STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2020AP002119 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

LARRY L. JACKSON,

Defendant-Appellant-Petitioner

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction entered in the Circuit Court for Milwaukee County, The Honorable Jeffrey A. Wagner, presiding

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REPLY BRIEF OF THE DEFENDANT-APPELLANT-PETITIONER LARRY L. JACKSON

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III. Argument.

A. This matter should be remanded for an evidentiary hearing on Jackson's motion for postconviction relief.

1. To assert, as the State does, that neither JaNikka Marsh nor Crystal Jackson could have provided Jackson with an alibi, requires a particularly tendentious reading of JaNikka's and Crystal's respective affidavits.

The State argues that neither JaNikka Marsh nor Crystal Jackson could have provided testimony supporting Jackson's alibi defense. (State's Br. 21-22). With regard to JaNikka, 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. 21). That is a highly tendentious reading of JaNikka Marsh's affidavit. What JaNikka 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, JaNikka 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. To the undersigned, that is testimony supporting an alibi defense. The State, however, appears to be arguing that it's only evidence supporting an alibi if JaNikka can testify that she was wide awake, eyes glued upon Larry, for the entire time they were in bed together. Ponder that for moment. Does the State seriously contend that one's spouse could not

testify that on a particular night he or she was sleeping with you in your marital bed?

That is the clear implication of the State's argument. Note, that the State writes that "Marsh's affidavit establishes that *she lacked personal knowledge* of where Jackson was at the time R.K. was shot." (State's Br. 21) (emphasis added). "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Wis. Stat. § 906.02. JaNikka would testify that Jackson was with her taking a nap when R.K. was murdered. Specifically, she would testify that she and Jackson went to bed together for a nap, and when she awoke he was still by her side. JaNikka's testimony supports Jackson's alibi defense. The insinuation that JaNikka is incompetent to testify to these facts is absurd. That she may have fallen asleep while she and Jackson were in bed together goes to the weight and credibility of her testimony, not to its admissibility. That is an important distinction. "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. ***State v. Leitner***, 2001 WI App 172, ¶34, 247 Wis.2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony)." ***State v. John Allen***, 2004 WI 106, ¶12 n.6, 274 Wis.2d 568, 682 N.W.2d 433.

There are so many unasked and unanswered questions to be addressed before a one can decide with certitude whether JaNikka Marsh should be believed when she says that Larry Jackson was in bed with her when R.K. was murdered. Just to name a few: Was JaNikka a heavy or a light sleeper? Might she have been taking any medications at the time? Was Jackson embracing JaNikka as they slept, or was he

on the other side of the bed? How large was the bed? Practically speaking, *could* Jackson have slipped out of bed, committed the homicide, and returned unnoticed by JaNikka? The State presupposes that the answers to all these questions will be adverse to Jackson's alibi defense. JaNikka must be a heavy sleeper. The bed was undoubtedly a large one. Jackson and JaNikka were obviously separated, sleeping on opposite sides of that bed. Jackson could easily have slipped out of bed, murdered R.K., then slipped back into bed, his absence being completely unnoticed by JaNikka. This is, of course, all supposition; we know none of this. JaNikka may well be a light sleeper, the bed small, the lovers embraced. What we do know is that JaNikka says she and Jackson went to bed together, and awoke together. An inference can be reasonably drawn that Jackson was in still in bed with JaNikka when R.K. was murdered. JaNikka's testimony is evidence supporting Jackson's alibi, regardless of what reservations the State may have concerning its believability.

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. 22). Once again, there is a divergence between the affidavit submitted and the State's interpretation of what the witness said. What Crystal 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). Crystal says was she was at her mother's home, that Larry and JaNikka went into their bedroom, and

that Jackson did not leave the bedroom until JaNikka had to leave for work. Again, to the undersigned that is evidence supporting Jackson's alibi defense. The State appears to be arguing that it is only evidence of an alibi if Crystal can verify that she was there in the bedroom with Larry and JaNikka. Again, there are so many questions that must be addressed before a one can conclude with certitude that Crystal is unable to provide evidence supporting Jackson's alibi defense. Was Crystal in a position to notice Larry Jackson leaving his bedroom? Were there alternative means of ingress and egress from Jackson's bedroom? (a window perhaps?) On what floor was that bedroom? As a practical matter, *could* Jackson have slipped out of his bedroom, murdered R.K., and returned to the bedroom, without Crystal noticing Larry's movements? All this may be a worthy line of cross-examination at an evidentiary hearing; but is an unreasonable expectation, and an unreasonable pleading requirement, that Crystal be in the bedroom watching Larry and JaNikka sleep, in order to testify in support of Jackson's alibi defense.

