STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP002012-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL ROSS STRAIGHT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Entered in the Grant County Circuit Court the Honorable Craig R. Day, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Straight's trial counsel provided ineffective assistance.

A. Trial counsel incorrectly concluded that self-defense was not an available defense.

While Mr. Straight agrees that Attorney Frank's roughly forty years of service to the defense bar in Wisconsin should be commended, his trial counsel's experience is not relevant to the ineffective assistance of counsel claim. As our Supreme Court explained,

> Whether or not an attorney is experienced is not the criterion for determining whether counsel was effective in a particular case, and the fact that an attorney is ineffective in a particular case is not a judgment on the general competency of that lawyer. It is merely a determination that a particular defendant was not appropriately protected in a particular case.

State v. Felton, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). Therefore, Mr. Straight did not address Attorney Frank's general experience.

Trial counsel's decision not to request the self-defense instruction because he had determined that Mr. Straight crossed a line into retaliation was incorrect. Counsel's testimony demonstrates that it was the result of conceit and not a well-thought out,

considered decision. (*See* 73:10, 11; App. 31, 32).[1] Counsel believed his view of the evidence was the most sophisticated, and as a result, counsel shut out all other possibilities, including his client's perspective that he had acted in self-defense. (*See* 73:10, 11; App. 31, 32).

The state cites *Shields v. State*, 187 Wis. 448, 204 N.W. 486 (1925), a Wisconsin case that preceded the enactment of the self-defense statute, Wis. Stat. § 930.48, by thirty years, in support of its argument that self-defense was not available due to a theory of retaliation. (Resp. Br. at 15-16). For further support, the state looks to language from an Oregon case. (Resp. Br. at 16). Neither of these cases is relevant to the issue at hand—whether Mr. Straight's trial counsel was ineffective for failing to request the self-defense instruction.

Shields merely illustrates a potential counterargument the state might have had, had trial counsel argued Mr. Straight acted in self-defense. The issue there was whether reversal of the jury's verdict convicting Shields was warranted because the trial court did not require witnesses to divulge the names of those marching in a KKK parade and because of a portion of the self-defense instruction given to the jury. *Shields*, 204 N.W. 486, 488-89. However, it does not bear on whether the instruction should have been requested in Mr. Straight's case.

[1] App. citations are to the appendix to Mr. Straight's brief-in-chief.

Had trial counsel provided effective assistance and requested the instruction, the state would have been free to argue the application of the facts to the jury instruction, as it presumably did in *Shields*.

Recent cases have made clear that self-defense has a low threshold to present the issue to the jury. *State v. Stietz*, 2017 WI 58, ¶16, 375 Wis. 2d 572, 895 N.W.2d 796. "The accused need produce only 'some evidence' in support of the privilege of self-defense." *Id.* (citations omitted). The circuit court is not to weigh the evidence. *Id.*, ¶18. If the defendant presents "some evidence," he or she is entitled to the jury instruction. *Id.*, ¶16. Therefore, as the circuit court here indicated, it would have given the self-defense instruction as to the disorderly conduct count at issue had it been requested. (72:39; App. 60).

B. Trial counsel's strategy was not reasonable, as he presented an inconsistent, non-defense to the disorderly conduct charge.

The state argues that it was reasonable for trial counsel to select the strongest defense to the charge, rather than present multiple defenses. (Resp. Br. at 17). The state seems to assume that trial counsel's argument, "C.G. caused the disturbance" was a reasonable defense strategy without explaining how it was a defense to the charge. (Resp. Br. at 17). However, the state's argument related to the "shotgun approach" fails because

trial counsel did not present the strongest defense, or even a valid defense to disorderly conduct.

As Mr. Straight argued in his opening brief, trial counsel was not able to articulate a legally valid defense to disorderly conduct. Counsel's closing argument was a jumble of claiming Mr. Straight was not disorderly because C.G. was, and aspects of self-defense. (52:249). At the *Machner*[2] hearing, trial counsel admitted that more than one person can commit disorderly conduct at the same time. (72:13; App. 34). Nor was the argument that C.G. had provoked the disturbance a valid defense, as the behavior need not actually cause a disturbance to be disorderly conduct. *See* Wis. Stat. § 947.01(1); WIS JI-CRIMINAL 1900 ("It is not necessary that an actual disturbance must have resulted from the defendant's conduct.").

Trial counsel's approach was not only incorrect and confusing, whether he intentionally muddled the self-defense argument or not, but it was also inconsistent with the defense to the battery count. The two defenses trial counsel presented were inconsistent *because* trial counsel chose to dissect the facts and requested the self-defense instruction as to the battery charge alone. Unlike the state's suggestion, that Mr. Straight was acquitted on the battery actually demonstrates that self-defense was the stronger

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

defense, not the pseudo defense of "it was her, not me." (*See* Resp. Br. at 17).

There is nothing inconsistent about arguing that the battery and disorderly conduct charges resulted from one course of conduct, and that Mr. Straight was acting in self-defense. And as the state repeatedly points out, trial counsel secured an acquittal on the battery charge, on the basis of self-defense.

