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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent.

v.

QUAID Q. BELK,

Defendant-Appellant.

APPEAL NO. 2019AP982-CR
Milwaukee County Case No. 15CF2861
Hon. Joseph Donald & Hon. Janet Protasiewicz, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Mr. Belk asks this Court to find that the Trial Court erred when it denied Mr. Belk's request for a new trial or, at least, for an evidentiary hearing to determine whether his trial counsel rendered ineffective assistance of counsel. In the alternative, Mr. Belk asks this Court to find that the Trial Court erred when it denied Mr. Belk's request for resentencing based on a new factor—the testimony of the only third-party eye witness to the accident.

The State's response to Mr. Belk's initial brief relies on a weak theory: that the overall nature of Mr. Belk's claims are conclusory, and therefore should be denied. Contrary to what the State argues, Mr. Belk presents a compelling case that he was deprived of effective trial counsel. The State excuses each individual instance of ineffectiveness, then ignores the cumulative impact of those mistakes, and undervalues the eye-witness testimony of Reginald Alston. These arguments miss the mark.

The whole point of Mr. Belk's appeal is that trial counsel denied Mr. Belk the ability to effectively defend himself and contradict the State's case. Because of the very deficiencies at issue in this case, Mr. Belk finds himself in something of a Catch-22: because of his trial counsel's failure to put forth a workable defense, call witnesses, investigate material facts, and establish a proper record for appeal, appellate counsel must make certain inferences as to

what *could* have happened if effective counsel had been given. Alas, because trial counsel *did not* do these things (which is the very reason for this appeal), the State argues that Mr. Belk does not have enough evidence to make its case on appeal, and therefore all of his claims are conclusory. It would seem, then, that the easiest way for any trial counsel to avoid a new trial or a *Machner* hearing would be to do as little as possible, establishing such a flimsy record that no appeal could be made in a conclusive fashion. This cannot be so.

The State asks this Court to ignore trial counsel's utter failure to zealously advocate for Mr. Belk. The State asks this Court to rely on hindsight to piece together what never was nor ever could be a coherent defense strategy. Trial counsel's mistakes individually prejudiced Mr. Belk. The cumulative impact of those errors demands a new trial, at most, or, at least, a *Machner* hearing. Such a proceeding will call trial counsel to account for his otherwise inexplicable trial decisions. In the alternative, Mr. Belk asks this Court to order resentencing based on a "new factor"—the testimony of Reginald Alston.

ARGUMENT

I. Trial counsel's deficient performance warrants a new trial, or at the very least a *Machner* hearing.

Trial counsel failed to competently participate in the adversarial process. Four deficiencies highlight trial counsel's ineffectiveness: (1) the failure to obtain pre-trial discovery; (2) the failure to examine witnesses or call witnesses for the defense; (3) the failure to object to purported expert testimony; and (4) deficient closing argument. Individually and cumulatively, trial counsel's errors prejudiced Mr. Belk. The mistakes resulted in an unfair trial, a guilty verdict, and a 20-year sentence. The ineffective defense strategy calls into question trial counsel's proficiency and the reliability of the trial's outcome. As a result, Mr. Belk is entitled to a new trial, or an evidentiary hearing, or to resentencing.

The State attempts to pick apart and isolate these deficiencies, claiming that no single error allows this Court to order a new trial or grant Mr. Belk an evidentiary hearing. This is not the case.

While, for example, failing to interview and ultimately call Reginald Alston—a key witness to Mr. Belk's defense who was readily available every day of the trial—is alone sufficient to give rise to prejudice, this Court should not look to one single instance of ineffective assistance in isolation. Instead, under

Wisconsin law, this Court may adduce ineffective assistance through the cumulative nature of all such instances: "When a defendant alleges multiple deficiencies by trial counsel," as is the case here, "prejudice should be assessed based on the cumulative effect of these deficiencies." *State v. Coleman,* 2015 WI App 38, ¶ 21, 362 Wis. 2d 447, 865 N.W.2d 190 (citing *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305).

The reason the Court may look to the totality of circumstances rather than each factor in isolation is because the inquiry "is not on the outcome of the trial, but on the reliability of the proceedings." *Id.* Critically, the right to counsel is "more than the right to nominal representation. Representation must be effective." *Id.*

Here, trial counsel's mistakes were numerous, and each alone gives rise to prejudice and demands a new trial. Trial counsel failed to adequately conduct sufficient pretrial discovery, failed to prepare adequately for trial, and failed to conduct meaningful cross-examination of witnesses at trial. All of these mistakes culminated in Mr. Belk's trial counsel failing to put forth any sort of cohesive or coherent defense, prejudicing Mr. Belk and entitling him to a new trial, or to an evidentiary hearing, or to resentencing.

