STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT C. WASHINGTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

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

Attorney for Defendant-Appellant

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ARGUMENT

I. Defense counsel was ineffective for failing to advise Mr. Washington about the possibility of requesting lesser-included offense instructions at trial.

A. The trial court's finding that defense counsel discussed lesser-included offenses with Mr. Washington was erroneous.

The State argues the "documentary evidence exception" does not apply in this case, because that exception only applies when the underlying facts are not in dispute. (State's Br. at 10-11). However, there is no real factual dispute in this case regarding whether Mr. Taylor advised Mr. Washington about lesser-included instructions. With respect to that issue, the evidence is uncontradicted for all practical purposes, because Mr. Taylor's letter effectively recanted his prior testimony in which he claimed that he discussed the issue with Mr. Washington. (84:1; App. 141). Given the uncontradicted nature of the evidence, the documentary evidence exception should apply.

At any rate, regardless of whether the documentary evidence exception applies, the circuit court's finding that Mr. Taylor discussed the issue of lesser-included offenses with Mr. Washington should be reversed. The circuit court ignored Mr. Taylor's recantation letter, and it failed to explain why or even acknowledge the existence of his recantation. The circuit court's decision thus appears arbitrary

and illogical. Its factual finding is accordingly clearly erroneous.

The State argues that the circuit court likely "did not think that [Mr. Taylor's] letter could plausibly be interpreted as a recantation." (State's Br. at 11). It further asserts that the court could have reasonably inferred from the letter "that Attorney Taylor and Washington had discussed jury instructions on lesser-included offenses, although Attorney Taylor did not remember the specifics of that discussion." (*Id.* at 10).

The State's interpretation is the one that is implausible, however. Mr. Taylor did not say in his letter that he discussed the issue of lesser-included offenses with Mr. Washington, but simply could not recall the specifics of the conversation. What he said was that he did not recall if he specifically discussed that issue with Mr. Washington. (84:1; App 141). There is no rational way to interpret that statement other than as a recantation. If Mr. Taylor has no recollection of discussing this issue with Mr. Washington, he cannot maintain that they discussed it at all.

The State further argues that even if Mr. Washington is correct that the evidence in this case is uncontradicted, this court should still deny his claim because he had the burden of proof and the circuit court found his testimony incredible. (State's Brief at 12). The circuit court's credibility determination regarding Mr. Washington, however, was inextricably linked with its flawed credibility determination regarding Mr. Taylor. Mr. Taylor's and Mr. Washington's versions of the events, as

described at the *Machner* hearing, were directly at odds. As such, a finding that one was credible necessarily required a finding that the other was not.

Given the interconnected nature of the credibility determinations, if this court concludes that the circuit court's credibility determination for Mr. Taylor was clearly erroneous—because it ignored his recantation letter—it should also conclude that its credibility determination for Mr. Washington was clearly erroneous. Those credibility determinations are two sides of the same coin. If one is fatally flawed, the other must be, as well.

B. Defense counsel was ineffective in failing to advise Mr. Washington about lesser-included offenses.

1. The State wrongly claims that Mr. Taylor did not perform deficiently in this case. It points out that a circuit court is not required, as part of a *Bangert* analysis, to verify that a defendant is aware of possible lesser-included offenses before accepting a guilty plea. Based on this, the State argues that there is no clear duty for a defense attorney to advise his client about the possibility of requesting lesser-included instructions at trial before a defendant enters a guilty plea. (State's Br. at 13). That is simply incorrect.

It *is* the duty and responsibility of defense counsel to advise his client about potential defenses and trial strategies, assuming there is a reasonable probability that the defendant may prevail based on those defenses or strategies. That duty is not limited to information that a circuit court has a mandatory duty to disclose during a plea hearing.

Thus, if there is a potential defense or suppression issue that might carry the day, it is objectively unreasonable under prevailing professional norms for an attorney to fail to advise his client about that and/or litigate it. *See, e.g., State v. Krawczyk*, 2003 WI App 6, ¶27, 259 Wis. 2d 843, 657 N.W.2d 77 (noting counsel may have performed deficiently by failing to advise client about a multiplicity defense); *State v. Cleveland*, 114 Wis. 2d 213, 338 N.W.2d 500 (Ct. App. 1983) (counsel found ineffective for failing to move to suppress).

