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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN

Plaintiff-Respondent

v. Case No. 2020AP261-CR

David Wayne Ross,

Defendant-Appellant

ON NOTICE OF APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE TIMOTHY DUGAN PRESIDING AND THE DENIAL OF POST CONVICTION RELIEF, THE HONORABLE JEFFREY A. WAGNER, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

ISSUES PRESENTED

1. Is Mr. Ross entitled to a new trial on the grounds that he was denied his constitutional right to effective assistance of counsel?

   The trial court answered no.

2. Is Mr. Ross entitled to a new trial in the interest of justice because the real controversy was not fully tried?

The trial court answered no.

3. Was Mr. Ross entitled to a hearing under ***Machner***?

The trial court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither is requested.

STATEMENT OF THE CASE

On November 25, 2014, Mr. Ross was charged with one count of misdemeanor battery and two counts of second-degree sexual assault. DDW alleged that on November 18, 2014, Mr. Ross hit and choked her while they were sitting in her car. (R1, App 101). The next day DDW contacted Mr. Ross to obtain medication and clothing she had left at his residence. She had moved in about 10 days earlier. When she arrived, Mr. Ross would not let her leave the apartment. He demanded she perform oral sex on him and forced her to remain in the apartment. (R1, App 101)

DDW reported that at 1:00 a.m. on November 20, 2015, DDW awoke to Mr. Ross pulling down her pants. Without her consent, Mr. Ross attempted to have anal sex and then that had penis to vagina intercourse with her. Later, around 11:00 a.m., Mr. Ross had intercourse with her a second time. (R1, App 101).

The case proceeded to trial in July of 2015. Mr. Ross was convicted of two counts of second-degree sexual assault but acquitted of battery. (R148-R155, (R78-R80). The Honorable Judge Timothy Dugan sentenced Mr. Ross to a total sentence of 15 years of initial confinement 10 years of extended supervision consecutive to a revocation sentence Mr. Ross was serving. (R161:97-98; R95, App 103).

Mr. Ross file a timely filed a post-conviction motion which the Honorable Judge Jeffrey A. Wagner denied in a written order without a hearing. (R116-R117; R132).

This appeal follows.

STATEMENT OF THE FACTS

Prior to trial, trial counsel sought to admit evidence of the prior consensual sexual relationship between Mr. Ross and DDW despite the presumption against admission in §972.11(2)(b). Additionally, trial counsel wanted to argue that BB, a friend of DDW, was a possible perpetrator under ***State v. Denny***, 357 N.W.2d 12, 120 Wis.2d 614 (Wis. App 1984). There was acrimony toward Mr. Ross by BB because BB was jealous of the victim's relationship with Mr. Ross. BB was an alcoholic. He was drunk when DDW had contact with him on November 19, 2014. Trial counsel's theory was that BB had caused DDW's bruises, not Mr. Ross. Additionally, DNA recovered from DDW contained a possible secondary contributor. Trial counsel sought permission to question the crime lab analyst about the present of another male's DNA. (R11; R143;17-18). The trial court granted trial counsel's requests. (Id.:17-18).

Trial counsel also filed a standard motion in limine seeking to prohibit the state from admitting any prior bad acts, using any evidence not identified in the discovery and any uncharged misconduct. (R14: paragraphs 1, 13 and 20). During the final pretrial hearing, the state agreed there were no "other wrongful acts" and that it had complied with section 13. (R146:8,11). The trial court also granted paragraph 20. (Id.:11). Paragraph 20 prohibited reference to any uncharged conduct. Trial counsel did not make a specific motion to keep out references to drug use or drug paraphernalia.

In his opening statement, the prosecutor told

the jury that DDW will testify:

> You will likely consider that she will say the Defendant was on drugs and drinking at the time. (R149:8).

He went on to state:

> And I don't expect you're going to see evidence on-scene of that; that is, the police did not see any alcohol or drug paraphernalia. (R149:8).

In reference to pictures of text messages on DDW's phone, later admitted as Exhibit 60, trial counsel, during his opening statement, stated:

> Instead of doing a digital data download, which would have had the complete record of this phone, they just took photos of what she showed them, and they took those photos nine days after the accusation. And, again, the most troubling part is that these photos do not match the objective evidence of the certified phone records from the phone company.
>
> These have been tampered with by [DDW]. (R149:15, *portions omitted*).

P.O. Adrian Harris ("Harris") was the state's first witness. He testified that he was dispatched at 1:34 p.m. on November 20, 2014 and arrived on scene 12 minutes later. DDW was near a Curtis Ambulance and Mr. Ross was walking down the street away from his apartment. (R149:19, 28, 38). Mr. Ross cooperated with the stop and arrest. (Id.:21, 39). He was not let back into his apartment. (Id. 39).

