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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2024AP115-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Case No: 24AP115-CR

Circuit Court Case No. 21CF3408

LYNETTA LAKE

Defendant-Appellant

Appeal from the Milwaukee County Circuit Court
Case No. 21CF1308
The Honorable Kori Ashley Presiding

BRIEF OF DEFENDANT-APPELLANT, LYNETTA LAKE

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
ISSUES PRESENTED	4
Question Presented	5
Position on Oral Argument and Publication	5
Statement of the Case	5
Argument	6
I. The motion filed by defense alleged sufficient facts that, if true, constituted ineffective assistance of counsel, and entitled Ms. Lake to an evidentiary hearing.	6
A. STANDARD OF REVIEW	7
B. The motion filed by defense sufficiently alleged that Ms. Lake’s trial counsel was deficient for failing to call two known witnesses at the restitution hearing.	7
C. Defense’s motion sufficiently alleged prejudice because the testimony of the two witnesses alleged would have overcome the credibility of the sole witness provided by the state.	8
CONCLUSION	10

TABLE OF AUTHORITIES**Cases**

<i>State v. Allen</i> , 2004 WI 106 274 Wis.2d 568, 682 N.W.2d 433	6
<i>State v. Guerard</i> , 2004 WI 85 273 Wis.2d 250, 682 N.W.2d 12	9
<i>State v. Gutierrez</i> , 2020 WI 52, 391 Wis. 2d 799, 943 N.W.2d 870.	7
<i>State v. Jenkins</i> , 2014 WI 59, 355 Wis.2d 180, 848 N.W.2d 786 (Wis. 2014)	8,9
<i>State v. Machner</i> , 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979)	6,8
<i>State v. Ruffin</i> , 2022 WI 34, 401 Wis. 2d 619, 974 N.W.2d 432	7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 80, L.Ed.2d 674 (1984)	7,9
United States Constitution	
6 th Amendment	6

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ISSUES PRESENTED

Defense filed a motion on October 20, 2023. The motion alleged that the appellant, Lynetta Lake, advised her trial attorney of two witnesses who could testify at the restitution hearing. The motion attached letters from both witnesses. The motion also alleged that Ms. Lake's trial attorney did not call the witnesses at the restitution hearing. Finally, the motion alleged that Ms. Lake was prejudiced by the failure to call these two witnesses because the state provided no evidence at the restitution hearing other than the testimony of the victim. The circuit court denied the motion without a hearing in an order on January 5, 2024.

Question Presented

Did Defense's postconviction motion allege sufficient facts that, if true, constitute ineffective assistance of counsel?

This Court should overturn the order of the circuit court.

**POSITION ON ORAL ARGUMENT AND
PUBLICATION**

Neither are requested.

STATEMENT OF THE CASE

Statement of the Record:

On August 11, 2021 the state filed a criminal complaint alleging one count of second degree reckless endangering safety contrary to section 941.30(2) of the Wisconsin statutes. (R. 2:1). The complaint alleged that Police Officer Steve Krejci spoke with the Victim, G.J., and that G.J. stated that on August 10, 2021, Lynetta Lake crashed into G.J.'s vehicle twice and fled the scene without checking on G.J. *Id.* at 1-2.

Ms. Lake entered a guilty plea to negligent operation of a motor vehicle and hit and run on October 26, 2022. (R. 52:25). The circuit court held a restitution hearing for this matter on December 9, 2022. (R 47:1). The state submitted a document listing the request for restitution from G.J. (R.38). An order from this Court on August 28, 2023 extended the deadline to file for postconviction relief to October 27, 2023. (R. 51). On October 20, 2023, Defense filed a motion alleging that Ms. Lake's trial counsel was ineffective for failing to call two witnesses that Ms. Lake alleged that she spoke to her attorney about prior to the December 9 restitution hearing. (R. 53). The motion filed by defense provided letters from both of the potential witnesses regarding their knowledge of G.J. and Ms. Lake as well as the vehicle that G.J. drives. *Id.* 7-8. The circuit court denied defense's motion without a hearing in an order on January 5, 2024. (R. 63). A notice of appeal was timely filed by defense on January 24, 2024. (R. 64).

