STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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 REPLY BRIEF

Respectfully submitted by:

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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.

A. Defense counsel's decision to forgo an investigation of whether an expert could rebut the State's expert that Mass lied was objectively unreasonable given the importance of the expert to the case and counsel's failure to recognize it.

1. Mass gave a consistent explanation sufficient for an expert to opine upon.

The State argues that defense counsel properly abandoned the idea of contacting an expert because Mass did not give consistent explanations. (St. Br. 17). Instead of retaining an expert, counsel herself tried to recreate what happened with Mass, but claimed she could not. (216:11). She testified that it was not as if she did not understand what Mass was saying, but she "didn't think its explainable." (216:11-13). But as Dr. Baker's report shows, she was wrong to assume it was unexplainable and she was wrong to believe Mass did not give "consistent explanations." (174:9; App. 23); (215:12-14, 28); (216:13).

There was just one "version" defense counsel needed to address with an expert, which is the same one the State's used to say that Mass was lying. Mass' video-taped interrogation shows Mass' explanation including a visual depiction of what happened the moment gun discharged. (96:1 – St. Ex. #20, Video); (211:178-80, 195-96). This was shown to State's expert Dr. Peterson and, as alleged in the criminal complaint, he concluded it was not consistent. (1:2-3); (96:1 – St. Ex. #20, Video); (212:197-98). There is no mystery

about what counsel needed to do; consult an expert to see if Dr. Peterson was correct about Mass' explanation on the video. Thus, counsel's personal belief that it was not explainable or her amateur attempt to reconstruct things with Mass are entirely irrelevant in the absence of consulting an expert, and constitute objectively unreasonable justifications for not asking an expert about it.

Moreover, the State's adoption of defense counsel's claim that Mass gave differing explanations simply is not consistent with the record. Both Mass' statements to the police during the stand-off and during his interrogation are essentially the same, which is that the gun was discharged while Mass and Heather changed sexual positions and the shot was fired while Heather was turning away from Mass. (211:195-96, 217-18).

The State argued that Mass shot Heather during oral sex, but this was a theory hatched by the State, cobbled together because an unknown injury to Mass' penis and because of a statement Mass allegedly made to Amy Hernandez after the shooting. (210:41-42). No medical evidence was offered to support what caused the injury. (212:150-51). As for Hernandez, Mass allegedly told her they were having oral sex, which assuming it is actually what Mass told her, it is not inconsistent, but part of the explanation that Mass would give later. The statements given to Sergeant James Beller and Lieutenant Bill Beth about what Mass said during the stand-off, are more complete explanations given by Mass. Thus, it is simply incorrect for the State to claim there were different versions, or for Mass' counsel to believe there was "no consistent explanations."

2. Counsel's investigation was insufficient where she did nothing but talk to someone who "seemed to know what he was doing."

The State argues that it is entirely reasonable for counsel to rely on a colleague to determine whether to retain an expert. (St. Br. 16). But this is not correct. It is not enough to simply say it reasonable to rely on a colleague regardless of the surrounding circumstances. When looked closely, speaking to a colleague was not nearly enough in this case when it required an expert to opine on the matter and its importance of the case demanded more.

The only thing defense counsel could remember doing regarding an expert was a phone call she had with Mass' prior counsel while she was driving somewhere. (216:17). Prior counsel was not an expert obviously, but according to counsel he "seemed to know what he was doing." (216:13). Counsel could not even recall whether she contacted an expert herself, including Dr. Corliss (who Mass' prior defense counsel had contacted). (216:10). She admitted maybe she did not do either. (216:10). She had no notes about this issue. (192:4); (216:17).

She claimed that she stopped further investigation into the question in part because prior counsel said it would not be helpful. (216:13). But when asked for specifics, she could not articulate them and instead blamed Mass for not giving her a consistent explanation. (216:10-11, 13). She admitted looking at Dr. Corliss' exchange with prior counsel, but could not say what was discouraging about it other than it did not seem to make any difference to her. (216:12-13). Notably, Dr. Corliss did not say he agreed with Dr. Peterson either, and as argued in the opening brief, it suggested another expert who was available

should be sought out. (Opening Br. 18); (174:2-3; App. 16-17).

In addition, the clearest example that counsel did not seek an expert opinion because she assumed it would not help the case, without doing the necessary investigation to rule it out, is illustrated by her view that Dr. Baker's opinion would not have helped Mass. When asked at the evidentiary hearing whether it would have helped to have an opinion (like Dr. Baker's opinion) that concluded Mass' explanation to the police was possible, she did not think it was helpful. (216:15). It cannot be accurate then to argue, as the State does, that it was a reasonable investigation when counsel herself admitted that she did not understand its importance.