If Crystal and JaNikka had appeared at trial they would have undoubtably been allowed to testify to the facts alleged in their affidavits. If Crystal and JaNikka *had* testified at trial, *could* a jury have reasonably concluded that it was extremely unlikely Jackson snuck off and murdered R.K., without waking JaNikka, and escaping the notice of Crystal? Certainly. It all comes down to the credibility of the witnesses and the believability of their testimony. JaNikka's and Crystal's credibility as witnesses has never been assessed by any trier of fact; the believability of their testimony has therefore never been fairly weighed.

The State's arguments amount to little more than quibbling with Marsh and Crystal'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 that she was awake the entire time she and Larry were in bed together trying to take a nap? Of course. Would it be better if Crystal could state that she was in that bedroom watching the two sleep? I suppose so. 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 affidavits which supported the motion, were sufficient in form to warrant an evidentiary hearing. If the State wishes to argue that Jackson might have somehow slipped out of bed without waking JaNikka, exited the bedroom through a window, murdered R.K., then climbed back through the window and snuck back into bed, all without waking JaNikka and escaping Crystal's notice, then that argument should be presented at an evidentiary hearing where the circuit court can evaluate the credibility of the witnesses, the believability of their testimony, and assess the plausibility of any alternative theories the State may wish put forth.

Once again, a circuit court should not deny a hearing for a motion based on the proposition that its allegations "seem to be questionable in their believability." ***John Allen***, 2004 WI 106, ¶12 n.6. Like any other motion to dismiss a pleading without an evidentiary proceeding, the courts are 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.* If true, the testimonies of Crystal Jackson and JaNikka Marsh would have established that Larry L. Jackson could not have murdered R.K. A failure to even try contacting and interviewing 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 to weigh their testimonies against the witness testimonies that were received at trial.[1]

2. Trial counsel's failure to interview Carol Jackson caused prejudice to Jackson's alibi defense which reinforced and was cumulative to the prejudice caused by trial counsel's failure to investigate other alibi witnesses.

The State writes that "Jackson ... [has] failed to explain how interviewing Carol before she spoke with police or prior to her testimony would have altered the outcome of the trial." (State's Br. 26). Jackson disagrees. As previously argued, an investigation by trial counsel into Carol Jackson's potential testimony would have assisted Jackson's defense in at least two respects. First, as Jackson alleged in his postconviction motion, Carol's testimony at trial was crippled by her disastrous phone conversation with Detective Sullivan. (R.124:8-9; Appx. 36). Witness preparation by trial counsel could have eased Carol Jackson's suspicions when called by Detective Sullivan, and cleared up confusion she obviously

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[1] The State, like the Court of Appeals, also argues that "given the overwhelming evidence against Jackson, there is no reasonable probability that the result of the proceedings would have been different." (State's Br. 21, 23-26). Jackson believes that argument was addressed in his initial brief, pages 34-43. Ultimately, it is his contention that the above conclusion cannot be reached without at least hearing what these alibi witnesses have to say. Only then can one reasonably conclude whether or not they should be believed.

had about the timeframes involved in this case. *Id.* Second, interviewing this witness prior to Detective Sullivan's interview may have allowed Jackson to forgo listing Carol as an alibi witness altogether. *Id.* To that the State responds that not calling Carol "would have left [Jackson] without an alibi defense." (State's Br. 27). But this is a glib response; after all, why was Jackson left only with Carol's testimony to establish his alibi? He was only in that position because trial counsel had failed to conduct an adequate investigation into other alibi witnesses who would have proved to be more credible witnesses. The prejudice caused by the trial counsel's myriad deficiencies was both cumulative and mutually reinforcing, in that, trial counsel's deficiencies in performance were all specifically prejudicial to Jackson's alibi defense.

Finally, the State places great weight on Carol Jackson's testimony at trial that Tiffany Tucker called Jackson on the evening of the shooting. (State's Br. 26-27). But Tiffany Tucker's calling Jackson's phone on that evening does not conclusively establish Jackson's guilt in R.K.'s murder. JaNikka's affidavit provides a reasonable alternative explanation for why Tiffany may have been calling Jackson. Tiffany and JaNikka worked in the same nursing home and were trying, unsuccessfully, to connect with one another that evening in order to carpool to work. (R.125:5; Appx. 44). If trial counsel had interviewed JaNikka before trial she would have known this, and could have mitigated the inference being drawn by the State, namely, that Tiffany was calling Jackson in order to get Gerald some assistance in his confrontation with R.K. Again, trial counsel's failure to conduct an adequate investigation into Jackson's alibi witnesses caused prejudices that were cumulative and mutually reinforcing of one another.