Statement of the Facts:

At the December 9 restitution hearing, the state provided no documentation other than the previously mentioned request for restitution to prove the restitution amount or the make and model of the vehicle that Ms. Lake struck on August 10, 2021. (R. 47: 31). G.J. did testify that the vehicle that was struck on August 10, 2021 was a maroon-colored Mercedes Benz (R:47:8). The state did not call any other witnesses at the hearing. At the same hearing, Ms. Lake testified that the vehicle which she struck on August 10, 2021 was white and not the maroon-colored vehicle described by G.J. (R. 47:33). The circuit court found the testimony of G.J. and ruled in favor of the state regarding the restitution request. (R. 47:46).

ARGUMENT

I. The motion filed by defense alleged sufficient facts that, if true, constituted ineffective assistance of counsel, and entitled Ms. Lake to an evidentiary hearing.

The motion filed by defense sufficiently alleged ineffective assistance of counsel. Where a defendant's postconviction motion, raising an ineffective representation claim alleges "sufficient material facts that, if true, would entitle the defendant to relief requested, the Court "must hold an evidentiary hearing." *State v Allen*, 2004 WI 106 ¶9, 274 Wis.2d 568, 682 N.W.2d 433. A hearing, and an opportunity for trial counsel to testify is "a prerequisite to a claim of ineffective representation" and necessary to "determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

A defendant in the state of Wisconsin has the right to effective assistance of counsel. Wisconsin Constitution Article 1 section 7; U.S. constitution 6th Amendment. A defendant is denied their right to effective assistance of counsel where the defendant's counsel fails to perform in a way that a reasonable attorney would perform under the same circumstances and where the defendant was prejudiced by their counsel's

deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 80, L.Ed.2d 674 (1984).

A. STANDARD OF REVIEW

This court should review the issues of whether the postconviction motion filed by defense alleged sufficient facts that, if true, would entitle Ms. Lake to relief De Novo. Whether a “[postconviction] motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief” or “the record conclusively demonstrates that the defendant is entitled to no relief” are questions of law reviewed de novo. *State v. Ruffin*, 2022 WI 34, ¶ 27, 401 Wis. 2d 619, 974 N.W.2d 432. “[W]hether a defendant received ineffective assistance of counsel [presents] a mixed question of fact and law.” *State v. Gutierrez*, 2020 WI 52, ¶ 19, 391 Wis. 2d 799, 943 N.W.2d 870. This Court upholds the circuit court’s factual findings, which include findings concerning the “circumstances of the case and trial counsel’s conduct and strategy,” unless they are clearly erroneous. *Id.* Whether counsel’s performance constitutes ineffective assistance presents a legal question that this Court reviews de novo. *Id.*

In this case, the question that is presented to this Court is whether the facts alleged in Ms. Lake’s postconviction motion, if true, would constitute ineffective assistance of counsel. Because the circuit court denied the motion without a hearing, there are no factual findings of the circuit court for this court to review. Because the question of whether Ms. Lake’s postconviction motion, if true, would constitute ineffective assistance of counsel is a question of law this court should review this matter De Novo.

B. The motion filed by defense sufficiently alleged that Ms. Lake’s trial counsel was deficient for failing to call two known witnesses at the restitution hearing.

The first step in determining whether a defendant’s counsel was ineffective is to determine whether their decision at the time were deficient under the circumstances. “In considering alleged incompetency of counsel, one should not reconstruct

the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonable effective representation.” *State v. Machner*, 285 N.W.2d 905, 907 92 Wis.2d 797 (Wis. App. 1979). Quoting *State v. Harper*, 57 Wis.2d 543, 556-7, 205 N.W.2d 1,9 (1973).