After denying the value of Dr. Baker's opinion, counsel notably couched her response by saying that it was not helpful with the inability to argue it was reckless. (216:15-16). But this answer is plainly erroneous. If counsel had actually recognized the need to consider an expert's opinion about Dr. Peterson's conclusion, it would have been long before whether to ask for lesser instruction or have a meaningful conversation with her client about it. Whether her client was going to make an informed decision about pursuing a reckless instruction or not depended upon her completing an investigation ahead of time. Moreover, even if her client remained insistent about not having lesser included instructions, it is not plausible to contend that an opinion saying Mass' explanation was possible undermined or conflicted with the theory counsel ultimately pursued, which was to poke holes in the State's evidence.

The State also argues that Mass' complaint that his attorney did not investigate enough was rejected by this Court in *State v. Hubert*, 181 Wis.2d 333, 510 N.W.2d 799 (Ct. App. 1993). (St. Br. 13, 15). In *Hubert*, the defendant was charged with arson and on appeal

he argued that his attorney should have hired a fire expert to examine the scene to see if accelerants were used. *Hubert*, 181 Wis.2d at 343. Defense counsel in *Hubert* knew that no accelerants had been found. *Id.* Counsel went further though and spoke to an expert, who indicated he could not be of assistance. *Id.* Ultimately, counsel decided not to pursue the issue further, in part because it would have also undermined Huber's credibility with the jury to do so. *Id.* at 343-44.

But counsel's decision-making process in the instant case differs from the one considered in *Hubert*. Unlike *Hubert*, counsel could not even say whether she consulted an expert. (216:10). She had no notes about this matter. (192:4); (216:17). Counsel never articulated why it would not help, except that her colleague told her while she was driving around it would not, and her assumption that he "seemed to know." (216:13). Unlike counsel in *Hubert*, she just believed it would not help as shown by the fact that when asked if an opinion like Dr. Baker would be helpful, she testified it would not. (216:15-16). Moreover, unlike defense counsel who chose not to pursue an expert because it could have downsides, there were no downsides to trying to undermine Dr. Peterson, who would testify that Mass lied.

Counsel had a duty to make a reasonable decision that further investigation was unnecessary. See *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary). She did not. Counsel's claimed confusion about what to ask an expert or how the expert would help about is simply unreasonable basis to forgo an investigation.

3. The claim that Dr. Baker's opinion was not available in 2015 is a red herring where it is not based on new science and counsel believed it would not help even if she had it.

Finally, the State argues that defense counsel could not be deficient for failing to call an expert regarding the forensic pathology because Mass has not shown Dr. Baker was ready, willing or able to testify way back in 2015. (St. Br. 14-15). The State alternatively argues that Mass has not shown that an expert like Dr. Baker was not available either. (St. Br. 14-15). These arguments fail for multiple reasons.

The first problem is that trial counsel never said she did not call an expert because Dr. Baker, or any other expert, was unavailable. She was specifically asked at the postconviction motion hearing if she had the opinion of Dr. Baker in 2015 would it have made a difference to her, and she said no. (216:15-16). Consequently, the State's argument that counsel was not deficient because Dr. Baker might not have been available must fail where Dr. Baker's availability was not the reason for counsel's failure to call an expert.

The State's argument has a faulty legal basis as well. The State attempts to support its position by relying on a 20-year-old decision from Pennsylvania, *Commonwealth v. Wayne*, 720 A.2d 456 (Pa. 1998). (St. Br. 13, 15). In *Wayne*, the court held that when the defendant claims his attorney failed to call witnesses, it is the defendant's burden to show that "the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the appellant." *Wayne*, 720 A.2d at 470. But unlike Mass' case, the issue in *Wayne* concerned counsel's alleged failure to call a fact witness, and more specifically, an

alibi witness. *Wayne*, 720 A.2d at 470. The difference between *Wayne* and instant case are obvious. The claim raised by Mass is not that counsel failed to obtain a fact witness, but that his counsel did not retain an expert to counter the State's expert. *See Thomas v. Clements*, 789 F.3d 760, 772 (7th Cir. 2015) (court found that defense was ineffective for failing to seek a pathologist's opinion, and rejected the State's argument about availability). Dr. Baker testified that he had served as a medical examiner for as long as 2004. (215:7). There is no reason to doubt that Dr. Baker or someone like him was not available in 2015, assuming counsel believed it was important to contact one.

Likewise, the State's argument that there is speculation about "what an expert forensic pathologist might have contributed to his defense in 2015" is groundless. (St. Br. 14). Dr. Baker's report and testimony is not new science. Dr. Baker did not indicate that the State's expert science was too old. Only three years passed in the time. Neither the State nor the court below suggested that counsel was not deficient because somehow Dr. Baker was relying on science that was not available three years prior. Moreover, Dr. Baker's report and testimony makes clear what he would stated had he been called to testify at Mass' trial. (174:9; App. 23); (215:12-14, 28-29).

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, where such an opinion would rebut the State's argument that Mass' explanation was "impossible."