3. Whether Jackson's decision to not testify at was a result of misinformation given to him by trial counsel, or was informed by advice he received from his father, is a fact issue that should be resolved by the circuit court after an evidentiary hearing.

The State asserts 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 advice not to testify." (State's Br. 29). This is only supposition on the State's part. We do not know from the trial transcript what advice was given to Jackson by his trial attorney. The trial transcript does not tell us exactly what advice was given to Jackson by his father (we only know that Jackson's trial counsel said Jackson's father was "absolutely clear about his advice"). (R.174:65). We do not know if the advice Jackson received from his father was in conflict with the advice that he received from his trial counsel. And we do not know if there were any off-the-record discussions between the trial counsel and the circuit court relevant to Jackson's decision to not testify, (though the trial transcript does suggest that a communication of some sort occurred).[2]

All we *know*, is that Jackson is now claiming, in a postconviction motion, that his trial attorney told him that the trial judge would require him to testify before his other alibi witness. If true, then trial counsel's advice was either erroneous as to fact (i.e., the judge had not instructed that Jackson testify first); or was erroneous as to law (i.e., absent circumstances in

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[2] Jackson's trial counsel told the circuit court "I know the Court's aware of the logistical issues we have with him." (R.174:63). This somewhat cryptic remark suggests that there might have been some off-the-record communications to the circuit court about the mode and manner of Jackson's testifying. The circuit court's order is silent on the issue. (R.155; Appx. 16-19).

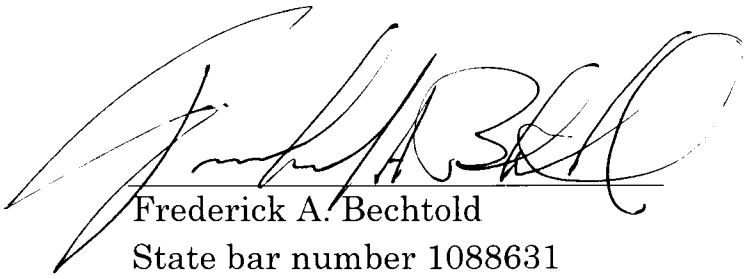
which having other defense witnesses testify first would have impeded the orderly progress of the trial, the trial judge could not legally have required Jackson to testify first. *See,* ***Brooks v. Tennessee***, 406 U.S. 605 (1972)). Jackson claims that it was the advice he received from trial counsel, not his father, that influenced his decision to not testify. The State is claiming something different, that it was advice from his father that influenced Jackson's decision not testify. It is the conflict between these two claims that makes an evidentiary hearing necessary.

Moreover, the advice Jackson's father gave to his son was undoubtedly being informed by the misinformation that trial counsel was giving her client. That Jackson's father might have advised his son to not testify after trial counsel announced that Jackson would have to testify first, is not a fact which would be in conflict with the allegations Jackson has made in his postconviction motion. Whether it was the advice Jackson received from his father, the misinformation he received from trial counsel, or some combination of the two, that was the dominating factor in Jackson's decision to not testify is a question of fact. The issue presented in this appeal is whether Jackson alleged sufficient facts to warrant an evidentiary hearing on this factual issue. The State questions the truth of Jackson's allegation. However, the facts alleged in a postconviction motion are assumed to be true for purposes of deciding whether to have an evidentiary hearing. And"[i]f 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. Once again, 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 without an evidentiary hearing, and remand this case for further evidentiary proceedings.

Respectfully submitted March 14, 2022.



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V. Certifications.

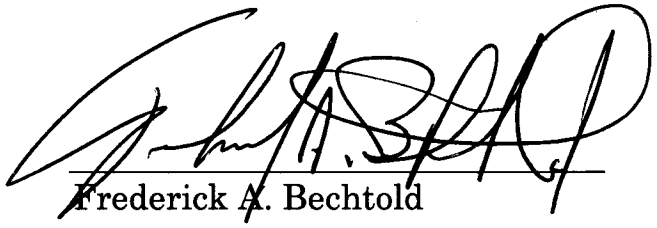
I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2775 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record cited in this brief are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, and that portions of the record have been reproduced to preserve confidentiality.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 March 14, 2022.



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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Supreme Court of Wisconsin, by priority express mail on 3/14/2022. I further certify that the brief was correctly addressed, and postage was pre-paid.

Date: 3/14/2022

Signature: