital early from his injuries he sustained from the assault, in order to better protect Heather and her daughter and he took them to a hotel. (212:227). Counsel asked Mass if he thought Heather set him up and Mass testified he did not know. (213:4).

Mass explained that he went to get guns after a person made a gun gesture to him in the neighborhood. (213:5). He did not know what else to do, because he had tried resolving it and tried to get help from the police. (213:6). The night of the shooting he purchased a shotgun and a .22 caliber revolver. (213:6-8). Mass testified that he had asked Heather by text message if she wanted the .22 revolver. (213:7-8).

After purchasing the guns for protection, he got back to his house. (213:10, 12). Mass' roommate told him that Heather had been there looking for him and that she went to Joseph's house. (213:10-11). Mass called Heather, who was upset that he was taking too long after he was supposed to meet her at the bar where she worked. (213:11).

Mass wanted Heather to come to his house so he sent a message saying her clothes were being thrown out. (213:15, 53). Mass really just wanted her to come over because he wanted to have sex. (213:11-12). Mass had no plan to kill Heather. (213:12). He was planning on giving her money for her and her daughter, and then leaving for Arizona to be with his wife. (213:12-13).

When Heather came over to the house, she was upset with Mass for having paid too much for the guns. (213:11-12, 17). Eventually, he had her come to his room to look at the guns. (213:17-18). She started playing with the gun, so he took it from her and set it down. (213:18). Then she performed oral sex on him, and she picked the gun back up and pointed it at his penis thinking it was funny. (213:19). He told her to quit playing with the gun. (213:19).

The shot occurred when she grabbed the gun from him to pull it away. (213:22). Just as it happened, she booted him back and he booted her forward. (213:22). The space was very tight and there was a television in front of her. (213:22). Her face went

towards the television and when he pulled the gun out of her hand, it went off. (213:22, 61-62).

Mass testified that afterwards, he was “freaked out” and was “panicked.” (213:68). Mass did not deny moving her body. (213:23-24, 63). He thought to take her body by a creek or a drug dealer’s house. (213:67-68). He also did not deny sending messages to her phone to make it look like she was not at his house. (213:70-71). He thought he would kill himself. (213:24-25, 28). He said he “was not thinking logically” and “kind of like had a breakdown afterwards.” (213:28).

In its closing argument, the State emphasized the forensic evidence and its theory that Mass shot Heather while she was kneeling in front of him. (210:41-43). The State argued that Mass’ story was “impossible.” (210:42-43). The State argued that Mass said it went off while she was giving him oral sex, then to the police later that it went off while she bent away from him, and then at trial he explained that she turned to avoid the TV when the gun went off. (210:41-42). The State told the jury that it was impossible to be falling forward, twisting, and still have the bullet go straight down. (210:42).

The State claimed that the one time Mass was telling the truth was when he said he shot her during oral sex. (210:41). The State argued that Mass was contemptuous enough to shoot her in this manner. (210:44). The State supported that argument by claiming the abrasion on his penis was proof that he did shoot her at that time. (210:43-44). Defense counsel quickly objected that such an argument was not based on any evidence. (210:43-44). The court overruled the objection and told the jury to rely on its memory about the evidence, and the State’s argument could be inferred. (210:43-44). The State over objection told the jury that it was his belief that was the cause of the abrasion. (210:44).

Defense counsel had no response to Dr. Peterson's testimony in her closing. Instead, she focused solely on what Mass did and did not do before and after the shooting, which were not consistent with a grand plan to shoot Heather, such as why he would seek to protect her and her daughter at a hotel if he harbored this plan. (210:51-64).

The jury was given the option of finding Mass guilty of first-degree intentional homicide, and if not, first degree reckless homicide, or not guilty. (210:17-23). The jury returned a verdict of guilty for the charge of first-degree intentional homicide and felon in possession of a firearm. (210:75-76; App. 2-3).

