STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP002119 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

LARRY L. JACKSON,

Defendant-Appellant

On appeal from the Circuit Court for Milwaukee County,

The Honorable Jeffrey A. Wagner, presiding

REPLY BRIEF OF THE DEFENDANT-APPELLANT LARRY L. JACKSON

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III. Argument.

A. It is the record's deficiencies which require this matter be remanded to the circuit court for an evidentiary hearing.

1. Jackson alleges that his trial counsel took no action to find the witnesses JaNikka Marsh and Crystal Jackson, and the record contains not a shred of evidence to suggest otherwise.

Jackson alleged that his "[t]rial counsel was deficient in her performance by failing to investigate or call Crystal Jackson and JaNikka D. Marsh as alibi witnesses at Larry L. Jackson's trial." (R.124:8; Appx. 14). Jackson submitted an affidavit stating that he provided the names of Crystal Jackson and JaNikka Marsh to his trial counsel as potential alibi witnesses. (R.124:8; Appx. 14). Both Crystal and Marsh submitted affidavits that they were never contacted by trial attorney and that they would have testified if called to. (R.125:7 and 125:5-6; Appx. 14). For purposes determining whether an evidentiary hearing should be held the allegations in Jackson's motion are to be taken as true. ***State v. John Allen***, 2004 WI 106, ¶12 n.6, 274 Wis.2d 568, 682 N.W.2d 433.

The State, however, asserts that "the record indicates that his trial counsel was *unable* to contact Crystal or Marsh." (State's Br. 17). The record indicates no such thing. There is no evidence that Jackson's trial counsel so much as called anyone in an attempt to locate these witnesses, and more importantly, there is no evidence that trial counsel hired an investigator to assist in finding these witnesses. Instead, the State cites portions of the record which indicated that law enforcement made some slight efforts to locate these witnesses as evidence that *Jackson's trial counsel* herself was

unable to locate Crystal Jackson or JaNikka Marsh. (State's Br. 18). Specifically, the State notes that Detective Jeffery Sullivan asked Carol Jackson during telephone call if she had any contact information for Crystal Jackson or JaNikka Marsh, which Carol Jackson denied having. (R.174:85). The State also cites the PSI writer's entry of Crystal Jackson address as "unknown" as evidence that *Jackson's trial counsel* was unable to locate Crystal Jackson. (State's Br. 18). There is no indication Detective Sullivan made any efforts beyond calling Carol Jackson to locate these witnesses.[1] And we know little from the record regarding what efforts, if any, the PSI writer took to locate Crystal Jackson. In any event, the PSI writer inability to find Crystal Jackson after the trial, is no more relevant to whether Crystal Jackson or JaNikka Marsh were unavailable for trial, than the fact that Jackson's postconviction counsel was quite able to find Crystal Jackson and JaNikka Marsh. The relevant timeframe concerning witness availability was pretrial.

More to the point, you cannot impute the State's half-hearted attempts to investigate and locate witnesses onto Jackson's defense counsel. It was the defense trial counsel's obligation to conduct her own independent investigation to find, interview, and (if helpful to Jackson's defense) to call potential alibi witnesses. The Wisconsin Supreme Court has held that the ABA Standards for Criminal Justice are an appropriate source of objective standards for determining if the "counsel's representation fell below an objective standard of reasonableness." ***State v. Ambuehl***, 145 Wis.2d 343, 425 N.W.2d 649 (1988). In ***State v. Harper***, 57 Wis.2d 543, 557, 205 N.W.2d 1 (1973)., the Wisconsin

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[1] And why should he? It was Jackson's trial counsel's obligation to provide contact information with the Notice of Alibi. *See,* Wis. Stat. § 971.23(8).

Supreme Court expressly adopted A.B.A. Defense Function Standard on investigations as an objective standard of reasonableness. The current version of A.B.A. Standard 4-4.1, the Duty to Investigate and Engage Investigators, provides as follows:

> **Standard 4-4.1 Duty to Investigate and Engage Investigators**
>
> Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
>
> The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
>
> Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, ***as well as independent investigation***. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.
>
> ***Defense counsel should determine whether the client's interests would be served by engaging fact investigators***, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.
>
> ***If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court***, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that

> the lack of resources for investigation may render legal representation ineffective.

A.B.A. Defense Function Standard 4-4.1, 4th Ed.

As per the ABA Standard, Jackson's trial counsel had a duty to conduct an "independent investigation," to engage "fact investigators" if necessary in that search, and if Jackson lacked sufficient resources to pay for such investigators, to petition the court for such resources. Jackson provided his trial counsel with the names of Crystal Jackson and JaNikka Marsh as alibi witnesses, and for all we can tell from the record trial counsel made no effort to find, interview, or call these witnesses. It is not reasonable for Jackson's trial counsel's to farm out the job of investigating her case to law enforcement. If the State is correct that defense counsel's duties in investigating a homicide case consist of no more than relying upon law enforcement to locate and interview potential alibi witnesses, then the professional norms for defense counsel in the State of Wisconsin have been seriously debased.