A. The record reflects an incoherent, if not incomprehensible, defense strategy, prejudicing Mr. Belk.

Trial counsel failed to conduct adequate pre-trial discovery, which prevented him from developing a coherent defense for Mr. Belk. For example, trial counsel never investigated references to DNA evidence—present in the police reports and defense file—that potentially identified Mr. Belk as the driver of the Monte Carlo. During trial, trial counsel admitted to this lack of investigation and failure to confirm such evidence—while at the same time incoherently referencing this potential evidence at closing. (R.15:63-65, 79-80). As a result, trial counsel pursued a nonsensical defense—that Mr. Belk was not the driver of Monte Carlo. This lack of coherent defense, and total failure to put together a meaningful trial strategy, prejudiced Mr. Belk, entitling him to a new trial, or, at least, an evidentiary hearing.

Another example is trial counsel's failure to pursue a motion to suppress custodial statements. The State does not meaningfully dispute this deficiency. Instead, the State simply summarizes the Trial Court's findings and asks this Court to affirm. That does not come close to meeting its burden to establish, by a preponderance of the evidence, that Mr. Belk received the required warnings ahead of a custodial interrogation. *See State v. Armstrong*, 223 Wis. 2d 331, 345, 588 N.W.2d 606, 612 (1999).

The State similarly responds to Mr. Belk's assertion that trial counsel failed to object to purported expert testimony. The State simply recounts the Trial Court's findings and asks this Court to affirm. *Cronic* requires more from trial counsel and of our Country's justice system. The failure to examine witnesses can result in constructive ineffective assistance of counsel and that's what happened here. Trial counsel failed to meaningfully engage in the adversarial process, calling into question Mr. Belk's conviction and making the outcome—a 20 year sentence—presumptively unreliable. *Cronic*, 466 U.S. at 656-57, 659.

Trial counsel also failed to meaningfully examine witnesses or call any witnesses in support of the defense. The State questions "how" trial counsel could have meaningfully examined witnesses and what the outcome could be for Mr. Belk. The law requires that trial counsel put the State's case to a meaningful and adversarial test. *United States v. Cronic*, 466 U.S. 648, 659 (1984). Trial counsel failed to do so. His failure to investigate, for example, the actions of the victims in the hours leading up to the accident, prohibited a fulsome defense. Any reasonable questioning of witnesses would have better served Mr. Belk's defense and protected his constitutional rights.

No judge, lawyer, juror, or defendant has a crystal ball with which to determine conclusively whether any single factor, if manipulated, would

change the outcome of the trial. But each of us are capable of discerning whether the factors taken as a whole affect our confidence in the overall fairness of the trial. And such is the issue here: while we cannot say with certainty that if trial counsel had not made one or all of these mistakes, Mr. Belk may have been acquitted of all charges, we can say that each of trial counsel's errors prejudiced Mr. Belk and his ability to put on a coherent and meaningful defense.

Trial counsel's failure to obtain pretrial discovery, coupled with trial counsel's failure to call a key witness, cross-examine prosecution's witnesses, object to purported expert testimony, give a sufficient closing argument, and put on a coherent defense, *in total*, is sufficient to undermine confidence in the outcome of this trial. These errors by trial counsel allow this Court to order a new trial for Mr. Belk—at most—or, at minimum, order a *Machner* hearing to hold trial counsel accountable for his trial decisions.

B. Failing to call Mr. Alston prejudiced Mr. Belk and prevented a meaningful adversary process.

Rather than half-heartedly (and incoherently) pursue a dead-end defense (that Mr. Belk may or may not have been the driver), trial counsel should have called Mr. Alston as a witness. Mr. Alston's statements contradict the State's narrative regarding Mr. Belk's actions after the accident. (*See* Affidavit of Reginald Alston (the "Alston Affidavit"), R.113 and Appendix for

Appellant ("A-App.") at 12-14). "When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify." *State v. Arredondo*, 2004 WI App 7, ¶ 40, 269 Wis. 2d 369, 674 N.W.2d 647. Contrary to the State's claim that Mr. Belk is unable to satisfy that standard, the Alston Affidavit satisfies the standard. (R.113 and A-App. at 12-14). Mr. Alston states that he saw Mr. Belk speak with the passenger in the other vehicle, that Mr. Belk was not trying to hide, and that Mr. Belk may have been trying to get help. (*Id.*, ¶¶ 19-20, 28, 30).