Mass faced a mandatory term of life imprisonment, but the judge had the discretion to determine a date to see if Mass could be eligible for extended supervision. (214:22). The State asked for the court to find Mass ineligible. (214:7). Defense counsel asked for the eligibility to be determined within 20 years. (214:18). In his ruling, the court reasoned that Mass had lured Heather to his house that night and killed her during oral sex, and that he failed to show any remorse. (214:24). Ultimately, the court's sentence allowed Mass to be determined eligible in the year 2050. (132:1-3; App. 6-8); (214:27).

Postconviction motion proceedings

After trial, through counsel, Mass obtained a report from Dr. Andrew Baker regarding the conclusions of Dr. Peterson. (215:7-8). Dr. Baker was a forensic pathologist who served as the Chief Medical Examiner of Hennepin County in Minneapolis. (215:7). He reviewed several materials, including the autopsy report, a drawing by Dr. Peterson, autopsy radiographs and photographs, portions of the trial transcripts, and video excerpts of Mass' interrogation. (174:4; App. 18); (215:7). After reviewing these materials, he summarized his opinions in a report, in which he disagreed with Dr. Peterson's testimony.

(174:4-10; App. 18-24). In light of the report, Mass filed a postconviction motion alleging ineffective assistance of counsel given the fact that had counsel pursued an expert, an opinion like the one provided by Dr. Baker could have rebutted the State's expert. (173:1-22); (174:1-10; 15-24).

At the hearing, Dr. Baker testified consistent with his report. (215:7-16). Dr. Baker agreed with Dr. Peterson's opinions about the cause of death, firing range, and that the wound trajectory was left to right and downward. (174:7; App. 21); (215:11). However, unlike Dr. Peterson's conclusion there was no back to front component, Dr. Baker concluded there was a very slight one. (174:7; App. 21); (215:12-13). Specifically, while Dr. Baker made clear that in general, he did not view the difference as being that important, he nonetheless reasoned that the entrance wound was 1/8 inch further back than Dr. Peterson's calculation. (215:12-13, 15-16).

Dr. Baker found it more significant that Dr. Peterson categorically excluded any possibility that Mass' explanation about the positions of himself and Heather when the shot occurred. (174:9; App. 23); (215:13-14). Dr. Baker explained that when forensic pathologists like himself and Dr. Peterson describe trajectories, they are described in terms of standard anatomic position. (215:11). Therefore, when Dr. Baker concluded that the trajectory was left to right and downward, it no way in implies where the victim's head was when the injury was sustained. (215:11-12). Dr. Baker explained that the head can move in a nearly infinite number of directions; it can tilt left and right; it can twist left and right; and it can tilt back and forth. (215:12).

As to the disagreement with Dr. Peterson, given the manner in which Heather's head could have been tilted or twisted at the time, his testimony would have differed from Dr. Peterson. (174:9; App. 23); (215:12-

14). Specifically, Dr. Baker would have testified that he could not have excluded the hypothetical positions of Mass and Heather as portrayed in the interrogation video, given the position of Heather's head cannot be known. (174:9; App. 23); (215:13-14). For example, Heather could have been facing away from, but with her head turned to the left and tilted upward. (174:9; App. 23); (215:28).

Mass also called trial counsel to testify. (216:3). She explained she had a difficult time working with Mass. (216:4). When asked what plan she had about contesting Dr. Peterson's testimony, she explained that her strategy was to show that "these doctors are unable to really say the exact position of people's bodies at the time that they're being shot. (216:8). However, Mass was not able to give her a version that made sense to her. (216:8-9).

Despite her position that it would not help, she did consider retaining an expert on the issue. (216:9-10). She talked about it with Mass' prior attorney on the case, Attorney Perz. (216:9-10). She knew that he had contacted a Dr. Corliss. (216:10). As she indicated during the trial, counsel testified at the hearing that Attorney Perz "didn't ultimately think that anything Corliss had to say was going to be helpful." (216:10). She had no records of the conversation, and she believed it probably happened while she was driving. (216:17). When asked if she spoke to Dr. Corliss herself, counsel said she could not recall. (216:10). She also could not recall if she spoke to any other expert. (216:10-11).