Similarly, where, as here, there is a reasonable probability that a defendant can obtain a conviction at trial for a lesser-included offense, it is deficient for an attorney to fail to advise his client about the potential strategy of going to trial and requesting an instruction for that lesser-included offense. This is especially true in homicide cases, which carry the most significant punitive consequences.

Indeed, the American Bar Association (ABA) recognizes that a criminal defense attorney "should advise the client with candor concerning *all aspects of the case*, including an assessment of possible strategies as well as likely possible outcomes." ABA, *Criminal Justice Standards for the Defense Function*, § 4-5.1 (4th ed. 2015). The Wisconsin Supreme Court has recognized that ABA standards are a good barometer for what "is required by the prevailing professional norms." *See State v. Ortiz-Mondragon*, 2015 WI 73, ¶¶85-86, 364 Wis. 2d 1, 866 N.W.2d 717.

The State further argues that even if a duty to advise a client about lesser-included offenses may exist in some cases, Mr. Taylor had no such duty in

this case because Mr. Washington was adamant that he did not want to go to trial. (State's Br. at 13-14). Even if Mr. Washington did express a desire to plead guilty, however, that does not make Mr. Taylor's omission reasonable. An attorney is not relieved of his obligation to advise his client about potential trial strategies and defenses just because a defendant has indicated a desire to plead guilty. Doing so could obviously cause the defendant to reconsider his decision, so it is critical that an attorney advise his client about all his options.

2. The State argues that even if Mr. Taylor performed deficiently, this did not result in prejudice, because Mr. Washington "would have pled guilty regardless of whether he knew about the possibility of requesting lesser-included instructions at trial." (*Id.* at 16). Not so.

Mr. Washington specifically testified that he would have gone to trial had he known about the possibility of requesting lesser-included instructions. (104:42-45). Also, Mr. Taylor acknowledged that "[t]he only issue Mr. Washington raised with [him] was whether [they] could get a less[e]r charge during the [plea] negotiating process." (84:2; App. 142). Since there was no available plea deal that would have reduced the charges, it would have been perfectly logical for Mr. Washington to try to obtain a conviction for a lesser charge by going to trial and requesting instructions for lesser-included offenses.

Moreover, the available plea deal only reduced Mr. Washington's potential exposure from a total of sixty-five years of confinement to fifty-five years. Given Mr. Washington age and poor health, this

reduction was virtually meaningless to him. If he received anywhere close to even the base maximums, it would have been effectively a life sentence for him.

Also, if Mr. Washington pled guilty to first-degree reckless homicide—thereby admitting that he showed utter disregard for his son's life—he was very likely to receive an effective life sentence. It therefore would not have been irrational for him to take his case to trial and request instructions for lesser-included offenses, as this was his only realistic path to avoiding a life sentence. When, from a defendant's perspective, the consequences of pleading guilty and going to trial are "similarly dire, even the smallest chance of success at trial may look attractive." *See Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1966, 1969 (2017).

II. W.W.'s statement acknowledging that he threw the basketball at Mr. Washington constitutes newly discovered evidence.

The State offers three arguments for denying Mr. Washington's newly discovered evidence claim—first, that Mr. Washington did not discover the new evidence after his conviction, or was negligent in discovering it; second, that the new evidence is cumulative; and third, that the new evidence is recantation evidence that is uncorroborated. All three claims are mistaken.

First, the newly discovered evidence is not the fact that W.W. threw a basketball at Mr. Washington, as the State suggests. It is W.W.'s statement *acknowledging* that he threw the basketball. In arguing to the contrary, the State cites a number of cases in which courts have rejected

claims that reports or affidavits generated after trial constituted newly discovered evidence.[1] (State's Brief. at 18-21). In all those cases, however, the parties claiming that the documents were newly discovered evidence were already aware of the information contained in those documents.

