STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN

Plaintiff-Respondent,

v. Case No. 2020AP261-CR

David Wayne Ross,

Defendant-Appellant.

PETITION TO REVIEW

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COURT OF APPEALS

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PETITION TO REVIEW

David Wayne Ross petitions the Supreme Court of Wisconsin pursuant to Rules 809.10 and 809.62 to review the decision of the Court of Appeals, District I, ***State of Wisconsin v. David Wayne Ross***, 2020AP261-CR.

ISSUES PRESENTED

1. Was 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.
   The court of appeals answered no.

2. Was Mr. Ross entitled to a ***Machner*** hearing?

   The trial court answered no.
   The court of appeals answered no.

STATEMENT OF CRITERIA SUPPORTING REVIEW

Review is appropriate because the Court of Appeals' decision that Mr. Ross failed to allege legally sufficient non-conclusory grounds to establish that he was prejudiced by his attorney's deficient performance when his attorney broke his promise to the jury to prove that the victim tampered with evidence is contrary to established case law. Mr. Ross is not required to show that the deficient conduct more likely than not altered the outcome, rather he only need show there is a reasonable probability of a different outcome. Review is appropriate to clarify this recurring constitutional issue of what a defendant needs to allege to meet that standard.

The decision of the Court of Appeals is also contrary the decision in ***State v. Coleman***.[1] In, ***Coleman***, trial counsel broke his promise to present evidence to the jury just as counsel did here. In, ***Coleman***, there was significantly more evidence of the defendant's guilt than is present here. Review is necessary to clarify when a broken promise to a jury is enough to prove prejudice.

The Court of Appeals also appears to suggest that because Mr. Ross endorsed the factually incorrect information he was provided with by his attorney he is not entitled to claim prejudice citing ***State v. Breitzman***.[2] However, the facts in ***Breitzman*** bear no resemblance to the facts in the case at bar. Review is necessary to resolve whether the facts here can support the legal conclusion the court of appeals seems to endorse. To suggest that an attorney can provide false and misleading information to a client, but not be found ineffective on

[1] 2015 WI App 38.

[2] 2017 WI 100.

both prongs of ***Strickland*** turns the 6th amendment right to counsel on its head.

Both the United States and Wisconsin Constitution guarantee defendants effective assistance of counsel and claims of ineffective assistance of counsel are common in criminal cases. However, what a defendant must allege to be granted a hearing on his claim in cases where he has been misinformed by his attorney is a moving target. Review is appropriate to clarify this recurring constitutional issue.

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). 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. (Id.)

DDW reported that at 1:00 a.m. on November 20, 2015, she awoke to Mr. Ross pulling down her pants. Mr. Ross attempted to have anal sex and then had penis to vagina intercourse with her. Later, around 11:00 a.m., Mr. Ross had intercourse with her a second time. She did not consent to sexual contact with Mr. Ross. (R1).

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). He was sentenced to 15 years of initial confinement and 10 years of extended supervision consecutive to another sentence he was serving. (R161:97-98; R95).

Mr. Ross timely filed a post-conviction motion which was denied in a written order without a hearing. (R116-R117; App 102).

The Court of Appeals denied Mr. Ross's appeal on June 29, 2021. (App 101).

STATEMENT OF THE FACTS

In his opening statement, the prosecutor told the jury that DDW would testify about being battered and sexually assaulted by Mr. Ross. Additionally:

> You're going to hear about repeated texts the Defendant sent to [DDW], and I expect that you will see them. You are going to hear voice messages that the Defendant had called [DDW] and left on the days between November 18th when the [battery] happened and November 20th when the sexual assaults happened. (R149:8).

In reference to these text messages on DDW's phone trial counsel stated in his opening statement:

> 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 text messages to which both counsel refer where later admitted into evidence as Exhibit 60. (R60).

The battery allegation DDW made against Mr. Ross on November 18th led to both having contact with the police. The responding officer did not observe any injuries to DDW and issued Mr. Ross a

citation. (R150:52-54). According to DDW the argument involved her friend, BB, buying Mr. Ross some beer. (Id.:63).

DDW met Mr. Ross at the Salvation Army. (R150:60). They started dating. (Id.:61). After she was "kicked out" of the Salvation Army she was staying in her car. About two weeks before the assault, she began to stay with Mr. Ross. He was in the process of setting up an apartment. (Id.).

The morning of 19th, DDW 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).

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.).

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. She wanted to leave. 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 that 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 her 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).

On cross-examination trial counsel identified several inconsistencies between DDW's testimony, the police reports, hearings held in April and December and other evidence.[3] 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).

[3] 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).

When asked why she did not call the police immediately 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).

DDW 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.).

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).