The State also contends Mr. Alston's testimony would promise a conviction on all but two of the counts Mr. Belk faced. But Mr. Belk *did* explain why this was a better defense. It is a better defense because introducing Mr. Alston's testimony contradicts testimony of the State's witnesses. In addition, Mr. Alston's testimony challenges the State's narrative that Mr. Belk fled the scene, failed to speak to either victim, and did not seek help.

The record reflects a completely disjointed and ineffective defense of any sort. If anything, trial counsel made only the slightest of efforts to test the State's case. While the benefit of hindsight allows for scrutiny of the record and attempts to piece together trial counsel's potential (yet incoherent) defense strategy, it was certainly not clear *at the time of the trial* what the strategy was meant to be. At the very

least, it cannot be said that trial counsel's defense strategy was coherent enough to for the State to discern with certainty what it was supposed to be, underscoring the prejudice to Mr. Belk by failing to call Mr. Alston to testify at trial. This failure further demonstrates the need for a new trial—at most—or, at least, a *Machner* hearing.

II. The Alston Affidavit is a "new factor" warranting resentencing.

Ordinarily, sentencing is "a matter committed to the circuit court's discretion." *State v. Holloway*, 202 Wis. 2d 694, 697, 551 N.W.2d 841 (Ct. App. 1996) (citation omitted). However, when the trial judge relied on an incomplete or erroneous set of facts to make his or her sentencing decision, then the existence of a "new factor" allows the appellate court to review the sentencing decision with a more critical eye. *See State v. Harbor*, 2011 WI 28, ¶ 37, 333 Wis. 2d 53, 797 N.W.2d 828.

Here, Mr. Alston's account of Mr. Belk's actions is just such a "new factor." (*See* R.113 and A-App. 12-14). Mr. Alston is indisputably a material witness. His testimony would have provided a clear and compelling counter narrative to the one offered by the State. His testimony would have seriously undermined several of the State's witnesses who claim to have seen Mr. Belk fleeing the scene. Even more compelling, Mr. Alston is the only third-party, eye-witness in the case. And yet, trial counsel inexplicably chose not to call this credible

and critical witness, despite knowing that Mr. Alston waited outside the courtroom each day of the trial. The record lacks any reason why trial counsel made this decision.

The State's argument that Mr. Alston's testimony contradicts trial counsel's alleged yet incoherent defense strategy—that Mr. Belk did not drive the car—nullifies the very real possibility of a *reduced sentence* as a result of a retrial with effective trial counsel, and the enormous value such a result would have for Mr. Belk. The State argues that even if Mr. Belk were given a retrial with the opportunity to call Mr. Alston as a witness, Mr. Belk not be acquitted of all charges. Thus, the argument goes, Mr. Belk should not be afforded a new trial, since could be convicted of some charge or another.

The law does not require that full acquittal more likely than not results from a retrial. *See State v. Foellmi*, 57 Wis. 2d 572, 582, 205 N.W.2d 144, 150 (1973). Thus, the relief Mr. Belk seeks is not necessarily to be cleared of all charges, but rather to have his sentence reevaluated based on the weight of his actual guilt after either a fair and proper retrial, or after a *Machner* hearing to assess trial counsel's ineffectiveness more fully, or at resentencing.

Mr. Alston's testimony exists, is highly relevant to the imposition of Mr. Belk's sentence, and was overlooked at sentencing. Mr. Alston's testimony also supports the legitimate argument that a jury may not

have found Mr. Belk guilty on all counts, resulting in no sentence or a reduced sentence on some counts. Both the jury and the sentencing court lacked complete information when convicting and sentencing Mr. Belk. At a minimum, Mr. Alston's testimony entitles Mr. Belk to resentencing before a court with complete and accurate information regarding the circumstances immediately surrounding the accident.

CONCLUSION

Mr. Belk requests that this Court remand for a new trial, or, failing that, for an evidentiary hearing or resentencing, as requested in his motion for post-conviction relief.

Respectfully submitted this 4th day of December, 2019.

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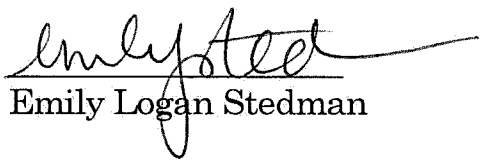
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief, including footnotes, is 2,395 words.



Emily Logan Stedman

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I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

Emily Logan Stedman

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I hereby certify that on this 4th day of December, 2019, I caused 10 copies of this Brief and Appendix to be filed with:

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