STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001347-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN TYRONE BRATCHETT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable T. Christopher Dee Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. S.D.'s identification.

The State references a deferential standard of review. (State's Br. at 13). Whether the motion to suppress was correctly decided is a question of law independently reviewed. *State v. Roberson*, 2019 WI 102, ¶ 66, 389 Wis. 2d 217, 935 N.W.2d 813. Here, the circuit court correctly found that the procedure was improperly suggestive. (151:25).

The State claims "Bratchett's photo did not impermissibly stand out […]." (State's Br. at 16). However, the State concedes Mr. Bratchett had distinguishing facial characteristics. (State's Br. at 16). The State argues these distinguishing features did not affect the validity of the procedure because the witness did not claim to base her identification on them. (State's Br. at 16). However, as Mr. Bratchett pointed out, the array is problematic because these differences unconsciously biased S.D.'s identification. (Brief-in-Chief at 25-26).

Moreover, S.D. relied on Mr. Bratchett's distinctive face shape when she identified him. (151:14). The State points out that S.D. had low confidence in her identification. (State's Br. at 16). Mr. Bratchett does not see the connection; the relevant takeaway is that Mr. Bratchett stood out for three reasons, one of which was expressly relied on by the witness.

The identification's validity is further imperiled by the State's administration of an identical lineup to S.D. prior to her testimony. The Department of Justice's Model Policy warns against conducting multiple procedures targeting the same suspect. Model Policy at 3. Because this is further law enforcement conduct impacting suggestiveness, it is properly considered when evaluating admissibility, contrary to the State's position. (State's Br. at 17).[1]

The State also argues Mr. Bratchett's arguments as to instructions given to S.D. are "meritless." (State's Br. at 17). Mr. Bratchett's brief cited to the Department of Justice's Model Policy. The record is also clear that S.D. utilized a "relative judgment" process, as she was instructed to by the agents of the State who arranged the procedure. (Brief at 26-27).

Finally, the State brushes aside the impact of any confirmation from law enforcement by pointing out that this confirmation came later in time. (State's Br. at 17). The Model Policy does not place temporal limits on its guidance that such confirmation may taint the validity of an eyewitness identification.

[1] The State's citation is not directly applicable. In the cited text, the Wisconsin Supreme Court was skeptical as to why the circuit court—in assessing reliability, a separate legal question—placed emphasis on whether the victim knew the difference between dreadlocks and cornrows. *Roberson*, 2019 WI 102, ¶ 74.

Here, S.D. participated in a problematic procedure, in which Mr. Bratchett stood out from the fillers. Law enforcement tainted S.D.'s identification further by: (1) instructing her to select the person who "best fit"; (2) confirming that she had chosen correctly; and (3) conducting an "informal" follow-up identification on the morning of the motion hearing.

Moving to reliability, the State claims this is established via S.D.'s testimony. (State's Br. at 18). As to the first factor—opportunity to view—the State focuses on the length of the interaction and the minimal distance between S.D. and the perpetrator. (State's Br. at 18). However, the robber's face was covered for most of the interaction and he wore a hood which covered his hair. (151:5).

Second, the State claims "S.D. testified about her degree of attention to detail and the accuracy of her description." (State's Br. at 18). S.D. never testified that she was focused on the robber's face or that she made a conscious attempt to memorize that person's facial features. S.D. also specifically referenced being "in shock" when asked whether she was able to get a good look at the robber's face. (151:9). The State's generic argument about the observational powers of victims (State's Br. at 19), has minimal relevance considering this record evidence.

Third, as to the witness' confidence, the undisputed testimony is that S.D.'s confidence was as low as sixty percent. (State's Br. at 19). The State

concedes this number is "not high," but nonetheless asks this Court to "balance" that low level of confidence with the other evidence. (State's Br. at 19). That evidence is weak. For example, with respect to the prior description of the suspect by S.D., she did not have much to offer. She did not know the robber's complexion or hairstyle. The only feature she recalled concretely was his height. (151:6).