Detective Timothy Wallich ("Wallich") processed Mr. Ross's apartment for evidence. He testified as follows during direct examination:

> STATE: Now, let me ask you this. Do you know what a Chore Boy is?
> WALLICH: Yeah.
> STATE: What's a Chore Boy in relation

> to drug investigations?
>
> WALLICH: It's usually used as, like, a filter.
>
> STATE: Okay. A filter for what?
>
> WALLICH: Crack/Cocaine.
>
> STATE: Did you recover anything like that in this kitchen?
>
> WALLICH: I don't know if I recovered it. We discovered something in one of the drawers, I believe.
>
> STATE: And what was it?
>
> WALLICH: Chore Boy.
>
> STATE: What is a Chore Boy? What does it look like?
>
> WALLICH: It's like a metal, like mesh metal. It almost looks like and SOS pad but a little thicker. It's, like, copper color.
>
> STATE: Where did you see one in the kitchen in Exhibit 30?
>
> WALLICH: I don't recall. I believe it was in one of the drawers. (R149:59-60).

Trial counsel did not object, but on cross questioned Wallich as follows:

> TRIAL COUNSEL: Tell me where in your report it says anything about Chore Boy?
>
> WALLICH: It doesn't. (R150:20)
>
> TRIAL COUNSEL: And on your direct testimony, you testified that Chore Boy was something you found in the apartment?
>
> WALLICH: Correct. (Id.:21).

Trial counsel established that Wallich did not document in any report that he found a Chore Boy. Trial counsel further established that Wallich found no evidence of a crack pipe:

> TRIAL COUNSEL: In fact, other than this late breaking otherwise undocumented Chore Boy, there was really no indication of any crack use whatsoever, correct?
>
> WALLICH: Correct. (R150:23)

Officer Brian Young ("Young") responded to 3001 W. Wisconsin Ave., to take a complaint from DDW. DDW informed him that Mr. Ross battered her earlier that day around 1:30 p.m. (R150:53). She

stated that Mr. Ross hit her while they were sitting in her vehicle. Young issued a citation to Mr. Ross which he believed to be the appropriate response to his assessment of the offense. He did not see any bruising and DDW did not report that she had been choked. (Id.:52, 54).

DDW testified next. She met Mr. Ross at the Salvation Army. (R150:60). They started dating. (Id.:61). At some point she was "kicked out" of the Salvation Army and was staying in her car. (Id.). Mr. Ross was in the process of getting an apartment. She started staying with him about 2 weeks prior to the assault. (Id.).

When asked to describe the events that led up to the battery, DDW testified that they argued about BB buying Mr. Ross some beer:

> He would stop the car, and he would be yelling at me. He would hit me. He choked me. All because I was telling him, no, and he didn't get to talk to [BB] to get his beer. (R150:63)
>
> Well, when he stopped the car, of course, he sort of came over on top of me, and he was choking me like that; and he did—he left marks on my neck, and for I don't know about a month or so after my throat was sore. (Id.:64).

DDW testified that she was on the phone with BB during the battery, but the phone went dead. BB left her a message telling her he had called 911. Dispatch called her back. She stayed on the phone with them and did not hang up, despite Mr. Ross begging her to do so. (R150:64-65). When Mr. Ross stopped the car, he got out and she drove away. (Id.:66). She went over to BB's. (Id.). She showed BB all the marks Mr. Ross caused. (Id.:68). When the police arrived, she felt they were uninterested in her statement or her injuries and did not believe her. (Id.:68-69; R152:9).

DDW testified that the night of the 18th, Mr.

Ross left her several messages, including voice mail messages. The messages were played for the jury. (R150:75-78, Ex 70).

The next morning, she sent Mr. Ross a text message informing him that she wanted to retrieve her property, especially her medications. (R150:82). When she arrived, she took her medication, but after that Mr. Ross would not allow her to leave. (Id.:83).

> He'd be standing in my way, follow me around the apartment. He'd follow me in the bathroom, and he just followed me everywhere. (Id.:85).

At one point, Mr. Ross followed her into the bathroom and asked her to "suck his dick." (R150:86). She testified that she complied "out of fear that he would start hitting me again." (Id.:87). She was crying the whole time. (Id.).

Prior to going into the bathroom, he hit her:

> Well, he grabbed me on the floor and in the living room where we slept; and he would—he got on top of me and had me pinned down, and he was asking me questions about what I told the police about the day before on the 18th of what happened, what they said, what they were going to do. And he was hitting me on the side of my face, side of my head, here… (R150:88, *portions omitted*).

Concerning the sexual assault that occurred at 1:00 a.m., the morning of the 20th, DDW told the jury:

> Well, I wake up to him trying to pull my pants down. He pulled my pad off, and he pulled my tampon out, and he proceeded to have sex with me; and I – but I was telling him I didn't want to. (R150:92-93).

After Mr. Ross fell asleep, she got up and got dressed with the intent of leaving. However, he woke up and asked her if she was trying to sneak out. She told him no because she was afraid of getting hit

again. He then made her lay back down and they went back to sleep. (R150:95).

When asked to clarify when the intercourse occurred in relation to the penis to mouth contact in the bathroom, DDW told the jury the assault occurred first. (R150:96). She also told the jury that Mr. Ross had made her mouth bleed when he first pinned her down and that he used a beer-soaked rag to wipe the blood off. While he was sleeping, she put the rag in a plastic bag and put it in her purse. (R150:95,96).