Dr. Corliss had an email exchange with Attorney Perz before defense counsel took over the case. (174:2-3; App. 16-17). Dr. Corliss informed Perz that the video he was given was too choppy to watch and was not of any real value to him. (174:2; App. 16). He said that the keyhole entry and beveling patterns "mean hard angled shot to many.....interesting to see what it

means to Peterson.” (174:2; App. 16). Dr. Corliss indicated that if Dr. Peterson opined it was a hard angle, the downward trajectory “must be a ricochet phenomenon....to me.” (174:2; App. 16). Finally, Dr. Corliss indicated that he wished he had more time to review the case and help out, but he did not have any extra time. (174:2; App. 16).

Counsel agreed that she had reviewed the email and speaking with Attorney Perz she decided not to pursue an expert. (216:13). But that was only part of the reason. (216:13). The other part was that in her opinion Mass could not explain what happened “because it’s not explainable.” (216:11-12).

The circuit court denied the motion. (193:1; App. 14); (217:3; App. 11). The judge concluded that Mass’ trial counsel did not perform deficiently by not obtaining an expert to testify. (217:3; App. 11). The court reasoned that Mass gave a number of different statements as to what had happened and Dr. Baker’s opinion did not differ significantly from Dr. Peterson. (217:3; App. 11). The judge believed it did not matter how the bodies were positioned at the time of the shooting; all that mattered was that a woman died and that Mass killed her intentionally. (217:3; App. 11). Ultimately, the judge decided there was no evidence that lead him to believe the outcome of the trial would have changed. (217:3; App. 11).

Mass appealed. (200:1-2).

ARGUMENT

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBTAIN A FORENSIC PATHOLOGIST, WHO WOULD HAVE REBUTTED THE STATE'S THEORY THAT MASS LIED ABOUT HOW THE SHOOTING OCCURRED.

Only one person was in the room when Heather Adamski was shot; Chester Mass. Consequently, his explanation for how the shooting occurred was critical. Any juror would want to know the credibility of Mass' explanation when he was given a chance to do so during his video-taped interrogation. The State used forensic pathologist Dr. Peterson, to argue that science proved that Mass' version was impossible, and therefore Mass was lying when he explained the shot accidentally occurred while she was facing away. (210:43-44); (211:90-92). But unknown to the jury, science could not be so certain about this conclusion. In fact, another expert would have informed the jury that Mass' explanation was entirely possible. (173:1-22); (174:1-10; App. 15-24).

But the jury never heard that Dr. Peterson's unqualified rejection of Mass' explanation was incorrect, because counsel presumed another expert would not help and because Mass was a difficult client. However, both of these reasons fail to constitute objectively reasonable performance, especially given the critical need in this case for counsel to determine whether Mass' explanation was possible. Consequently, confidence in the outcome of the trial was significantly undermined in absence of an opinion like Dr. Baker, who opined that Mass' explanation was possible.

Trial counsel's failure to obtain an expert denied Mass the effective assistance of counsel. The right to effective assistance of counsel is constitutionally guaranteed. U.S. Const. Amend. VI, Wis. Const. Art. I, § 7, *Strickland v. Washington*, 466 U.S. 668, 685-86

(1984), *State v. Thiel*, 2003 WI 111, ¶11, 264 Wis.2d 595, 665 N.W.2d 305. The rules governing ineffective assistance are well settled. *See State v. McDowell*, 2004 WI 70, ¶30, 272 Wis.2d 488, 681 N.W.2d 500. To prove ineffective assistance, the defendant must prove deficient performance by counsel and resulting prejudice. *Strickland*, 466 U.S. at 687.

Deficiency occurs when counsel performs below “an objective standard of reasonableness.” *State v. Franklin*, 2001 WI 104, ¶13, 245 Wis.2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). Prejudice is shown if there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* ¶ 14 (quotation and quoted authority omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the proceeding. *Strickland*, 466 U.S. at 694.

On appeal, a claim of ineffective assistance is a mixed question of fact and law. *Strickland*, 466 U.S. at 698. Facts found by the court below are upheld unless clearly erroneous. *Thiel*, 2003 WI 111, ¶¶21, 24 (citations omitted). However, the ultimate determination of whether counsel’s performance was deficient and prejudicial are questions of law reviewed *de novo*. *Thiel*, 2003 WI 111, ¶¶21, 24.