Finally, the State also claims that "Marsh's affidavit acknowledges that she actively avoided testifying at Jackson's trial." (State's Br. 18). That's not true. What Marsh actually stated in her affidavit that "I did not attempt to contact Larry L. Jackson's trial attorney." (R.125:5; Appx. 31). She noted a number of stressor in her life at that time, notably the near death of her daughter from a gunshot wound, which occupied her mind. *Id.* But she stated "However, I would have testified at trial if I had been subpoenaed to do so." *Id.* Most importantly, she stated that "I was never contacted by law enforcement, by Larry L. Jackson trial attorney, or any investigator, with regard to testifying at Larry L. Jackson's trial." *Id.* Had she been subpoenaed she would have testified.

(R.125:6; Appx. 32). JaNikka Marsh was not "actively avoiding testifying" at trial. She did not testify because she was never asked to.

2. JaNikka Marsh and Crystal Jackson both submitted affidavits, and the postconviction motion alleged, that they were with Jackson at his mother's home when R.K. was shot.

The State argues that "Marsh's affidavit establishes that she lacked personal knowledge of where Jackson was at the time R.K. was shot." (State's Br. 18). That is an inaccurate characterization of JaNikka's affidavit. What she stated was that:

> At sometime between 5:00 p.m. and 6:00 p.m. I went into our room to lie down for a nap. I recall Larry getting into bed with me after he took his shower. Sometime afterward I fell asleep. ... I next remember Larry shot up in bed, waking me up sometime around 9:30 p.m. He was in bed with me, in his boxers and a tee shirt, with his legs under the covers. He said something to the effect of, "Shit! Get up, we almost overslept, you'll be late for work."

(R.125:5; Appx. 31). That is, she and Larry went to bed at sometime between 5:00 – 6:00 p.m., they fell asleep, and woke up around 9:30 p.m. When they woke up Larry was still under the covers and in his underwear. To the undersigned, that sounds like an alibi. From State's perspective, however, it's only an alibi if JaNikka can testify she was awake with her eyes glued upon Larry the entire time. Ponder that when you next get into bed with your significant other, do you have an alibi once he or she falls asleep? This is an unreasonable expectation and an unreasonable pleading requirement.

Similarly, the State argues that Crystal Jackson's affidavit shows "that she lacked personal knowledge of Jackson's whereabouts at the time R.K. was shot." (State's Br. 19). Once again, there is divergence between the affidavit submitted and the State's interpretation of what the witness said. What Chrystal actually stated was that:

> On March 11, 2015, I was with Larry L. Jackson at my mother's home during the late afternoon and evening. I recall watching Wheel of Fortune with my family. Larry was arguing with JaNikka, and JaNikka stated that she was not feeling well. JaNikka and Larry then went to their room so that JaNikka could take a nap before work. *They stayed in their room until JaNikka had to leave for work.*

(R.125:7; Appx. 33) (emphasis added). That is, Chrystal stated was she was at her mother's home, Larry and JaNikka went into their room, and did not leave the room until JaNikka had to leave for work. To the undersigned that is an alibi. But from the State's perspective, it's only an alibi if Crystal can verify that she was actually in the bedroom watching Larry and JaNikka while they were sleeping. Again, this is an unreasonable expectation and an unreasonable pleading requirement.

The State's arguments amount to little more than quibbling with Marsh and Chrystal's statements. JaNikka says that Larry was in bed sleeping with her at the time R.K. was shot. Crystal says JaNikka and Larry went into the bedroom and did not leave the bedroom until JaNikka had to go to work. These statement establish an alibi. Would it be better if JaNikka could state she was awake the entire time she and Larry were sleeping together? Of course. Would it be better if Crystal could state that she was in the bedroom watching the two sleep? Certainly. No doubt a surveillance video from the bedroom would be better yet. The evidence can always be better. But the question is whether the allegations in the motion, and the affidavit which supported the motion, were sufficient to warrant an evidentiary hearing. If the State wishes to argue that Jackson might have somehow snuck out of bed without waking JaNikka, exited the bedroom through a window, then climbed back through the window and snuck back into bed, all without waking JaNikka and escaping Crystal's notice, then those quibbles should be presented at an evidentiary hearing where the circuit

court can evaluate the credibility of the witness testimony, and assess the plausibility of the State's alternative theories.

A circuit court should not deny a motion for a hearing based on the proposition that its allegations "seem to be questionable in their believability." ***John Allen***, 274 Wis.2d 568, at ¶12 n.6. Like any other motion to dismiss a pleading without an evidentiary proceeding, this Court is bound to assume the allegations made in the pleading are true. Determinations of witness credibility are to be made only after holding an evidentiary hearing. *Id.* at fn. 6.

If true, the testimonies of Crystal Jackson and JaNikka D. Marsh would have established that Larry L. Jackson could not have murdered R.K. Failing to even contact and interview these witnesses, if true, would clearly constitute deficient performance on the part of trial counsel. These allegations alone merited an evidentiary hearing to test the credibility of Crystal Jackson and JaNikka D. Marsh, and weigh their testimonies against the witness testimonies that were received at trial.