Additional challenges to DDW's credibility involved her claim that Mr. Ross was smoking crack drinking gin and beer. She claimed she put a crack pipe on a ledge inside the apartment. (R150:114-115). However, photos from the scene did not support her claim. Likewise, testimony from Officer Bughman, who helped detectives search the apartment, established no evidence that Mr. Ross was smoking crack or drinking gin. (R153:32).

Patricia Zdiarski, an investigator from the State Public Defender's Office, testified that 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 with 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.[4] (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).

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

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 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 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 depicting 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).

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 message 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 much of 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 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 a revocation sentence he was already serving. (R161:97-98; R95).

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).

ARGUMENT

I. REVIEW IS NECESSARY TO CLARIFY THE RECURRING LEGAL QUESTION CONCERNING WHAT ASSERTIONS ARE SUFFICIENT TO ESTABLISH PREJUDICE AFTER ESTABLISHING DEFICIENT PERFORMANCE.

Review is necessary to clarify the recurring legal question of what constitutes prejudice after a finding of deficient performance.

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 proceedings 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)).

Mr. Ross asserts that he is entitled to a new trial because he was denied his right to effective assistance of counsel when 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.

The Court of Appeals appears to agree that trial counsel was deficient by failing to understand the difference between the two types of messages but opines that all of Mr. Ross's claims about the resulting prejudice are conclusory and do not shake the court's confidence in the verdict. In short, Mr. Ross was not proven that he was prejudiced by trial counsel's deficient performance. (App 101).

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 Mr. Ross 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 and sought confirmation from Zdiarski that texts could be manipulated. (R153:48-49;R154:66-68). As it turned out, trial counsel's promise was based on his failure to understand the differences between SMS and MMS messages and correctly subpeona the latter 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 this claim. Trial counsel had no basis to assert that DDW had manipulated the messages. His belief that this was a possibility was based solely on his failure to understand that difference between the two types of 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's 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).

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 asserted 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 officers did not see. The jury concluded she hadn't been battered. They acquitted Mr. Ross of the battery charge. She tried to make one of the officers 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 lack of any evidence 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. 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's failure to prove as promised 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. Trial counsel pursued an unreasonable defense strategy without no basis in fact.

In deciding against Mr. Ross, the court of appeal opines that trial counsel's factually incorrect argument that DDW had manipulated text messages did not prejudice him because "the allegedly altered text messages were only one part of trial counsel's use of D.D.W.'s phone records to attack her credibility." (App 101:¶45). It true that trial counsel challenged DDW's credibility in a variety of ways that have already been reviewed, including the lack of any evidence of drug use or drinking despite DDW's claim to the contrary. The problem, however, with dismissing Mr. Ross's claim, is that the court of appeals ignores the fact that trial counsel's mistake impacted the jury's assessment of him, his client and his entire case. The court of appeals ignores what every trial attorney knows-that the jury's impression of a defense attorney and his defendant in most cases teeters on a very thin edge. Juries are not looking for reasons to acquit a rapist or decide that a vulnerable woman who testified she has been sexually assaulted is lying under oath. They search for any reason to convict.

In this case, trial counsel promised the jurors exactly that-DDW is lying-when he told the jury she had tampered with evidence. Significantly, trial counsel did not just make this claim during opening statements, he called two witnesses to the stand to support his claim, and elicited testimony from Mr. Ross consistent with his flawed theory. The court of appeals ignores trial counsel's June 25, 2015 letter to Mr. Ross where counsel forcibly asserts that DDW is trying to frame him and he had the records to back it up. Mr. Ross cannot be faulted for adopting his trial attorney's strategy as the court of appeals seems to suggest. Because Mr. Ross adopted trial counsel's theory he testified in accordance with that theory only later to be proven to be incorrect based on a mistake his attorney made and propagated. The court appeals ignored the impact this had on the jury.

In other words, trial counsel told the jury he will prove the victim is lying, she is trying to frame Mr. Ross, therefore, they must conclude she is lying about the assault. The state's rebuttal spectacularly deflated trial counsel's claim of subterfuge by DDW. Yet the court of appeals opines that there is no reason to think there was any impact on how the jury viewed the entirety of the defense.

The court of appeals dismisses Mr. Ross's claim of prejudice as conclusionary because Mr. Ross "does not allege sufficient material facts to support that assertion." The court of appeals misses the point, the broken promise is the prejudice. This is not a case where there is any corroborating evidence to support DDW's claim. As the dissent notes:

> It appears that D.D.W.'s credibility was significantly damaged at trial, both due to the absence of any evidence to corroborate her allegations of Ross's drug and alcohol use, and also through other aspects of trial counsel's cross examination. If the jury disbelieved D.D.W. about the drugs and alcohol, there is a reasonable probability that that would have been enough to secure an acquittal on the sexual assault charges—except that counsel promised conclusive proof that she falsified text messages and that proof fell flat. (App 101:¶48)

In, ***Myers v. Neal***, 975 F.3d 611(7th Cir. 2020), Myers was convicted of murdering a woman last seen riding her bike. During opening, defense counsel promised the jury they would hear not only evidence of an alibi, but also evidence of the victim was seen fighting with a man she was romantically involved with the day before she disappeared. (Id. *at* 615). He told the jury that a bloodhound had tracked the victim to man's doorstep (Id. *at* 616). Defense counsel never produced the promised evidence. Testimony from the dog handler contradicted counsel's promise. No alibi witnesses testified for the defense. (Id. *at* 617).