A. Defense counsel’s decision not to obtain an opinion to counter the State’s expert about the position of the firearm at the time of the shooting constitutes deficient performance because of how critical it was to the case.

Trial counsel offered two reasons for not obtaining an expert opinion, neither of which constitutes reasonable performance of counsel. First, she believed it would not be helpful based on the fact Mass’ prior counsel had already spoken with an

expert. (216:9-10). But it was objectively unreasonable for counsel to conclude from this prior contact that an expert would not be helpful in this case given the email to prior counsel from an expert was not conclusive.

Second, counsel testified at the postconviction motion hearing that Mass was a difficult client that made it hard to explain to the jury Mass' explanation of how the shooting happened. (216:11-13). But counsel's excuse does not hold water. Mass was consistent about Heather's position at the time of the shooting, and regardless, the only version counsel needed to be concerned about was the very one relied upon by the State's expert, which was Mass' video-taped confession. These reasons given by counsel are objectively unreasonable and constitutes deficient performance.

To prove deficiency, a defendant must show that counsel's performance fell below "an objective standard of reasonableness." *State v. Franklin*, 2001 WI 104, ¶13, 245 Wis.2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). An attorney's decision, even if "strategic," must nonetheless be valid and have a basis in law and fact. *State v. Domke*, 2011 WI 95, ¶41, 337 Wis.2d 268, 805 N.W.2d 364; *State v. Thiel*, 2003 WI 111, ¶ 51, 264 Wis.2d 571, 685 N.W.2d 305. Any strategic or tactical decisions must be rational and based on the facts and the law. *State v. Felton*, 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 170 (1983). Thus, "[l]awyers have a duty...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 (quotation and quoted authority omitted).

Counsel should have recognized the importance of obtaining an expert opinion. The trial judge reasoned below that it did not matter how the bodies were positioned during the shooting, just that there was a dead body. (217:3; App. 11). But this view of the

case is inconsistent with the State's theory at trial. In this case, how the bodies were positioned was directly relevant to show whether Mass' explanation about how the shooting occurred was believable or not. The State attempted to use science about the position of Heather to explain that Mass' explanation was not possible. (210:43-43). If accepted by the jury, and almost certainly the jury would considering there was nothing offered to rebut it, there was no basis upon which the jury could conclude that Mass' explanation was credible.

The fact the State was going to use Dr. Peterson's testimony to show that Mass lied about how the shooting occurred was clear from the beginning as well. The State included in the criminal complaint the fact that Dr. Peterson was shown Mass' video-taped explanation of how the shooting occurred and Dr. Peterson's opinion that Mass' explanation not possible. (1:2-3).

Yet, trial counsel never obtained an expert opinion to determine whether this inevitable argument by the State could be rebutted. At the postconviction motion hearing, counsel offered two explanations for her failure to obtain an opinion: prior counsel told her it would not help and Mass's explanations were all over the place. (216:11-13). Consequently, counsel surrendered a critical part of the case, Mass' credibility about the shooting, to the State. But, her both of her explanations fail, and therefore, her performance was deficient.

1. **Defense counsel never determined whether Mass' explanation could be supported by science and thus counter the State's argument Mass' explanation was impossible.**

At trial, Mass made a specific complaint about counsel's failure to obtain an expert or counter the

State's expert. Mass' prior defense counsel, Attorney Matthew Perz, had contacted an expert named Dr. Corliss about offering an opinion about the trajectory of the shot. (174:2-3; App. 16-17). At trial, counsel offered the following explanation for failing to do use an expert: "[Attorney] Perz talked to another forensic person. They did not support a different conclusion here. So I did not retain an expert for that reason." (212:212). Likewise, at the postconviction motion hearing, counsel testified that she was told that Attorney Perz did not think anything Dr. Corliss had to say was going to be helpful. (216:10).