At 11:00 a.m., Mr. Ross pulled her pants down and once again took her tampon out and once again had sexual intercourse with her. He also put his fingers in her anus. (R150:98). She recalled that he ejaculated. (Id).

DDW went into the bathroom to clean up. Mr. Ross told her he was going to the store. (R150:99). She called BB first and then called 911. The police arrived prior to Mr. Ross returning to the apartment. (Id.).

When asked if she had been using her phone, DDW testified Mr. Ross had her phone for most of the 19th and part of 20th. He threw it at her when she asked for it back. (R150:100). When he had the phone, he kept it on his person. (Id.). She had the phone back before the 11:00 a.m. assault because she texted BB. She then testified that she, in fact, had the phone more than once but he would take it and then give it back. (Id.:102).

When asked by the prosecutor if anyone was using drugs, DDW told the jury that Mr. Ross was smoking crack cocaine, but the only drugs she used were her prescription medications. (R150:114). When asked if there was any drug paraphernalia in the house, DDW testified that Mr. Ross had hidden a glass pipe in one of her boots. She took it out and sat it on a ledge. (Id.:115). The prosecutor showed her a picture of the area where she claimed she put the

crack pipe and DDW acknowledged that there was no crack pipe in the picture. (R151:15)

The prosecutor admitted the text messages between DDW and Mr. Ross between the 18th and the 19th. (R150:121, Ex. 60).

On cross-examination trial counsel identified several inconsistencies between DDW's testimony, the police reports, hearings held in April and December and other evidence.[2] DDW initially denied that Mr. Ross had picked up her car from the tow lot until confronted with the release. (R151:32-34). Phone records established that DDW spoke to someone for about 27 minutes at 1:07 P.M. on November 19th. (Id.:49). She texted this same individual from the hospital on the 21st. (Id.:50).

When asked why she did not call the police right away after the battery on the 18th she told the police it was because she could not get Mr. Ross out of the car. However, phone records established that he was out of the car by 1:38 p.m. (R151:62-63).

She testified previously that Mr. Ross took her phone at 6:00 p.m. on the 19th and did not return it until the 20th. (R151:69, 71, 73). She told the police she found the phone and used it to call 911 on the 20th. (Id.:71). However, she testified on direct that she got the phone back when he threw it at her. (Id.). She previously testified that he threw the phone at her prior to the second assault which occurred at 11:00 a.m. (Id.:72,73). On direct she testified that Mr. Ross only had the phone some of time. (Id.:74). Trial counsel established that this testimony came after the prosecutor showed DDW her phone records before trial. (Id.).

[2] The two hearings referred to during the trial are an injunction hearing held on December 10, 2014 marked as exhibit 151 (R67) and testimony from April 1, 2015 revocation hearing marked as exhibit 152 (R68).

She testified during a hearing in April that she hadn't called BB until after she called 911 on the 20th. (R151:75) However, phone records revealed that she texted BB the morning of the 20th at 9:49 a.m. (R152:5). She told BB that she had been kidnapped and raped. (Id.). When Mr. Ross left the apartment to get something to eat, she waited 30 minutes before calling 911 despite having her phone. (Id.:6, 7).

Officer Matthew Bughman ("Bughman") testified that he interviewed DDW and helped Wallich search Mr. Ross's apartment. On cross, trial counsel established that during the search, Bughman did not find any crack, gin and or beer. (R153:32). He did not find any of these items in DDW's car either. (Id.:35). He made no mention of any drug paraphernalia in his report. (Id.:36). On redirect, the prosecutor asked Bughman if he has seen a chore boy during the search and Bughman stated that he had. (Id.:35). Once Bughman's testimony was complete, the state rested. (Id.:37).

Trial counsel called Harris to rebut DDW's claims about his interview with her. He denied telling DDW that he did not believe her or believed Mr. Ross over her. (R153:42).

Patricia Zdiarski, an investigator from the State Public Defender's Office, testified next. She attempted to identify the numbers DDW called, or was called by, surrounding the timeframe of the sexual assaults. She determined that DDW had called Walgreens, Hanger Orthopedics, Budget Mobile, Samsung Customer Service, the Bradley Center, St. Luke's, and her own voicemail. She also testified that there were ways that text messages can be manipulated based on training she received but she didn't "know personally how to do it," "hadn't tried it" and "hadn't researched it." (R153:48-49).

Nathan Hammell, an intern for the State Public Defender's Officer, testified that he was provided DDW's phone records and created exhibit 156.

(R153:62, 64; R71). He reviewed the pictures taken of DDW's phone by the police and DDW's call detail from the phone company. (R60. R69). Hammell testified that three of the messages that appeared in the pictures of the phone, specifically, 11/18/14 at 4:09 p.m., 11/19/2014 at 9:17 a.m. and 11/19/2014 at 12:13 p.m., were missing from the call detail produced by the phone company as a result of trial counsel's subpeona.[3] (R153:66-67).