Fourth, the State argues that the timing of the procedure strongly establishes reliability. (State's Br. at 19). This is not dispositive, especially considering all the other evidence tending to problematize the reliability of this questionable identification.

Accordingly, applying a proper standard of review and assessing the totality of the circumstances, the record is clear that the motion to suppress should have been granted.

II. Proof of Mr. Bratchett's prior incarceration.

Mr. Bratchett concedes that it was proper for the State to inform the jury that Mr. Bratchett's identification card was found near the victim's stolen property. However, admission of that identification card into evidence and its resulting publication to the jury was improper because it clearly signaled that Mr. Bratchett had been previously incarcerated in a prison facility.

The State argues "Bratchett has offered little proof that the photo identification card was unduly

prejudicial" and disputes his argument that a viewer of the photograph would infer Mr. Bratchett's prison status. (State's Br. at 20). The photograph, however, speaks for itself as Mr. Bratchett is clearly in prison garb. In support, Mr. Bratchett cited to publicly available sources of information to demonstrate how readily a hypothetical member of the public would make this connection—what the State dismisses as mere reference to "Google and Wikipedia." (State's Br. at 21).

Because the photograph readily discloses that Mr. Bratchett had been confined in a prison—and because that inference is not eliminated merely by covering up the prison address—the circuit court erred in admitting the evidence. Any contrary factual finding as to the nature of the photograph is unreasonable considering the photograph itself and those publicly available sources cited in the brief. Accordingly, the circuit court erred in admitting evidence that had the effect of informing the jury that Mr. Bratchett had served time in prison.

III. Harmless error.

In the State's view, admission of S.D.'s identification and the photograph of Mr. Bratchett was harmless. (State's Br. at 21). This is a significant hurdle for the State to clear, as they must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis.2d 642, 734 N.W.2d 115. The State fails to meet that burden.

The State claims that S.D.'s identification was "not crucial" to its case, apparently because the "key piece" of evidence was testimony that Mr. Bratchett's fingerprint was consistent with the fingerprint recovered from S.D.'s wallet. (State's Br. at 22). Yet, the fingerprint evidence does not establish Mr. Bratchett's guilt beyond a reasonable doubt. It cannot place Mr. Bratchett inside the residence. It cannot identify him as the man who grabbed at S.D.'s clothing and allegedly threatened to rape her. While it is an admittedly suggestive piece of circumstantial evidence it cannot prove guilt beyond a reasonable doubt, especially given counsel's adequate attempt at cross-examining the analyst about his methods and conclusions. (154:41-43).

The State also argues that, even if the jury did not get to see the actual photograph of Mr. Bratchett in prison garb, it would have heard that his identification card was recovered near S.D.'s stolen items. (State's Br. at 22). Once again, this does not establish Mr. Bratchett's guilt beyond a reasonable doubt. That evidence cannot place Mr. Bratchett in the residence and cannot prove that he was the man who grabbed or threatened S.D.

Finally, the State claims the police made a visual observation that someone matching Mr. Bratchett's description entered and left the residence around the time of the robbery. (State's Br. at 22). However, Officer Thomas Wichgers could not recall the race of the man he saw and could only remember that he was wearing a "light" colored sweatsuit.

(153:13). Officer Michael Wichgers witnessed a black man in a white hooded sweatshirt. (153:42-44). He never claimed to identify the man as Mr. Bratchett. (153:51). While Mr. Bratchett is a black man, this is not strong evidence that someone "matching" Mr. Bratchett's description was near the scene of the crime. Once again, this evidence, even when aggregated with the fingerprint and the identification card, cannot prove Mr. Bratchett guilty beyond a reasonable doubt.

IV. Prior inconsistent statement of S.D.

Here, S.D.'s original account of the robbery contains a radically different description of the alleged attempted sexual assault, one that entirely omits any explicit threats to commit sexual assault. Mr. Bratchett has argued this creates a totally different understanding of the interaction between S.D. and the robber. The State disagrees that reasonably competent counsel should have objected, calling arguments to the contrary "meritless." (State's Br. at 24).

