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SUPREME COURT

**STATE OF WISCONSIN
SUPREME COURT**

Appeal No. 2018AP1665-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

CHESTER J. MASS,
Defendant-Appellant-Petitioner.

**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**

PETITION FOR REVIEW

Respectfully submitted:

Michael G. Soukup, 1089707

PINIX LAW, LLC
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
michael@pinixsoukup.com

Attorney for Defendant-Appellant-Petitioner

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STATEMENT OF THE ISSUE

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?

History of the Issue Below

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.

The court of appeals concluded that trial counsel did not render ineffective assistance because counsel made an informed decision not to retain one and because another expert would not have provided a significantly different opinion.

STATEMENT OF CRITERIA FOR REVIEW

Review is appropriate because the court of appeals decision is in conflict with controlling opinions of this Court and the United States Supreme Court. Wis. Stat. § 809.62(1r)(d).

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

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

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). 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 his 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. 14-5).

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. 18-20); (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); (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). 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); (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); (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); (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); (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); (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); (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). 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). 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). 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). 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).

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. 26); (217:3; App. 23). The judge concluded that Mass’ trial counsel did not perform deficiently by not obtaining an expert to testify. (217:3; App. 23). 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. 23). 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. 23). Ultimately, the judge decided there was no evidence that lead him to believe the outcome of the trial would have changed. (217:3; App. 23).

Court of appeals proceedings

The court of appeals held that defense counsel’s performance was not objectively unreasonable. *State v. Mass*, No. 2018AP1665-CR, slip op. (Ct. App. November 11, 2020) (hereinafter “Order”); (Order at ¶¶24-26; App. 10-12). The court held that it was sufficient that defense counsel relied upon the prior attorney’s view that an expert would not be helpful, because the prior attorney “seemed to know what he was doing.” (Order at ¶24; App. 10). The court also noted that defense counsel tried re-creating what Mass said on her own. (Order at ¶24; App. 10). Plus, counsel pursued the alternative strategy of eliciting from Dr. Peterson that he could not say with certainty where the bodies were at the moment the shot was fired. (Order at ¶25; App. 11). The court also concluded that Dr. Baker’s opinion supported counsel’s decisions because Dr. Baker did not necessarily believe what Mass said happened, even if it could have happened. (Order at ¶26; App. 11-12).

In a footnote, the court also held that counsel’s performance was not prejudicial because the

prosecutor did not focus on Dr. Peterson's testimony.
(Order at ¶26; App. 12).

Mass appealed. (200:1-2).

ARGUMENT

Review is appropriate where the court of appeals failed to conclude that defense counsel rendered ineffective assistance of counsel, by failing to obtain an expert who would have rebutted the State's theory that Mass lied about how the shooting occurred, by not considering critical facts.

Only one person was in the room when Heather Adamski was shot; Chester Mass. Consequently, his explanation for how the shooting occurred was critical. Mass was interrogated after Adamski's death, and any juror would want to know whether his explanation during that interrogation was credible. 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 Adamski 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. Mass' defense counsel explained during postconviction proceedings that she did not obtain one because she presumed another expert would not help and she thought Mass was a difficult client. (216:4, 8-12). 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.

Yet, the court of appeals below concluded that defense counsel was not deficient. (Order at ¶23; App. 10). The court of appeals appears to have reached this decision without considering critical facts that show that counsel's decision was not informed, but a guess. Moreover, counsel's failure to counter the State's expert allowed the prosecutor to hammer away that Mass was not credible. Thus, under controlling law, it was both deficient performance and prejudicial, and constitutes ineffective assistance of counsel.

The right to effective assistance of counsel is constitutionally guaranteed. U.S. Const. Amends. VI, XIV, 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). In order to provide the defendant with objectively reasonable performance, counsel's 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).

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.” *Franklin*, 2001 WI 104, ¶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. Counsel’s performance was objectively unreasonable where it not based on facts, but guesses and her frustration with her client.

The court of appeals concluded that it was “perfectly” reasonable for counsel to consult with Mass’s prior attorney in investigating and evaluating the case. (Order at ¶24; App. 10). But the facts show that counsel’s reliance was utterly flawed. When all the relevant facts are considered, and not cherry-picked, that conclusion is clear.

The court of appeals determined that counsel made an informed decision not to retain an expert “[b]ased on the information from [prior counsel], as well as her own research and attempts to recreate Mass’s story.” (Order at ¶24; App. 10). However, when counsel was asked why her conversation with the prior counsel led her to conclude not to pursue an expert opinion, she could not articulate any reason and instead blamed Mass for not giving her a consistent explanation. (216:10-11, 13). Counsel agreed she reviewed an email exchange between prior counsel and another expert, Dr. Corliss. (216:12-13). But again, she could not say what in that exchange was discouraging to her. (216:12-13).

Any person who reviewed that exchange would have no reason to be discouraged by it. In the email, Dr. Corliss did not say he agreed with Dr. Peterson. Dr. Corliss stated that the video he was given was too choppy to watch and was not of any real value to him. (174:2). 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). 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). 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). Nothing about this would lead a reasonable attorney to abandon pursuit of an expert opinion. But importantly, it was error for the court of appeals to hold that counsel made an informed decision, when counsel could not explain it herself.