Here, by contrast, Mr. Washington did not know before his conviction that W.W. acknowledged throwing the basketball at him right before the gun went off, because W.W.'s prior statements to police omitted any mention of this fact.[2] (76:1; 77:3). The absence of that important piece of information strongly suggested that W.W. was claiming that he did not, in fact, throw the basketball at Mr. Washington. W.W.'s admission that he did is thus a new piece of evidence discovered after Mr. Washington's conviction. Additionally, Mr. Washington was not negligent in any way in discovering this new evidence.

Second, the new evidence here is in no way cumulative. Evidence is cumulative only when it is offered to support an *established* fact. *State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305. At the time Mr. Washington was convicted, the fact

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[1] *See State v. Shanks*, 2002 WI App 93, ¶¶20-21, 253 Wis. 2d 600, 644 N.W.2d 275; *State v. Williams*, 2001 WI App 155, ¶21, 246 Wis. 2d 722, 631 N.W.2d 623; *Kocinski v. Home Ins. Co.*, 147 Wis. 2d 728, 744, 433 N.W.2d 654 (Ct. App. 1988); *see also State v. Vennemann*, 180 Wis. 2d 81, 98, 508 N.W.2d 404 (1993) (testimony not newly discovered because "it did not come to [the defendant's] attention *after* trial.") (emphasis in original).

[2] Mr. Taylor stated that he reviewed those police statements with Mr. Washington. (103:26-28).

that W.W. threw the basketball was far from established. Again, W.W.'s police statements were conspicuously silent on the matter. Also, at sentencing, the State argued that Mr. Washington's version of the events was incredible. (102:5; App. 105).

Third, W.W.'s statement that he threw the basketball is not a recantation. W.W. never actually denied throwing the basketball in his police statements. He simply did not say anything about the matter one way or the other. His new statement that he threw the basketball is thus not a classic recantation; it is not a renunciation or retraction of a former statement. *See State v. McAlister*, 2018 WI 34, ¶54, 380 Wis. 2d 684, 911 N.W.2d 77. It is also not the functional equivalent of a recantation, which attacks the veracity of a prior statement. *See id.*, ¶55. W.W.'s new statement does not retract or attack the veracity of his prior statements. It simply adds to and supplements his prior statements.

In any case, even if W.W.'s new statement does constitute a recantation, the corroboration requirement is met because: (1) W.W. had feasible motives for his initial statements in which he did not acknowledge throwing the basketball; and (2) his recantation has circumstantial guarantees of trustworthiness. *See State v. McCallum*, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997).

Regarding feasible motives for failing to mention throwing the basketball, W.W. likely did not want to admit that his actions were a factor in causing his brother's death. Also, he certainly would have been angry with his father for shooting him and

his brother. He thus would have likely wanted to place all the blame on his father's shoulders.

W.W.'s new statement also has sufficient circumstantial guarantees of trustworthiness. As an initial matter, his statement does not even directly contradict his prior police statements; it merely adds to them. His testimony at the *Machner* hearing was also internally consistent. In addition, his testimony was consistent with Mr. Washington's claim that he threw a basketball at him right before the gun went off. At the same time, however, there are differences in their accounts, particularly with respect to whether Mr. Washington pointed the gun at W.W. W.W. was thus not just parroting what his father said or saying what he wanted him to say. Finally, W.W.'s testimony, unlike his prior police statements, was made under oath subject to the penalties of perjury.

III. Resentencing is necessary because Mr. Washington was denied an effective advocate at sentencing.

1. In this case, Mr. Taylor's sentencing argument fell so far below the objective standard for reasonableness that it constituted an effective abandonment of his client. But despite this, the State argues that Mr. Washington has failed to demonstrate deficient performance.

First, the State claims that Mr. Washington "has not explained with enough specificity what he thinks Attorney Taylor should have said" at sentencing that he did not. (State's Br. at 28). In doing so, however, the State ignores the fact that Mr. Washington specifically described all the things

he believes Mr. Taylor should have said at sentencing, but didn't. (Washington's Initial Br. at 46-49).