Hammell testified that his review of the DDW's phone records revealed text messages between BB and DDW beginning at 9:47 a.m. and ending at 11:47 a.m. on the 20th. (R153:72). There were multiple outgoing text messages to a number starting with 920 and ending on 2911 on the 19th and 20th. (Id.:75). DDW spoke with someone for 1666 seconds (~28 minutes) at 11:59 a.m. on the 20th. (Id.:76). She spoke to Hanger Prosthetics Clinic for 304 seconds (~5 minutes) at 10:47 a.m. on the 20th. (Id.:79) She spoke to Walgreens for 248 seconds (~4 minutes) at 10:41 a.m. on the 20th. (Id.) She made calls to Budget, Prepay Budget and Samsung starting at 12:16 p.m. through 12:56 p.m. on the 20th. She called Mr. Ross at 1:14 p.m. on the 20th and then the Bradley Center, then St. Luke's, then BB and finally called 911 at 1:34 p.m. (Id.:79-81)

On cross the prosecutor asked Hammell if he was familiar with "a multimedia message service" and Hammell replied "Barely, but yeah". (R153:85).

Once Hammell was the off the stand the prosecutor explained that he intended to call Nicole Smith in rebuttal. Smith worked in the D.A's office as an intelligence analyst. Smith would testify that there was a difference between SMS messages, standard text messages, and MMS messages, multi-media text messages and that there was an explanation for why the three missing MMS messages testified to by

[3] These three messages were MMS, multi-media messages.

Hammell did not appear on DDW's phone records. (R54:7-8).

Mr. Ross was the last witness for the defense. Mr. Ross denied hitting DDW on the 18th. (R154:9,19,22). He asked DDW to live with him after he found out she was homeless. (Id.:13). Mr. Ross denied that any of the MMS messages appeared on his phone and that the first time he saw the MMS messages was in the discovery. (Id.:29, 30, 34). Trial counsel asked Mr. Ross if he knew why one of the messages showed up as a "multimedia" and Mr. Ross commented that "[t]here's a lot of strange things that those texts happening on my phone and numbers. I have no idea." (Id.:35). Mr. Ross also denied sending the messages that referred to himself in the third person. (R154:36)

Trial counsel showed Mr. Ross a photo of the apartment taken by the police which depicted his phone. When asked if he left the phone there when he went out to get two Dr. Peppers for DDW after the assaults, Mr. Ross replied, "Absolutely. She had my PIN code. She had my phone." (R154:47). He testified that DDW had changed his PIN code to her birthday after finding his PIN code in his appointment book. (Id.:52-53). He denied taking DDW's phone away from her. (Id.:52).

Mr. Ross offered alternative explanations for the text messages in Exhibit 60. He told the jury that he had consensual sex with DDW in the afternoon of the 20th. He denied sexually assaulting her. (R154:50-51,56, R60).

On cross, the prosecutor stated "[s]he gave you a Percocet. You could use her debit card on occasion, is that correct? Go to an ATM on her behalf, that sort of thing? (R154:59). Trial counsel did not object to the prosecutor's statement that DDW had given Mr. Ross a Percocet. (Id.).

The state called Nicole Smith. She had experience subpoenaing and analyzing cell phone data. (R154:85-86). Smith testified that SMS stood for "short messaging service" and MMS stood for "multi-media messaging service." (Id.:88). In short, the difference is that an SMS message is sent over the cellular network and MMS message is sent over the internet. (Id.:88). The prosecutor showed Smith the subpeona trial counsel generated for DDW's phone records. (Id.:89). The subpeona did not request MMS messages and, therefore, the phone company would not produce the records in response to the subpeona. (Id.).

On cross trial counsel asked Smith if she was aware that there were ways to fake text messages and Smith replied, "I have never come across in any of my cases of fake text messages in my experience." (R154:92).

In his closing argument, trial counsel spent a significant amount of time discussing the phone records and the fact that they established that DDW was on the phone a considerable about of time during the time she claimed she was being assaulted. (R155:32-35). In relation to his mistake subpoenaing the records he stated:

> So I will fully admit right here and now, I screwed up as a defense attorney when I didn't subpeona the MMS messages, and that looked to me as a defense attorney like a big deal; and it wasn't until yesterday that I learned from an analyst, an intelligence analyst for the District Attorney's Office, that I, in my pursuit of my defense of my client, screwed that up. (Id.:44, *portions omitted*,).

Trial counsel also argued that his investigator testified that there were ways to manipulate text messages, despite the response he received from Smith. (R155:45).

The jury convicted Mr. Ross of two counts of second-degree sexual assault. They acquitted him of the battery charge. (R155:80-81). Mr. Ross was sentenced to a total sentence of 15 years of initial confinement and 10 years of extended supervision consecutive to any other sentence. (R161:97-98; R95, App 103).

Mr. Ross timely filed a post-conviction motion. After further briefing, the trial court denied the motion without a hearing. (R116, R117; R127, R128; R130; R132, App 102).