Moreover, counsel’s “attempts to recreate Mass’s story” does not constitute an informed decision either, given she is not an expert in forensic pathology. But in addition, counsel only needed to address 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.

The court of appeals concluded that counsel was reasonable because she pursued a different strategy also fails. The court of appeals considered that counsel chose to elicit from Dr. Peterson that he could not say for certain how the bodies were positioned at the time of the shot. (Order at ¶25; App. 11). But the record shows that defense counsel's cross-examination did nothing to undermine Dr. Peterson's conclusion that Mass' explanation was impossible. Counsel admitted as much during the postconviction motion hearing, when she said that her plan was to *adopt* the State's version of events. (216:9). Without a counter to Dr. Peterson, the closing argument was damning for Mass in the eyes of the jury. Thus, this "strategy" did nothing, it was doomed, and was not reasonable.

B. Counsel's failure to obtain an opinion, like the one provided by Dr. Baker who opined that Mass' explanation was possible, undermined confidence in the outcome because of the credibility of Mass' explanation was critical to this case.

The court of appeals misunderstands the value of Dr. Baker's opinion, and consequently, miscalculates counsel's deficient performance. The court of appeals states that Dr. Baker agreed with much of what Dr. Peterson concluded and did not really believe what Mass stated. (Order at ¶26; App. 11-12). But of course, the court of appeals reasoning fails to understand that neither Dr. Baker nor Dr. Paterson are fact witnesses. They were there to explain what could or could not have happened based on their knowledge of anatomy, trajectories, and forensic pathology. Thus, what Dr. Baker believed actually happened is beyond the scope of his scientific

opinion; it is an opinion better reserved for the jury. *See State v. Repp*, 117 Wis.2d 143, 149, 342 N.W.2d 771 (Ct. App. 1983) (an expert is not allowed “to be a super juror whose opinion [as to the ultimate issue] is cloaked in the seeming scientific knowledge of an expert”). While an expert can state that one position is possible or not, as the court of appeals itself noted, forensic pathologists cannot know for certain whether bodies were in one possible position or another possible position. That is for the jury to decide.

Whether Mass’ explanation was true or not might not be the ultimate issue, but in this case it was a critical one that, given counsel’s failure to counter it, undermined confidence in the verdict. The value of Dr. Baker’s opinion is that he said that it was possible the shooting occurred as Mass explained, when Dr. Peterson clearly said it was not possible. (174:9); (215:12-14). Consequently, Dr. Baker’s opinion directly contradicted Dr. Peterson’s opinion. (174:9); (215:12-14). The court of appeals failure to understand this problem undermines its decision that counsel’s failure to obtain an expert was not prejudicial.

In a footnote, the court of appeal states that there was no prejudice because Dr. Peterson did not opine about Mass’ state of mind and the prosecutor’s closing argument centered on circumstantial evidence of his intent. (Order at ¶26; App. 12). Obviously, Dr. Peterson did not opine about Mass’ state of mind, so that is not a meaningful point. But the court of appeals entirely misreads the record regarding the prosecutor’s closing argument. In his closing argument, the prosecutor emphasized the forensic evidence and its theory that Mass shot while she was kneeling in front of him. (210:41-43). The State argued that Mass’ story was “impossible.” (210:42-43). The State claimed that the one-time Mass was telling the truth was when he said he shot her during oral sex. (210:41). Repeatedly, the prosecutor urged the jury to consider how the bodies were situated when the

shooting occurred to show that Mass was lying and that there was no accident. It is myopic for the court of appeals to claim that it did not matter. Thus, following applicable law, it is clear that counsel's failure to counter this evidence by obtaining another expert opinion undermined confidence in the outcome of Mass' trial.

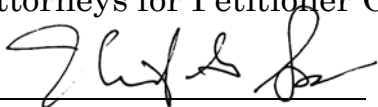
CONCLUSION

On this record, counsel's decision when considering all the relevant facts was not informed or rational. *See Felton*, 110 Wis.2d at 502-03. Counsel "[had] a duty...to explore all avenues leading to facts relevant to the merits," but counsel failed to do so based on guesses and assumptions. *See Mayo*, 2007 WI 78, ¶59 (quotation and quoted authority omitted). Moreover, where Mass' explanation about the shooting was repeatedly addressed to the jury, counsel's failure to counter it with an expert constitutes prejudice.

For the aforementioned reasons, Mass respectfully requests that this Court grant his petition for review.

Dated this 11th day of December, 2020.

PINIX LAW, LLC
Attorneys for Petitioner Chester Mass


Michael G. Soukup, 1089707

CERTIFICATION

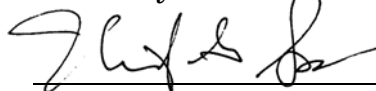
I certify that this petition conforms to the rules contained in Section 809.19(8)(b) and (c) for a petition produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this petition is 6648 words, as counted by the commercially available word processor Microsoft Word.

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

I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 11th day of December, 2020.

PINIX LAW, LLC
Attorneys for Petitioner Chester Mass



Michael G. Soukup, 1089707

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, 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.

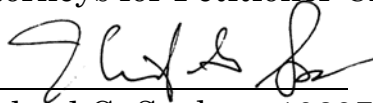
I further certify that this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 11th day of December, 2020.

PINIX LAW, LLC

Attorneys for Petitioner Chester Mass

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

Michael G. Soukup, 1089707