But counsel's belief that an expert was not necessary because of Dr. Corliss was not objectively reasonable considering what he wrote to Attorney Perz. Counsel received a copy of an email exchange between Attorney Perz and Dr. Corliss. (216:13). Nothing about the email can be read to say that an expert would not be helpful in Mass' case. First, Dr. Corliss did not offer a formal opinion. Instead, he offered general conclusions considering he had difficulty opening the electronic video file of Mass' video-taped explanation of how the shooting occurred. (174:2-3; App. 16-17). Dr. Corliss also explained that he did not have the time in his schedule to "help out" and that it was "too close to home." (174:2-3; App. 16-17).

In addition, what Dr. Corliss did have to say was not unsupportive. Given the materials he could view, Dr. Corliss thought that there was a downward trajectory, as well as a ricochet, which Dr. Peterson did not find. (174:2-3; App. 16-17). If anything, that difference suggested that perhaps Dr. Peterson's conclusions about the position of Heather's head and the muzzle of the gun might not be accurate.

In sum, it was objectively unreasonable for Dr. Corliss' email to cause trial counsel to abandon whether she could rebut the State's theory that

forensic evidence showed Mass lied. At the hearing on Mass' postconviction motion, counsel was asked whether there was some other opinion that she considered, and the answer was essentially that she had not. She agreed that Dr. Corliss' email was the information she had been given by Attorney Perz. No formal opinion was ever obtained; just the brief email exchange Attorney Perz had with Dr. Corliss. Thus, her assumption that it was not necessary based on prior counsel's actions was either incorrect, or she assumed it would not be helpful based on the limited inquiry prior counsel received. Either way, her decision not to obtain an expert's opinion was deficient given the inevitable importance of the scientific evidence in Mass' trial.

2. Counsel's decision not to obtain an expert because she felt Mass was a difficult client does not constitute objectively reasonable performance.

Defense counsel testified at the hearing that prior to trial she tried to discern from Mass an understanding of how exactly the shot occurred. She testified that Mass had no cognizant theory about how the shooting occurred. She offered her frank opinion at the hearing that in her view, Mass could not explain what happened "because it's not explainable." (216:11-12). Essentially, she did not believe her client.

The notion that Mass' explanations were all over the place is simply not accurate. The State suggested at trial that Mass said the shot happened during oral sex, but that Mass later said it happened while she faced away from him. (210:42-43). Defense counsel seemed to accept this idea as her own apparently as well. (216:9). But the record shows otherwise.

Lieutenant Bill Beth testified about what Mass was saying about the shooting during the standoff. (211:214, 218). His testimony was consistent with how

Mass explained it hours later during the video interrogation. The relevant testimony by Beth, during direct examination by the State, was as follows:

Q: Did he give you any specific explanation as to how the shooting occurred?

A: He did.

Q: What did he say?

A: He said that he and Heather were having sex; specifically that she was performing oral sex on him and that he went to change positions and during this time also they were using the gun as a prop for kinky sex. He said that he wasn't aware of it, but she had pulled the hammer back on the gun and that when they were repositioning while having sex that the gun went off and he had taken it from her hand. (211:217-18).

This is similar to how Mass explained the situation during his interrogation. Sergeant James Beller testified that Mass explained to him, during the video-taped interrogation, that Heather was giving him oral sex and when they changed positions to Heather facing away, the gun went off. (211:195-96).

It is clear then that Mass' explanation was essentially the same and, most importantly, Mass did not waver about when the shot occurred: while Heather's head was facing away. Thus, counsel's attempt to blame Mass for her decision not to challenge to the State's theory that Mass lied is not objectively reasonable. Contrary to her view, the record shows that Mass was consistent.

Moreover, regardless of whatever personal difficulties she had with Mass, she only needed to address whether Mass' explanation on the video-taped explanation was possible. It was the video-taped statements of Mass that Dr. Peterson formed his opinion, and that was the explanation another expert

would need to consider. Consequently, it was deficient performance for counsel to rely on an erroneous view of Mass' explanation for how the shooting happened, or her difficulty in working with him, to excuse a failure to obtain a formal opinion about a critical matter to the case.