ARGUMENT

I. MR. ROSS IS ENTITLED TO A NEW TRIAL BECAUSE HE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

a. *Trial counsel's mistake concerning the SMS and MMS messages led to an unreasonable defense strategy, that damaged Mr. Ross's credibility and left him without a defense.*

To prove a claim of ineffective assistance of counsel a defendant must show both that his attorney was deficient and that he was prejudiced by the deficient performance. (See ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). To establish prejudice, a defendant must aver that there is a "reasonable probability" that, but for counsel's errors, the result of the proceeding would have been different. Mistakes that undermine confidence in the outcome are sufficient. ***Strickland***, 466 U.S. at 694. More than one allegation of deficient performance should be evaluated for their cumulative effect. (***State v. Thiel***, 2003 WI 111, ¶63).

Reviewing courts frown on second guessing an attorney's decision making and judgement, however, conduct must be objectively reasonable:

> It implies deliberateness, caution, and circumspection. It is substantially the equivalent of the exercise of discretion; and, accordingly, it must be based upon a knowledge of all facts and all the law that may be available. The decision must evince reasonableness under the circumstances. (***State v. Felton***, 329 N.W. 2d 161, 169, 110 Wis.2d 485 (Wis.,1983)

Trial counsel predicated his defense on his review of the phone records which he believed established that DDW had manipulated the text messages depicted in Exhibit 60. (R60). In a letter to Mr. Ross dated June 25, 2015, trial counsel stated:

> We also know that there are two text messages missing from the police photos for her text conversation with BB on 11/20 (at 11:55 and 11:57 am EST)
>
> We also know that there are various instances in which the caller called and listened to voicemails at great length throughout the 11/18-11/20 period. I am rather certain that is when she is figuring out how to frame you using those voicemails.
>
> I am fairly confident that this phone record will destroy [DDW's] testimony and her statements about what happened on 11/18-11/20. (R117:affidavit of counsel, Ex. A)

Mr. Ross was cognizant that MMS messages were missing from the phone records because he commented on that fact in a letter he wrote trial counsel on May 26, 2015. In the same letter he expressed a belief that the missing messages established that DDW somehow manipulated the text messages, as well as confusion about the difference between SMS and MMS messages. (R117:affidavit of counsel).

In addition to trial counsel's belief communicated in the June 25, 2015 letter, trial counsel was also adamant that the missing MMS messages would destroy DDW's credibility and prove that DDW had manipulated the data on the phone

during conversations he had with trial counsel prior to the start of the trial. Trial counsel told him that BB and DDW were together at the Village Inn and had somehow manipulated the messages. (R117:affidavit of counsel).

Trial counsel promised the jury in his opening statement that the text messages would not match up to the objective evidence in the case and that would suffice as proof that DDW manipulated the messages. (R149:15). He presented evidence of the missing messages during Hammell's testimony. (R154:66-68). As it turned out, trial counsel's promise was based on his failure to understand the differences between SMS messages and MMS message and correctly subpeona MMS messages from the phone company.

Moreover, trial counsel presented no evidence that text messages could be manipulated other than a vague statement by his own investigator that "she heard it could happen." The more qualified witness from the DA's office did not support his claim. Trial counsel had no basis to make the claim that DDW had manipulated the messages. His belief that this was a possibility was based solely on his failure to understand that difference between MMS and SMS messages. Even after Smith explained his mistake, he continued to suggest the text messages were manipulated when he argued during closing that there were ways to manipulate the messages. (R155:45).

Further, and more troubling, this belief was contrary to information trial counsel already had. In fact, trial counsel retained an expert to examine Mr. Ross' phone. The expert, Joseph Henricks, from SIFT USA, authored a report dated May 9, 2015. Henricks concluded that a review of the loaded and deleted apps on Mr. Ross's cell phone and did not find any indication of apps that could manipulate or send fake SMS messages. There were no viruses on

phone capable of manipulating messages either. (R117:affidavit of counsel, Ex. B).

A review of trial counsel's file revealed no research or other information that the text messages or data either on DDW's or Mr. Ross's phone had been manipulated or that trial counsel was specifically aware how a person could manipulate text messages or that DDW possessed the ability to do so. (R117:affidavit of counsel).

While trial counsel, did not specifically argue to the jury that DDW was accessing voicemails for the purpose of framing Mr. Ross, his assertion, which he conveyed to Mr. Ross in the June 25th letter, fed into the inaccurate belief that DDW somehow had the ability to manipulate phone data without any evidence that DDW possessed that skill and without any expert testimony to explain to a jury how exactly DDW could have done so. (R117:Ex A).

In ***State v. Coleman***, 2015 WI App 38, 362 Wis2d 447, 865 N.W.2d 190, this Court, addressed the issue of a "broken promise" made to the jury by trial counsel:

> Defense counsel is seen by the jury as an agent for the defendant. If counsel says something will happen that does not, without explanation, counsel necessarily damages both his own, and potentially his client's, credibility. (***Coleman*** at ¶30).

It is well settled that strategic decisions made by a trial lawyer in defense of a client are unassailable, if the decisions are reasonable, but trial counsel may be found ineffective if the strategy was objectively unreasonable. See ***Felton***, 329 N.W.2d at 169. Trial counsel's decisions "must be based on facts and law upon which an ordinarily prudent lawyer would have then relied." (Id.).