Myers lost his state court appeals, but the federal district court reversed. (***Myers*** *at* 618). While the 7th Circuit reinstated his conviction, the reasoning offers some insight here. The 7th Circuit recognized the significance of unfilled promises noting that "[m]aking false promises about evidence in an opening statement is a surefire way for defense counsel to harm his credibility with the jury." (Id. *at* 620, *source omitted*). The 7th Circuit did not doubt the counsel's false promises damaged his theory of the case. However, in reinstating his conviction the 7th Circuit noted the overwhelming evidence presented by the state against Myers, including inculpatory statements made by Myers to others who testified for the state subsumed his attorney's deficient performance. Myers failed to prove the probability of different outcome. (Id. *at* 627).

In the case at bar, there no overwhelming evidence of Mr. Ross's guilt. The court of appeals agreed with Mr. Ross that the case came down to who the jury found more credible, but opined that Mr. Ross has failed to prove a reasonable probability of a different outcome. (App 101:¶39). The only basis for this conclusion is that court of appeals must believe that the evidence against Mr. Ross overwhelmed the damage of the broken promise. However, the only analysis offered is that DDW's "account of what happened was plausible despite minor inconsistencies, matched the physical evidence and the timeline established in the text messages." (Id.: ¶31). This conclusion is contrary to the record and contrary to the court's later conclusion that trial counsel had undermined DDW's credibility sufficiently enough that his blunder concerning "text message manipulation" had no impact on the jury. (Id.:¶35).

As already discussed, there were more than minor inconsistencies in DDW's story and implausible behavior inconsistent with testimony she was sexually assaulted. The text messages largely relate to the battery of which Mr. Ross was acquitted.

Additionally, Mr. Ross testified that DDW had control over his phone when he left the apartment to purchase soda. A photo of the phone inside the apartment was shown to the jury. (R154:47). There was no physical evidence to tip the scales one way or another. The jury's decision turned only on their assessment of the parties' credibility. Therefore, it hard to rationalize the court of appeals decision with caselaw that does not require Mr. Ross to show that he would have not been convicted absent the trial counsel's error. The standard is not more likely the not. Mistakes that undermine confidence in the outcome are sufficient. ***Strickland***, 466 U.S. at 694.

The court of appeals reaches the apparent conclusion that because Mr. Ross endorsed his attorney's factually incorrect theory he ought not complain citing ***Breitzman*** as authority. (App 101: ¶29). As already argued, the facts of that case bear no resemblance to Mr. Ross's. To conclude that an attorney could give a client factually incorrect information on which the client relied and that somehow vitiates any subsequent claim by the client turns the 6th amendment right to competent counsel on its head. All courts should encourage diligence from the attorneys who practice in the State of Wisconsin, not look for any reason to excuse the opposite.

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

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 laid out in his post conviction 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.

In the present case, trial counsel promised his client that the missing text messages would destroy DDW's credibility. He made the same promise to the jury and called witnesses to the stand to back his erroneous assertion that "he had found a smoking gun that would conclusively prove that D.D.W. fabricated evidence against Ross." (App 101:¶45). The smoking gun "never went off" and trial counsel was left with egg on his face. (Id.). Trial counsel admitted to the jury that he "screwed up as a defense attorney." (Id.:¶46). Notwithstanding this admission, trial counsel continued to endorse his theory that DDW, a person who two weeks prior to assault had been living in her car, was able to manipulate text messages despite the lack of any evidence to support the assertation. Yet the circuit court and the court of appeals concluded that Mr. Ross has failed to allege grounds sufficient to get him a hearing. It appears that what it takes to get a hearing is a moving target and this Court should agree to accept this case to clarify what allegations are good enough.

CONCLUSION

For all the reasons, Mr. Ross respectfully asks this Court to grant this petition.

Dated this 24th day of July, 2021.

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 6,348 words.

_____
Marcella De Peters
State Bar No. 1001704

CERTIFICATION OF COMPLIANCE WITH ORDER No. 19-02

I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

_____
Marcella De Peters
State Bar No. 1001704

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 §809.62(2)(f).

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.

_____
Marcella De Peters
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