B. The absence of an opinion like Dr. Baker's at Mass' trial undermines confidence in the outcome and thus counsel's performance was prejudicial.

For the reasons stated above, it is clear that countering Dr. Peterson's opinion was critical in Mass' case and that counsel did not obtain a formal opinion to determine if it could be countered before she decided to surrender to the State the argument that science proved Mass lied during his interrogation. What then would have happened had counsel sought out that formal opinion? Counsel would have uncovered an opinion like Dr. Baker's opinion, who gave two important conclusions regarding Dr. Peterson's opinion. First, while it was a small disagreement, he opined that the trajectory was downward but slightly back to front, unlike Dr. Peterson. Second, and most important, he disagreed with Dr. Peterson's testimony that Mass' explanation was not possible. In a case where the jury's determination of whether Mass was guilty or not turned on its determination of his credibility, it vastly undermines confidence in the outcome, when another expert could have said that Mass' explanation was possible. Therefore, counsel's deficient performance was prejudicial.

"The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Jenkins*, 2014 WI 59, ¶34, 355 Wis.2d 180, 848 N.W.2d 789. "[A]

court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.” *Strickland*, 466 U.S. at 696. It is “not an outcome-determinative test.” *State v. Smith*, 207 Wis.2d 258, 276, 558 N.W.2d 379 (1997).

1. Unlike the State’s expert, Dr. Baker would have opined for the jury that Mass’ explanation was possible.

After trial, during postconviction proceedings, Mass obtained what counsel did not do before; a formal report from a forensic pathologist. (174:4-10; App. 18-24). Dr. Andrew Baker serves as Chief Medical Examiner for the Hennepin County Medical Examiner’s Office. (215:7). Dr. Baker reviewed several materials, including the video-taped explanation given by Mass, Dr. Peterson’s report, autopsy photos and radiographs, trial testimony, and police reports. (174:4; App. 18); (215:7). After these materials, Dr. Baker reached two relevant conclusions. Dr. Baker placed the location of the entrance wound very slightly further back than Dr. Peterson. (174:7; App. 21); (215:12-13). More importantly, unlike Dr. Peterson, Dr. Baker could not rule out Mass’ explanation. (174:9-10; App. 23-24); (215:14).

As in his report and at the hearing, Dr. Baker explained that Heather’s head could have been tilted in various directions at the time the shot entered her head. (174:9; App. 23); (215:12, 28). Considering the autopsy materials and Mass’ explanation, Dr. Baker explained that the gun could have gone off with her body facing away as Mass explained, if at that time the bullet entered her head, she was turning her head to the left and upward; a position that is also consistent with the fact that it was tight space, and she was about to hit the television. (174:8-9; App. 22-23); (213:22, 61-62); (215:28-29). The entry on the left side of her head

and the downward trajectory are not inconsistent with that explanation. Consequently, Dr. Baker would not have told the jury that Mass' explanation "doesn't work." (174:9; App. 23). Instead, Dr. Baker would have said that Mass explanation was in fact possible when one considered that Heather's head could have been tilted at the time. (215:14).

While the circuit court believed that Dr. Baker's other conclusion was not as significant, and even it is not as important as the Dr. Baker's other conclusion, it nonetheless supports Mass' explanation further. Dr. Baker concluded that entry wound was slightly further back than where Dr. Peterson described it. (174:7; App. 21); (215:15-16). Dr. Baker made clear that the difference in location was small; around an 1/8 of an inch. (174:7; App. 21); (215:15-16). In his view, this difference was not significant or important. (215:23-24). It did not affect his opinion that Mass' explanation was possible either. (215:27-28). But it still represents another difference from Dr. Peterson's testimony. Dr. Peterson testified that there was no back to front trajectory. (212:194, 198). However, given the difference found by Dr. Baker about the location of the entrance wound, there would have been a slight back to front trajectory.

While Dr. Baker viewed this difference as small, as it might be from a forensic pathologist perspective, it does in the context of Mass' trial. It adds support to what Mass told authorities all along, which is that Heather's back was towards him when the gun went off accidentally and undercuts the State's argument that the shooting occurred when Heather was facing her. Logically as well, it is very unlikely that a man would shoot a gun in a manner that risked having the trajectory go straight towards the male anatomy, as it would in the State's theory. The fact Dr. Baker opine that there was a back to front trajectory, however slight, makes the version offered by the State more

unlikely as the trajectory is now going towards the shooter under the State's theory.

2. The absence of a challenge to the State's expert, where his opinion was used by the State to argue that Mass lied, undermines confidence in the verdict.

Considering the entirety of the trial, the absence of Dr. Baker's opinion undermined confidence that Mass committed first degree intentional homicide. Contrary to the idea that all that mattered was the fact Heather was shot, how the bodies were positioned did matter because it was used to show that Mass was not credible. Credibility was critical in this case, where the important questions concerned what happened in the room just before and up to the second Heather was shot.

The State argued below that there was a mountain of evidence that Mass intended to kill Heather. But for almost every fact, there is counter fact that does little to answer the one and only critical question in the case, which was whether Mass' actions constituted first-degree intentional homicide or not.

The State presented evidence that Heather and Mass had a volatile relationship that included physical abuse. But Mass did not dispute that there were difficulties in their relationship. For example, the State presented evidence that Mass pointed a gun and threatened to kill Heather in front of others. But not only was this event weeks before the shooting, and in front of others, Mass later took other actions entirely inconstant with an intent to kill. Mass provided aid to Heather and her daughter by taking them to a hotel for protection from the people in the neighborhood responsible for the assault. Mass let her hold the gun right before the gun went off as well. Even Justin

agreed that Mass was not capable of coming up with such a plan to kill Heather.

Given the context of the entire trial, the more relevant question was not what Mass did weeks or months before, but what he did moments before the shooting. The State's attempt to answer this question was Dr. Peterson. During opening statements, the State informed the jury about how it was going to use Dr. Peterson. (211:90-91). Unsurprisingly, the State essentially told the jury that Dr. Peterson would be able to call Mass a liar, and with science. (211:90-91). Trial counsel's cross examination of did nothing to cast any meaningful doubt on Dr. Peterson's assertions. Counsel admitted as much during the postconviction motion hearing, when she said that her plan was to also adopt the State's version of events. (216:9). Without a counter to Dr. Peterson, the closing argument was damning for Mass.

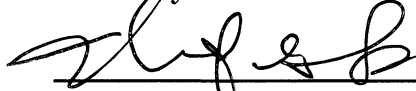
Thus, for all these reasons, counsel's deficient performance prejudiced Mass. He never had the chance to give the jury the opportunity to consider an opinion like the one provided by Dr. Baker. Where the forensic evidence was important to this case, as it was used by the State to supports its theory and call Mass a liar, counsel's decision to forego an expert opinion undermined confidence in the outcome. Thus, Chester Mass was denied his constitutional right to the effective assistance of counsel.

CONCLUSION

For the aforementioned reasons, Mass asks this Court to reverse his convictions and vacate his sentences.

Dated this 13th day of March, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



By: Michael G. Soukup

CERTIFICATION

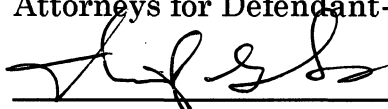
I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7339 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 13th day of March, 2019.

PINIX & SOUKUP, LLC
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By: Michael G. Soukup

CERTIFICATION OF APPENDIX CONTENT

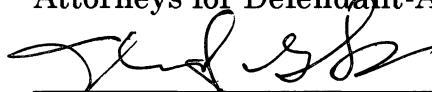
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken 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.

Dated this 13th day of March, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



By: Michael G. Soukup

**CERTIFICATION OF FILING BY THIRD-
PARTY COMMERCIAL CARRIER**

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief will be delivered to a FedEx, a third-party commercial carrier, on March 13th, 2019, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 13th day of March, 2019.

PINIX & SOUKUP, LLC
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A handwritten signature in black ink, appearing to read 'Michael G. Soukup', is written over a horizontal line.

By: Michael G. Soukup