Here trial counsel's strategy that the DDW manipulated text messages was unreasonable and

imprudent because it was untrue. It was based on trial counsel's failure to correctly subpeona DDW's phone records. He told the jury the text messages would not match the phone records and continued that assertion in his direct of Hammell. He made a promise he could not keep. Moreover, trial counsel had an opinion from his expert dated May 9, 2019, that no applications existed on Mr. Ross's phone that would have allowed for the manipulation of the data on the phone.

Trial counsel's assertion that DDW had manipulated data on any phone was without any basis in fact and was contrary to information trial counsel already had.

Mr. Ross was prejudiced by trial counsel's failure, because, as articulated in ***Coleman***, his credibility was damaged by his agent's false claims. Claims which the state destroyed with the testimony of Smith, the intelligence analyst from the DA's office.

Credibility was all that the jury had to make their determination when they deliberated. DDW claimed Mr. Ross raped her, Mr. Ross asserted the sex was consensual. There were several credibility hits against DDW's version presented to the jury. She delayed reporting the initial battery. She claimed injuries that Harris did not see. The jury concluded she hadn't been battered. They acquitted Mr. Ross of the battery charge. She tried to make Harris out to be incompetent or insensitive in order to explain away the fact that he saw no injuries. She went over and into Mr. Ross's apartment alone after she filed the battery complaint. She made several inconsistent statements about whether she or Mr. Ross had her phone and when she had it. She provided no explanation for why she was texting, calling and checking voicemail during and around the time she was assaulted or why she delayed calling 911 after Mr. Ross left the apartment. She made claims about drinking and drug use despite the fact that police found no evidence of any in the apartment. She saw

a crack pipe that was not there. The DNA evidence established sexual contact, but not an assault, given Mr. Ross's position that the sex was consensual.

Because of the inconsistencies in DDW's testimony, the jury's assessment of Mr. Ross's credibility was critical. The jury was left with Mr. Ross's testimony versus DDW's. Consequently, any challenges to Mr. Ross's credibility were prejudicial because they detracted from his credibility and bolstered DDW's in case where the defense was that DDW was lying. Trial counsel assertion that DDW had manipulated the text messages without any evidence she had done so affected the strength of his entire presentation and tainted the jury against his client.

Trial counsel's mistake eviscerated his defense which was predicated on his representation that DDW had manipulated the text messages as evidence that she was lying about the sexual assault. This claim was interwoven with other parts of his defense that relied on DDW's use of the phone during the times surrounding the assault. Essentially, Mr. Ross was left without a defense as a result of trial counsel's mistake concerning the MMS and SMS messages and an unreasonable defense strategy without any basis in fact.

b-Trial counsel was ineffective when he failed to object to the introduction of testimony concerning drugs, drug use and drug paraphernalia and Mr. Ross was prejudiced by trial counsel's deficient performance.

The state told the jury during opening arguments that they would hear evidence of drug use and drinking by Mr. Ross. Trial counsel did not object. (R149:8).

Out of the blue, the prosecutor asked Wallich if he knew what a chore boy was and whether he had

seen a chore boy in Mr. Ross's apartment, trial counsel did not object. (R149:59).

When the prosecutor asked DDW if there was any drug paraphernalia in the apartment, trial counsel did not object. (R150:115).

When the prosecutor asked DDW if Mr. Ross was smoking crack cocaine, trial counsel did not object. (R150:114).

When the prosecutor, asked Mr. Ross if DDW have given him a Percocet, trial counsel did not object. (R154:159).

Trial counsel filed a motion in limine prohibiting the state from admitting any other bad acts, introducing any evidence not already disclosed and any uncharged conduct. (R14). Possession of crack cocaine, possession of drug paraphernalia and obtaining a prescription drug without a prescription are all criminal acts.

The only indication of drugs or drug use came from a statement DDW made to Bughman: "[DDW] stated that during the course of the incident Ross was drinking beer and gin and was smoking crack cocaine." (R117:affidavit of counsel).

As trial counsel established, there was no mention in any police report that the police discovered or recovered any evidence of drug use or drinking gin from Mr. Ross or his apartment. Harris does not describe Mr. Ross as being under the influence when he arrested him. There were no pictures of any drug paraphernalia, any drugs, any gin bottles. The crack pipe DDW claimed Mr. Ross put in her boot, which she then put on a ledge, was not depicted in the photo of the ledge. The prosecutor had no reason to ask Mr. Ross if DDW had given him a Percocet, a crack pipe or chore boy, other than to unfairly prejudice Mr. Ross. Trial counsel had no reason not to object.