Next, the State claims that Mr. Washington forfeited his argument that Mr. Taylor failed to discuss his health concerns at sentencing by failing to ask Mr. Taylor about this omission at the *Machner* hearing. (State's Br. at 28-29). However, counsel for Mr. Washington specifically asked Mr. Taylor at the hearing why he did not point out "that because of Mr. Washington's age and poor health, any relatively lengthy sentence . . . would, effectively, be a life sentence for him." (104:43-44). This question clearly encompassed the issue of Mr. Washington's health, as well as Mr. Taylor's failure to emphasize that issue.

The State also asserts that Mr. Washington forfeited his argument that Mr. Taylor took an "antagonistic stance" against his client by not asking Mr. Taylor why he did so. (State's Br. at 29). That argument is hypercritical to the point of absurdity. There is no plausible reason why an attorney would ever take an antagonistic stance against his client.

2. Because Mr. Taylor completely failed to subject the State's sentencing case to any sort of meaningful adversarial testing, this court should presume that Mr. Taylor's deficiencies resulted in prejudice under the doctrine of constructive denial of counsel. *See United States v. Cronic*, 466 U.S. 648, 659 (1984).

The State points out that Mr. Taylor mentioned a few kernels of positive information at sentencing. (State's Br. at 27). That is insufficient to show that Mr. Taylor subjected the State's sentencing case "to

meaningful adversarial testing." *See Cronic*, 466 U.S. at 659. Even prosecutors will generally say one or two positive things about a defendant at sentencing. That does mean that the prosecutor's sentencing argument against a defendant qualifies as a substitute for a real advocate at sentencing.

Here, Mr. Taylor did not argue on Mr. Washington's behalf at sentencing in any meaningful way. For all intents and purposes, it was as if there were two prosecutors in the room.

By contrast, in *Bell v. Cone*, 535 U.S. 685 (2002), the defendant claimed that he was constructively denied counsel at a death penalty sentencing hearing because his attorney failed to adduce mitigating evidence and waived closing argument. *Id.* at 697-98. In that case, however, defense counsel gave an opening statement in which he called the jury's attention to the mitigating evidence already before them. He also asked for mercy for his client. In addition, he effectively cross-examined the state's witnesses and successfully objected to the introduction of prejudicial evidence. Finally, after the junior prosecutor on the case gave a "low key" closing argument, defense counsel strategically waived his final argument to prevent the lead prosecutor, who was an extremely effective advocate, from arguing in rebuttal. *Id.* at 691-92.

This case is nothing like *Cone*. Here, Mr. Taylor "entirely fail[ed] to subject the prosecution's [sentencing] case to meaningful adversarial testing." *See Cronic*, 466 U.S. at 659. Prejudice should therefore be presumed.

3. However, even assuming a showing of prejudice is required, Mr. Washington should still be entitled to resentencing because Mr. Taylor's deficiencies at sentencing were prejudicial. Again, as noted in Mr. Washington's initial brief, there were many additional points and arguments that Mr. Taylor could have made at sentencing to increase Mr. Washington's chances of receiving a more favorable sentence. Chief among these was the fact that Mr. Washington maintained that the shooting was an accident that resulted from the fact that W.W. threw a basketball at him. Contrary to the State's suggestion (State's Br. at 31), it defies common sense to think that the circuit court gave no weight to whether the shooting was an intentional act or an accident.

But instead of making any of the arguments that would have helped Mr. Washington at sentencing, Mr. Taylor "punted" and deliberately advocated against him. This undermines confidence in the outcome of the sentencing proceeding.

CONCLUSION

For these reasons, Mr. Washington respectfully requests that this court reverse the circuit court's judgment and postconviction order denying his claim for plea withdrawal, and remand the case for purposes of a new trial. Should this court conclude that Mr. Washington is not entitled to plea withdrawal, he requests that the court reverse the circuit court's postconviction order denying his resentencing claim and remand the case for a resentencing hearing.

Dated this 3rd day of May, 2019.

Respectfully submitted,

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

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

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,973 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 3rd day of May, 2019.

Signed:

LEON W. TODD
Assistant State Public Defender