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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W. 2d 905 (Ct. App. 1979)

CASES CITED

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.

The State correctly argues that a defendant cannot show that his attorney's performance was deficient when "trial counsel pursued a theory rationally based on counsel's discussions with the defendant and his expectations for what evidence would come out at trial." (State's Br. page 12).

Mr. Ross asserts there are at least two problems with this argument as it applies to him. First, trial counsel's theory was not rationally based because not only was it based on a mistake he made in subpoenaing the phone records but contrary to the information he had from his own expert or any other evidence he had available to him. The state does not explain how a theory can be rational and at the same time be based on objectively incorrect information. The State ignores the fact that trial counsel had a report from his expert indicating that there was no evidence that text messages on Mr. Ross's phone had been manipulated. His theory that DDW had manipulated messages on her own phone was based only on the fact that he failed to understand the difference between two types of messages. The State ignores the fact that trial counsel's theory was born from a lack of diligence in understanding the differences between the two types of messages and how to correctly subpeona phone records. Trial counsel's theory was irrational because there was no factual basis to support it.

Second, the State argues that because Ross endorsed trial counsel's theory he is not entitled to complain. (State's Br. page 13). Here the State ignores the letter that trial counsel sent Ross:

> 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' belief that that messages were missing was based on the incorrect information that he received from trial counsel. Trial counsel's lack of diligence fueled Ross' incorrect belief. Trial counsel's letter and subsequent conversations with him added more fuel to the fire. This is not a 'which came first, the chicken or the egg' scenario. Trial counsel had a duty to properly advise his client not to encourage an incorrect belief based on faulty information.

While it is true that a reviewing court should give deference to strategic decisions by trial counsel, there must be a limit to that deference. Here the limit is promising to produce evidence and then not delivering. In reference to exhibit 60, trial counsel told the jury in his opening statement that the police had not properly preserved evidence and the proof of that was found in the certified phone records, therefore, DDW had tampered with the messages:

> 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*).

The State argues that ***State v. Coleman***, 2015 WI App 38, is not on point because Mr. Ross' trial counsel did not break any promises. Trial counsel told "the jury that [DDW] has tampered with her text messages" and "continued to make that argument in closing.". (State's Br. 12). In effect, the State is arguing that because trial counsel continued to pursue an irrational strategy in spite of the knowledge he acquired by Smith's testimony all the way to the bitter end of the trial that somehow his decision making was sound.

The damage here is not the nature of what trial counsel promised, i.e. the defendant will testify versus DDW tampered with the phones. The damage is the fact that trial counsel promised evidence, did not deliver on the promise and the effect that failure had on the jury.

> 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).

Trial counsel's assertion that DDW had manipulated text messages was without any basis in fact and was contrary to information trial counsel already had. The State's attempt to redefine the mistake as a reasonable trial strategy is a non-starter.

As for the balance of the State's arguments on this issue Mr. Ross disagrees and incorporates arguments already made.

b-Trial counsel was ineffective when he failed to object to the introduction of testimony concerning drugs, drug use and drug paraphernalia.

The State told the jury during opening arguments that they would hear testimony of drug use and drinking by Mr. Ross. However, he also told the jury that they should not expect to see any "evidence on-scene of that." (R149:8).

While it is true that trial counsel told the jury that DDW would claim Mr. Ross was smoking crack and drinking gin the night of the incident, he concurred with the State that no evidence was found on scene:

> You will hear that [DDW] accused David Ross of smoking crack and drinking gin all-night long the night of the incident. You will hear that there were no evidence of crack, of drug paraphernalia, of gin, of gin bottles, of anything that corroborates that the next day when the police arrived to a secured location. (R149:15).

However, it was the State that introduced evidence of the chore boy, the crack pipe and the Percocet while questioning his witnesses, despite the lack of any physical evidence or mention in any police report. (R149:59; R150:114,115; R154:159).

The State argues the evidence was "panorama evidence" citing ***State v. Dukes***, 2007 WI App 175 ¶28. Dukes was found guilty of possession with intent to deliver and keeping a drug house. The state sought to admit evidence of a drug deal that had taken place about a month earlier. Police witnessed a person enter the house and come out within minutes. A stop and search of the person's car revealed crack and a crack pipe. (***Dukes*** at ¶6, ¶7). Trial counsel complained that the evidence was other acts evidence. In deciding that the evidence was not other acts evidence, the Court noted that the police had observed numerous people coming and going consistent with a drug house. In short, given that Dukes was charged with keeping a drug house, the evidence showed that the house was "indeed a drug house." (Id. at ¶30).

In the present case the evidence does nothing to aid the jury in determining whether or not Mr. Ross sexually assaulted DDW. It was not "inextricably intertwined with the crime." (***Dukes*** at ¶28). It offered nothing to provide context and background. The only thing accomplished by the introduction of the chore boy, crack pipe and Percocet was to prejudice Mr. Ross. The fact that trial counsel placed himself in a position, after failing to properly object, of attempting to use it to his advantage does not mean that it should have been admitted in the first place or that he exercised sound judgment.

As for the balance of the State's arguments on this issue Mr. Ross disagrees and incorporates arguments already made.

c. Mr. Ross was prejudiced by trial counsel's deficient performance.

The State argues that Mr. Ross cannot prove prejudice or cumulative error because the evidence corroborating DDW's version of events was overwhelming. (State's Br. 17). However, Mr. Ross has already outlined why the evidence against him was not overwhelming and how trial counsel's errors prejudiced Mr. Ross. There is no need to fully repeat them here other than to point out that DDW's behavior during and after the assault was inconsistent with her claim she was assaulted. She never called for help despite having her phone, she didn't leave when she had the opportunity, she told multiple varying versions of the events.

While the text messages Mr. Ross sent the day before and the morning of the day DDW arrived at the apartment might appear damning, they only relate to the battery charge. The jury acquitted Mr. Ross of the battery charge.

As for the balance of the State's arguments on this issue Mr. Ross disagrees and incorporates arguments already made.

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

Mr. Ross has already argued why he is entitled to a new trial and, therefore, stands on arguments already made and disagrees with State's position on this issue.

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

Mr. Ross presented arguments in his post-conviction motion and brief specifically addressing why trial was ineffective and explained fully why Mr. Ross was prejudiced by each of trial counsel's errors entitling him to a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W. 2d 905 (Ct. App. 1979). Therefore, Mr. Ross stands on arguments already made.

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 31st day of August, 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 2,065 words.

Dated this 31st day of August, 2020.

_____
Marcella De Peters
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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 31st day of August, 2020
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