First, the State suggests that counsel reasonably focused on a defense that Mr. Bratchett was not there rather than focusing on what "Bratchett" said during the robbery. (State's Br. at 24). The implication is that, by focusing on what "Bratchett" said, trial counsel would be contradicting or watering down his claim that Mr. Bratchett was not the person who committed the robbery. However, Mr. Bratchett is arguing that trial counsel should

have cross-examined S.D. about what *the robber* said not about what "Bratchett" said. Cross-examination of this nature would not have contradicted the chosen defense theme; instead, it would have offered a "bonus" line of attack—regardless of whether the jury believed that Mr. Bratchett was the robber, exposure of S.D.'s damaging prior inconsistent statement tends to rebut the argument that at least one crime—attempted sexual assault—occurred at all.

Second, the State disputes that the two versions were all that inconsistent. (State's Br. at 25). A review of the two statements side-by-side—coupled with a commonsense view of ordinary human communication—contradicts that argument. There is a material difference between threatening to "fuck" someone, on the one hand, and informing them—in context of a discussion over whether they are hiding a phone with which they will call the police—that they better not be "fucking" with the speaker.

Third, the State claims that reasonably competent counsel would not want to "upset the jury by quibbling over phrases used during an attempted sexual assault." (State's Br. at 25). This is not quibbling. The State's closing argument focused on the words uttered as establishing the requisite intent. (155:29). This was a crucial trial issue, and the claim cannot be dismissed, as the State wishes, by making a conclusory assertion that the credibility of the witness would not have been impacted. The statements are inconsistent, this inconsistency

mattered, and a reasonably competent lawyer would have recognized that. This is deficient performance.

As to prejudice, the State references "all of the evidence" that supports the conviction without specifically responding to Mr. Bratchett's detailed prejudice analysis. (State's Br. at 26). In essence, the State argues that S.D.'s testimony was "compelling" and therefore sufficient to establish Mr. Bratchett's guilt with respect to the sexual assault charge. (State's Br. at 26). However, if S.D. was cross-examined successfully about a key component of her story—the threats to commit sexual assault—then the narrative becomes much less "compelling." The State relied on this evidence to convict Mr. Bratchett at trial. (155:28-29). Because there is now compelling proof that the words spoken by the robber may have been radically different, a reasonable doubt exists with respect to the sexual assault charge.

V. Cross-examination as to integrity of identification.[2]

The State claims that Mr. Bratchett failed to show why the proffered strategy was unreasonable, alleging that the deficient performance argument rests on merely conclusory allegations. (State's Br. at 27). Here, an examination of both the trial transcript as well as the postconviction testimony of trial counsel makes clear that the identification by S.D. was the most centrally disputed issue in the entire trial. Trial counsel has testified that he reviewed the DOJ Model Policy and that his goal, at trial, was to attack the reliability of S.D.'s identification. (160:10-13). Trial counsel was obviously present during the motion hearing when S.D. gave sworn testimony relevant to that objective. Bizarrely, despite this being the linchpin of his defense, trial counsel did not

[2] The State claims that the presumption that counsel acted reasonably is "virtually unassailable." (State's Br. at 26-27). In *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984), the United States Supreme Court held "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" thereby nesting the quoted language within some particularly important caveats. And in *Maloney*, this Court held that a reasonable trial strategy will ordinarily preclude an ineffectiveness finding, but did not create an "unassailable" presumption of reasonableness, as the State suggests in its brief. *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620.

utilize this information to attack the identification when she testified during the trial.

The State does not respond to the overall thrust of Mr. Bratchett's argument and instead mostly reiterates what was said in the circuit court's decision and order denying postconviction relief. The circuit court's order, however, rests on speculative—and factually questionable—assertions. For example, a finding that the "best fit" instruction did not impact the outcome of the procedure is belied by the witness' testimony that she utilized a relative judgment process to select Mr. Bratchett. (151:9) (Telling the Court she picked Mr. Bratchett because he "just fit the description best.").