The State cannot escape the fact that the jury never heard that Chester Mass' explanation to the

police was possible, or that without an opinion like Dr. Baker, the State got away with arguing to the jury that Mass' explanation was "impossible." (210:42-43). Unknown to the jury, or counsel who believed it should be abandoned, was that it was scientifically possible for it to have happened the way Mass said it did. No matter what counsel did otherwise, the jury could disregard it because when a chance to explain what happened, Mass lied.

Instead of addressing this problem, the State argues that Dr. Baker does not know what happened or believe that it happened the way that Mass explained. (St. Br. 20). But of course the State surely understands that Dr. Baker or Dr. Paterson are not fact witnesses. They were there to explain what can possibly have happened based on their knowledge of anatomy, trajectories, and forensic pathology. Whether Dr. Baker believed or not about what happened is not scientific opinion, it is an opinion reserved for the jury. But again, the critical point the State cannot escape is that Dr. Baker was quite clear that Mass' explanation was possible and he was quite clear that he would not have testified like Dr. Peterson. (174:9; App. 23); (215:12-14).

The State argues that if a person points a gun you can infer an intent to kill. (St. Br. 21). This unremarkable statement is entirely irrelevant to this case. The question is what happened in the bedroom when the gun went off. Was Mass intentionally pointing the gun at Heather and did he intentionally pull the trigger, or was the gun discharged while pulling it from her? Likewise, the State argues that the gun required two actions. (St. Br. 4). But again, this says nothing about what was happening when it was discharged. What matters is whether Mass' explanation was possible.

The State argues that Mass never challenged the sufficiency of the evidence. (St. Br. 21). The State

must know that this is a disingenuous argument, and its inclusion here is inexplainable. First, the standard for ineffective assistance of counsel is not the same. In order to obtain relief, Mass merely has to show a reasonable probability of a different result had deficient performance not occurred. *State v. Franklin*, 2001 WI 104, ¶14, 245 Wis.2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). For sufficiency of the evidence, the question viewed most favorably to the State, is whether the evidence so insufficient that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). Not only do these standards differ greatly, as any appellate practitioner knows, but it is particularly different here where the issue is a failure to bring information to the jury's attention.

Finally, the State argues that regardless of whether jury heard that Mass' explanation was possible, the evidence against him was overwhelming. (St. Br. 21). But these circumstantial pieces of evidence, from compromised witnesses, pale in comparison to the objective attack on Mass' credibility posed by the State's expert. (Opening Br. 24-25).

The State points out that Mass and Heather fought, and at one point, he allegedly said he would kill her. (St. Br. 4). The alleged threat that Mass made was months before the shooting, and even State's witness Amy Hernandez admitted that it was joke. (212:26). Mass and Heather had a history of fighting, which then says little about what was going on the night of the shooting.

The State mentions that Mass purchased a gun the night of the shooting. (St. Br. 4). The State conveniently leaves out the reason for Mass' purchases. Mass had been beaten weeks before and feared for his safety when someone subsequently made a gun gesture towards him. (213:5). Several people

were present when Mass purchased these guns, and he purchased two. (211:100-04, 113, 142). Even State's witness Justin Mass said Chester was not capable of coming up with a plan to kill. (211:109-10, 155). It is not logical either that if Mass harbored an intent to murder, he would purchase guns in this manner, and purchase two not just one.

Relatedly, the State argues that Mass thought Heather had set him up. (St. Br. 5). Mass agreed, even at trial, that perhaps she did. (213:4). But the State ignores that Mass also subsequently took Heather and her daughter to a hotel for their safety. (212:227). If Mass intended to get back at Heather for setting him up, he surely did not act in a matter consistent with it.

The bottom line remains, these circumstantial facts do not prove what happened in the bedroom. Counsel presented evidence countering the State's circumstantial evidence, but it means little to nothing to address a critical question for the jury; whether Mass was lying when he told the police how the shot occurred. It was thus of paramount importance for counsel to fully investigate whether an expert could counter the State's expert that Mass' explanation was impossible. She completely failed to do so.

But reasonable counsel would not have made such an assumption on so little, and if reasonable counsel had completed an investigation into this crucial matter, the jury could have heard that Mass' explanation was possible. Accordingly, counsel was not only deficient, but in a case where the credibility of Mass' explanation was critical, counsel's deficient performance was prejudicial as well.

CONCLUSION

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

Dated this 26th day of June, 2019.

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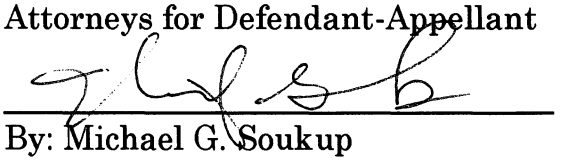

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CERTIFICATION

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 2960 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 26th day of June, 2019.

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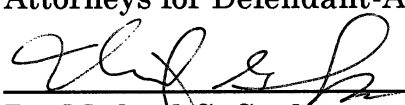

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CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

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 June 26, 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 26th day of June, 2019.

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