Assuming, arguendo that the motion in limine did not cover the admission of drugs and drug use, then trial counsel should have made a more specific request to prohibit the testimony from DDW or any other witness. Either way, trial counsel was ineffective for not keeping testimony of drug use, for which there was absolutely no evidence, from the jury. First, putting aside whether the testimony was 'other act' evidence, it was not relevant. Pursuant to §904.01, Wis. Stats. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. There was nothing about whether Mr. Ross was smoking crack, had a crack pipe or a chore boy that made it more or less likely that he sexually assaulted DDW. There is no link in the chain between the drugs or drug use that creates any inference that because Mr. Ross was using crack or had a crack pipe or wanted a Percocet that he raped DDW. Moreover, even if the state could have posited some theory that it was relevant, the testimony still would have been barred under §904.03 as more prejudicial than probative.

Secondly, the testimony was not admissible pursuant to §904.04(2)(a). To determine whether other acts are admissible, the trial court engages in the three-step analysis laid out in ***State v. Sullivan***, 216 Wis. 2d. 768, 576 N.W.2d 30 (1998). Is the evidence offered for a permissible purpose? The answer is no. It does not help establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Was the evidence relevant? As argued above, it was not. There was no probative value to the evidence and there is no similarity between drug use and sexual assault. While the analysis should stop here, to the extent there was any probative value, it was outweighed by the danger of unfair prejudice, confusion of the issues or a waste of time. At least some effort was expended by the parties discussing

the chore boy and the crack pipe. The testimony served no purpose and only had the effect to unfairly prejudice Mr. Ross. If he was the kind of person to do one bad thing, he was the kind of person to do another. The exact reason why other act evidence should not be admitted without passing the inquiry laid out in ***Sullivan****.*

While it is true that trial counsel had no warning that the prosecutor was going to ask Wallich about a chore boy or DDW about a crack pipe, he was on notice that DDW told the police that Mr. Ross had been smoking crack. Therefore, trial counsel could have made a specific motion to keep the testimony out. Once the prosecutor told the jury that they would hear testimony about drug use, trial counsel should have objected and moved to exclude the evidence pursuant to either §904.01 or §904.04(2)(a) and moved to strike the comment. Applying the law, the trial court would have granted the motion and instructed the state accordingly.

c. The cumulative effect of trial counsel's deficient performance.

The aggregate of trial counsel's error demands the conclusion that Mr. Ross was prejudiced. (***Thiel***, 264 Wis. 2d, 571 at ¶59). First, trial counsel told his client about the missing messages and averred that the phone data will destroy DDW's testimony. He told the jury that the inconsistency was "troubling" and that DDW manipulated the messages. His theory of defense that DDW was lying was predicated on these facts. However, he had no objective, reasonable belief that the messages had been manipulated. He damaged Mr. Ross's credibility, bolstered DDW's and submarined his theory of the case.

Second, he failed to make a more specific motion to keep out testimony of drug use, then failed to object during the prosecutors opening statement and when testimony was introduced about drug paraphernalia and drug use. He did not move for a

mistrial or even a cautionary instruction. Allowing the jury to hear that Mr. Ross was smoking crack did nothing to help his defense. Leaving the jury to believe that Mr. Ross assaulted DDW while under the influence of crack was contrary to the claim that the sex was consensual. The combination of these errors deprived Mr. Ross of his constitutional right to effective representation of counsel.

d. The errors were not harmless.

An error is not harmless if it affects the substantial rights of the defendant. (***State v. Britt***, 203 Wis. 2d 25, 41 553 N.W. 2d 528 (Ct. App. 1996). Unless the state can show that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent" the error is not harmless. (***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W. 2d 362). For the reasons, already stated that the state cannot show beyond a reasonable doubt that trial counsel's errors did not contribute to the verdict.

e. The trial court's decision denying Mr. Ross's post-conviction motion.

In its decision denying Mr. Ross' claim that he was denied effective assistance of counsel because of the mistake trial counsel made concerning the SMS and MMS messages, the trial court largely incorporates the arguments the state made in their response. (R127, R128; R132, App 102). The state argued that because, in their view, Mr. Ross endorsed trial counsel's strategy it cannot be deemed ineffective. The state cites ***State v. Breitzman***, 2017 WI 100, 378 Wis. 2d 431, 904 N.W.2d 93 (Wis. 2017) in support of their position.

Breitzman was charged with multiple crimes for physically and verbally abusing her minor child on several different days. In his opening statement, her attorney told the jury that Breitzman's actions were reasonable parental discipline as defined in Wis JI-

Criminal 950. On appeal Breitzman complained that because she had told her attorney, in reference to two charges, that she had not struck her child, her attorney's statement was inconsistent with the agreed upon theory of case. In short, trial counsel's statement contradicted her anticipated testimony. (2017 WI at ¶36).

In denying Breitzman's claim, the Supreme Court opined:

> …we conclude that trial counsel's theory of reasonable parental discipline, as presented in opening remarks, was not deficient performance, and thus not ineffective assistance of counsel, because it reflected trial counsel's reasonable expectations, which were rationally based on discussion with Breitzman, and it was part of a reasonable trial strategy. (2017 WI at ¶42)

Further, Breitzman's attorney choose a reasonable defense strategy consistent with the facts of the case:

> At the outset, we note that, for trial counsel's performance to have been deficient, Breitzman would need to overcome the strong presumption of reasonableness of her defense counsel's trial strategy by demonstrating that counsel's incorporation of the reasonable parental discipline defense was irrational or based on caprice. (2017 at ¶65).