Because the highlighted areas of cross-examination directly support the defense strategy, it was unreasonable for counsel to omit them. This is deficient performance.

As to prejudice, the State alleges that a "plethora" of evidence other than the identification supported Mr. Bratchett's conviction. (State's Br. at 28). For the most part, these arguments have already been replied to, above, with respect to the State's harmless error claim. The record does not fully support the State's claim about "suspects matching Bratchett and his brother's description entering and leaving S.D.'s apartment" and, as has already been argued, none of the other evidence can conclusively place Mr. Bratchett inside the residence, committing the crimes at issue here.

VI. Closing argument.

The State makes several arguments as to why there was no deficient performance here. First, the State suggests that, in context, the controverted remark was not overtly problematic. (State's Br. at 30). Mr. Bratchett disagrees. Trial counsel made a reasonable argument, asking why additional forensic testing had not been conducted. In response, the prosecutor mocked trial counsel (and defense attorneys generally) by referencing a (nonexistent) confession. A reasonable juror would not immediately recognize this as a pure "hypothetical," contrary to the State's second point, in context. Even though the prosecutor used those words, the overall tone of the argument—referencing evidence that does not exist in this case—was reasonably likely to confuse the jury and was objectionable.

The State focuses extensively on alleged strategic reasons for not doing more to remedy this asserted error and virtually ignores the important embedded legal questions—whether an objection would have been sustained and whether the motion for a mistrial would have been granted. Because the State does not address those aspects of the ineffectiveness claim, they should be conceded in Mr. Bratchett's favor. When that concession is considered, the State's deficient performance arguments fail—the State cannot sufficiently explain why counsel would have foregone a concededly meritorious objection and a motion just to avoid

"highlighting" something he had, by virtue of one sustained objection, already drawn attention to.

The State's prejudice arguments are superficial and do not meaningfully engage with the arguments set forth in the brief-in-chief; the State relies on a speculative judgment that this argument would not have made a difference. (State's Br. at 31). As set forth in the brief-in-chief, the error matters precisely because it allowed the jury to become confused about the existence of uniquely powerful evidence—a confession to the crime. Accordingly, trial counsel's deficient performance prejudiced Mr. Bratchett.

VII. Cumulative prejudice.

In assessing cumulative prejudice, the State does not meaningfully respond. The State does not outline why Mr. Bratchett's cumulative prejudice argument is mistaken, besides once again making a conclusory reference to the "plethora" of evidence it claims to exist. (State's Br. at 32). Although it claims that this evidence was "devastating" and "powerful," the State does not further expound on these argumentative conclusions. (State's Br. at 33). If trial counsel had performed adequately, the overall landscape of the trial would have been radically transformed. The jury would have new reasons to question S.D.'s testimony and would not have been impacted by problematic closing argument.

Accordingly, when assessed in the aggregate, counsel's performance was prejudicial.[3]

VIII. The evidence was insufficient.

The State believes that the available evidence adequately supports an inference that Mr. Bratchett intended to sexually assault S.D. (State's Br. at 38). The evidence, however, fails to prove this beyond a reasonable doubt, given the overall context of the encounter between Mr. Bratchett and S.D. For the reasons set forth in the brief-in-chief, the conduct attributed to the robber does not "unequivocally" show an intent to commit sexual assault. Even considering the facts pointed to by the State, the evidence is inherently ambiguous. This Court should reverse.

[3] In the brief-in-chief, the cumulative prejudice combines multiple allegations. Although the State did not flag it, counsel's re-review of that argument reveals that the Court should properly focus on these aggregated errors cited herein.

CONCLUSION

Mr. Bratchett respectfully requests that, for the reasons outlined herein, this Court reverse the circuit court and grant the relief requested herein.

Dated this 14th day of January, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,964 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 14th day of January, 2021.

Signed:

_____

Christopher P. August
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