C. Mr. Straight was prejudiced by trial counsel's deficient performance.

Next, the state seemingly argues that the self-defense instruction would not have been available because there was conflicting evidence. This post hoc justification is irrelevant because Mr. Straight met the "some evidence" threshold, which entitled him to a self-defense instruction. *See Stietz*, 375 Wis. 2d 572, ¶¶16-18. Moreover, the circuit court here explained that it would have given the instruction had trial counsel asked for it. (72:39; App. 60). The state's claim that "it would have been almost impossible" for the court to instruct the jury is illogical and disingenuous given the court's ruling. As Mr. Straight explained, there is no inconsistency in his actions such that he could not claim self-defense as to the entire course of conduct involving C.G. (Brief-in-Chief at 29-30, 33).

Further, the state's citation to *State v. Olsen*, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980), is inapt. *Olsen* deals with the applicability of self-defense to a situation in which the state did not allege any use or threat of force on Olsen's part. *Id.* at 577. As

Mr. Straight established, the conduct alleged in this case clearly involved the use and/or threat of force. (Brief-in-Chief at 28). And given the state's reference to one of its witness's testimony, one would think that the element of force was clear to the state as well. (*See* Resp. Br. at 18).

In addition, the state's characterization of Mr. Straight's testimony is inaccurate. Mr. Straight did not testify that he did not use any force against C.G. Rather, he explained that he knocked her down, held her down by getting on top of her, got the knife away from her, and then got up and returned the knife by putting it near her on the ground once "the threat was done." (52:194, 196). This is totally consistent with his theory of defense—that he acted in self-defense during the entire encounter with C.G., and did not mean to harm her.

The state's inflammatory retelling (*see* Resp. Br. at 19-20) only reinforces the fact that Mr. Straight did not actually use the knife against C.G. There was no "stabbing," no "coup de grace," but only Mr. Straight gaining control of the knife, holding it out of her reach, and ultimately returning it to C.G. once the threat was extinguished. Mr. Straight's actions were consistent with self-defense, and the jury could easily have acquitted him on that basis had trial counsel requested the self-defense instruction.

Regardless, that these facts continue to be in dispute demonstrates that this was an issue for the jury. Only the jury, not Mr. Straight's trial counsel,

and not the parties on appeal, could have resolved this issue. The jury is the trier of fact, and trial counsel's decision inappropriately took the matter of self-defense out of the hands of the jury.

Again, Mr. Straight has proven that the circuit court would have given the self-defense jury instruction as to the battery. The court stated as much in its oral ruling at the *Machner* hearing. (72:39; App. 60). The prejudice is also clear. The only difference in how the battery and disorderly conduct charges were argued at closing was the self-defense instruction. Given that Mr. Straight admitted to knocking C.G. to the ground, there is no other theory of defense upon which the jury could have acquitted him of the battery. Therefore, the fact that Mr. Straight was acquitted of the battery, for which trial counsel requested the self-defense instruction, and convicted of the disorderly conduct that stemmed from the same course of conduct, but for which trial counsel did not request the self-defense instruction, demonstrates that Mr. Straight was prejudiced by trial counsel's failure.

Finally, Mr. Straight does not suggest that trial counsel should have provided multiple or alternative defenses to the disorderly conduct charge. Rather, Mr. Straight argues that trial counsel should have requested the self-defense jury instruction, and not disregarded it in exchange for the poorly-thought out, unclear, and legally invalid defense of "C.G. did it."

The state's suggestion that arguing self-defense as to the disorderly conduct would have undermined the favorable result on the battery and the unrelated disorderly conduct charge is unsupported by law, and entirely speculative. (*See* Resp. Br. at 21). As such, it is conclusory. It is also irrelevant to Mr. Straight's claim that his trial counsel was ineffective for failing to request a self-defense instruction as to the disorderly conduct charge. This court should therefore reject the state's unsupported contention.

II. Mr. Straight's trial counsel effectively conceded guilt in violation of his Sixth Amendment rights.

The state does not address Mr. Straight's argument that trial counsel violated his sixth amendment right to choose the objective of his defense. Mr. Straight argued that his trial counsel overrode his desire to maintain his innocence as to the disorderly conduct charge when he chose to present a legally invalid defense instead of requesting the self-defense instruction.

The state does not directly address this argument at any point in its response brief. Rather, the state seems to assume that trial counsel presented a valid defense. As such, the state concedes the issue. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). This court should not develop the state's counterargument on its behalf. *See State v. Robinson*, 2014 WI 35, ¶50, 354 Wis. 2d 351, 847

N.W.2d 352. This court should hold that trial counsel failed to present a defense in violation of Mr. Straight's Sixth Amendment rights, both on the basis of Mr. Straight's argument in his opening brief and the state's concession.

CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Straight respectfully requests that this Court reverse the order denying his postconviction motion, and remand his case with directions to vacate the disorderly conduct conviction and hold a new trial as to that charge.

Dated this 1st day of May, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,919 words.

Dated this 1st day of May, 2023.

Signed:
Electronically signed by
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