In the present case, the point the ***Breitzman*** Court makes in the above paragraph is the same point Mr. Ross makes. His attorney's decision to pursue the manipulated text message theory *was irrational* and *was capricious* because trial counsel's belief was based on his lack of knowledge concerning the difference between SMS and MMS messages and his failure to correctly subpoena phone records. The fact that Mr. Ross held the same erroneous belief aggressively promoted by his attorney does nothing to lessen the argument. Regardless of who

come up with the irrational theory first, trial counsel was responsible presenting factually accurate information to his client and the jury. It is significant that trial counsel, continued to promote his theory during closing, even after it was rebutted by the state's expert. Therefore, it is of little surprise and no consequence that Mr. Ross continued to make the argument his attorney never repudiated.

The trial court dismisses Mr. Ross claim of prejudice because "there is no reasonable probability that counsel's phone records error materially affected the outcome of the proceedings based upon the overwhelming evidence corroborating the victim's testimony." (R134:3, App 102).

However, there was not "overwhelming evidence corroborating" DDW's testimony. As already outlined, her testimony was inconsistent in several areas. She was inconsistent about when and if her phone was available to her to call for help. She provided no explanation or why she was using her phone during the time she was allegedly being assaulted. She delayed calling 911 after Mr. Ross left the apartment. She claimed to have seen evidence of drug use and drinking that the police did not find. She went to Mr. Ross's apartment alone after she claimed he had battered her.

In denying Mr. Ross's post-conviction motion on the second issue, the trial court again largely adopts the arguments made the state in their response. (R127, R128; R132, App 102). The state argued that fact that trial counsel, in the state's view, used the drug use testimony to his advantage somehow negates the error. At the onset the state does not explain why his introduction of the evidence during his opening and throughout the trial did not violate the trial court's orders made during the hearing on the motions in limine but instead claims that the state was merely anticipating trial counsel's attack.

However, the state ignores that it was the state that introduced evidence not contained in any police report to which trial counsel had no notice into the trial. The state's attempt to turn his misbehavior on this point into an invited response is unfair. Trial counsel's statement that he made during opening that the jury would hear no evidence of any drug paraphernalia or crack cocaine was a true statement based on the discovery turned over by the state. It did not entitle the state to introduce testimony about a chore boy, crack pipe and Percocet of which there was no mention in the police reports or any other evidence that these items existed.

Because trial's counsel theory was that these items did not exist, not objecting to their reference by the state was contrary to trial counsel's theory of the case and as already argued did absolutely nothing to help his client. Mr. Ross was the one on trial not the police. Trial counsel had a duty to keep substantially prejudicial evidence from the jury. The state's attempt now to try to parlay trial counsel's failings into an advantage is a non-starter. For the reasons already argued Mr. Ross was prejudiced by his attorney's deficient performance and the errors were not harmless.

II. MR. ROSS IS ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE BECAUSE THE REAL CONTROVERSY HAS NOT BEEN FULLY TRIED.

Even if this Court concludes that trial counsel was not ineffective, Mr. Ross asserts that pursuant to §752.35, Wis. Stat. he is entitled to a new trial in the interest of justice because the real controversy was not tried. (See ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990)).

Reversal in the interests of justice on the grounds that the real controversy was not tried is necessary for all the reasons stated above. Trial

counsel's errors clouded the real issue in the case, namely, who was telling the truth, Mr. Ross or DDW.

III. MR. ROSS IS ENTITLED TO A *MACHNER* HEARING

In his post-conviction motion, Mr. Ross requested that a hearing be held pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W. 2d 905 (Ct. App. 1979) to resolve the questions of fact and law presented by the allegations enumerated in the motion. Mr. Ross alleged sufficient facts, which the trial court must assume are true, entitled him to relief and, therefore, an evidentiary hearing on his motion was necessary. *See* ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted); See also ***State v. Love***, 2005 WI 116, 42, 284 Wis. 2d 111, 700 N.W.2d 62.

This Court reviews de novo whether a post-conviction motion alleges sufficient material facts to warrant a hearing. (***Allen*** at ¶9). A defendant who raises only conclusory allegations is not entitled to a hearing. The allegations raised in the case at bar were not conclusory, the post-conviction stated specific reasons why trial counsel was ineffective and explained fully why Mr. Ross was prejudiced by each of trial counsel's errors.

CONCLUSION

For all the reasons stated above Mr. Ross requests this Court grant him a new trial. In lieu of such relief Mr. Ross requests that the matter be remanded for a ***Machner*** hearing.

Dated this 12th day of June, 2020.

Respectfully submitted,

_____

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.(19)(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 8,544 words.

Dated this 12th day of June, 2020.

_____
Marcella De Peters
State Bar No. 1001704

CERTIFICATION 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 s. 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 12th day of June, 2020
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Marcella De Peters

Attorney for Defendant-Appellant
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CERTIFICATION FOR APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with 809.12(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 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 12th day of June, 2020

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