3. Whether Jackson's trial counsel failed to prepare Carol Jackson for trial testimony is a fact issue that should be resolved by the circuit court after an evidentiary hearing.

The State writes that "Jackson also alleges that his trial counsel performed deficiently when she failed to meet with Jackson's mother before she testified at trial. However, Jackson failed to establish that his trial counsel failed to meet with his mother before her testimony." (State's Br. 4).

Whether trial counsel *in fact* met with Carol Jackson and prepared her for testifying at trial is a *fact* issue to be resolved at a *factfinding*

hearing. ***John Allen*** requires allegations.[2] Evidence supporting those allegations is to be presented at a hearing. If at hearing, the evidence should fail to establish that trial counsel failed to meet with Carol Jackson, then that allegation will obviously fail. The circuit court, however, did not hold an evidentiary hearing. Consequently, the courts are obliged to accept as true Jackson's allegation that Jackson's trial counsel did not meet with Carol Jackson and failed to prepare her for testifying at trial. Those being the facts alleged, the questions are was this deficient performance? If so, was it prejudicial?

Failing to prepare a witness for testimony at critical stages in the proceedings can constitute ineffective assistance of counsel. ***Harris v. Thompson***, 698 F.3d 609 (7th Cir. 2012). The State makes no argument that failing to prepare a witness for trial would not constitute deficient performance on the part of defense counsel. Rather, beyond postulating that trial counsel might have met with Carol Jackson, the State challenges whether Jackson's motion alleged sufficient facts to demonstrate prejudice. (State's Br. 20-21). Jackson will not rehash the arguments made in his initial brief concerning prejudice. (Defendant's Initial Br. 31-38). However, Jackson would like to address the following statement in the State's brief:

> Jackson also alleges that, had trial counsel interviewed Carol before trial, she "could have made the determination that [Carol] should not [have been called] as an alibi witness." (R. 124:9.) However, as the

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[2] Perhaps the State is faulting Jackson for not submitting an affidavit that Jackson's trial attorney did not meet with Carol Jackson. If so, the undersigned is aware of no authority that requires allegations in a postconviction motion to be supported with affidavits, and the State provides no authority for such a requirement. That Jackson provided affidavits for some allegations, and not for others, does not render those other allegations somehow null and void.

> circuit court explained, not calling Carol "would have left [Jackson] without an alibi defense." (R. 155:3.)

(State's Br. 21). But this only reinforces Jackson's arguments concerning the prejudice Jackson suffered by trial counsel's failure to investigate the witnesses Crystal Jackson and JaNikka Marsh. The only reason Jackson was left with Carol Jackson as his sole alibi witness was because trial counsel failed to investigate the two more credible alibi witnesses available. The prejudice in this case accumulates, first by failing to investigate other known potential alibi witnesses, and then by failing to prepare the one flawed witness who remained. And the cumulative prejudice resulting from these errors undermined confidence in the outcome of Jackson's trial.

4. Whether Jackson's decision not to testify at was a result of misinformation given to him by trial counsel is a fact issue that should be resolved by the circuit court after an evidentiary hearing.

The State writes in its brief that "... it is clear that Jackson did not change his mind about testifying because his trial counsel misinformed him about that law. Instead, he changed his mind based on his father's 'absolutely clear' advice not to testify." (State's Br. 22). But the advice Jackson's father gave his son was undoubtedly informed by the misinformation that trial counsel had given her client. Jackson's in his postconviction motion alleged that his trial counsel told him that in a private consultation, which his father also attended, that he would be required by the Court to testify before his alibi witness testified. (R.124:10; Appx. 16). He further alleged that it was this misinformation that motivated him to not testify. *Id*. That Jackson's father might have advised his son not to testify after trial counsel announced that Jackson would have to testify first, is not a fact in

conflict with Jackson's allegations. Whether it was the advice Jackson received from his father, or the misinformation he received from trial counsel, the was the dominating factor in Jackson's decision to testify may be a worthy line of questioning at an evidentiary hearing. But once again, the issue presented in this appeal is whether Jackson alleged sufficient facts to warrant an evidentiary hearing. Jackson alleges that it was misinformation from trial counsel, not advice from his father, that motivated him to waive his right to testify at his trial. The State questions that allegation's believability. "If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing." ***John Allen***, 274 Wis.2d 568, at ¶12 n.6. All Jackson is requesting is the evidentiary hearing where the believability of those allegations may be tested.

IV. Conclusion.

Wherefore Jackson respectfully requests that this Court reverse the circuit court's order denying his motion for postconviction relief, and remand this case for further evidentiary proceedings.

Respectfully submitted June 11, 2021.

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V. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2978 words.

I further certify that if the record is required by law to be confidential, this brief and portions of the record included in the appendix are reproduced using first and last initials, or appropriate pseudonyms, instead of full names of persons, specifically including victims, 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.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated June 11, 2021.

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