Defense’s motion alleged that Ms. Lake’s counsel performed deficiently when he failed to call two witnesses during the Deficient performance is performance that falls below the line of what a reasonable attorney would do given the same circumstances. “Failure to call a potential witness may constitute deficient performance.” *State v. Jenkins*, 2014 ¶ 50 WI 59, 355 Wis.2d 180, 199, 848 N.W.2d 786, 795 (Wis. 2014).

In *Jenkins* the defendant’s trial counsel knew of the existence of a witness that would have testified in a way that would have contradicted the testimony of a witness upon who’s testimony the entirety of the state’s case rested on. *Id.* The facts of the current case, if true as alleged, are similar to the facts of *Jenkins* because Ms. Lake’s attorney is alleged to have known of the existence of not one but two potential witnesses that would have contradicted the testimony of G.J. at the restitution hearing. G.J. was the sole witness for the state at the restitution hearing and the state’s case rested entirely on her testimony.

The letter attached to defense’s motion written by Griffin Lake Jr. on April 25, 2023 states “the vehicle [G.J.] was driving on the day of the accident was white. My sister struck a white large size sedan” (R. 53:7). The language of the letter implies that Griffin Lake Jr. observed the crash. Griffon Lake’s potential testimony is material to the matter of restitution because it contradicts the testimony of the state’s witness. If it is true, as alleged, that Ms. Lake informed her trial counsel of the information to which Griffin Lake Jr. would possibly testify and Ms. Lake’s attorney did not call Griffon Lake Jr. to testify then this performance is deficient.

C. Defense’s motion sufficiently alleged prejudice because the testimony of the two witnesses alleged would have overcome the

**credibility of the sole witness provided by
the state.**

Ms. Lake was prejudiced by her trial counsel's deficient performance because the testimony of the two witnesses would have overcome the credibility of the sole witness provided by the state. The second prong of the test for ineffective assistance of counsel is the prejudice prong. *Strickland*, 466 U.S. at 694. Prejudice to determine ineffective assistance is defined as "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Guerard*, 2004 WI 85 ¶ 43, 273 Wis.2d 250, 682 N.W.2d 12 (Citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Whether counsel's deficient performance satisfies the prejudice prong of *Strickland* depends upon the totality of the circumstances at trial." *State v. Jenkins*, 2014 ¶ 50 WI 59, 355 Wis.2d 180, 199, 848 N.W.2d 786, 795 (Wis. 2014).

In the current case, the state's sole witness at the restitution hearing was G.J. who was the victim in this matter. The state provided no evidence other than G.J.'s testimony at the hearing. Similarly, defense only provided testimony from one witness at the restitution hearing. Ms. Lake's testimony contradicted G.J.'s testimony. The two potential witnesses who were not called at the restitution hearing would have also contradicted G.J.'s testimony with their testimony.

With three witnesses testifying in a way that contradicts the sole witness of the state, defense would have likely been able to overcome the testimony of the state's witness. More witnesses to corroborate Ms. Lake's version of events strengthens the argument of defense. Based on the circumstances at the restitution hearing, there is a reasonable probability that with the two additional witnesses to testify for defense, the outcome of the proceeding would have been different. Because there is a reasonable probability that the outcome would have been different, the failure to call these two witnesses was prejudicial to Ms. Lake.

Because the motion filed by defense sufficiently alleged deficient performance and sufficiently alleged prejudice, this court should reverse the decision of the circuit court and remand this matter to the circuit court for further proceedings.

CONCLUSION

For the aforementioned reasons this court should reverse the decision of the circuit court and remand this matter to the circuit court for further proceedings.

Dated at Milwaukee, Wisconsin this 20th day of March, 2024.

Respectfully submitted,

Electronically Signed by Kirk D. Henley

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I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief in that it is proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text. The text is 13-point type and the length of the brief is 1788 words.

Dated: March 20, 2024

Respectfully submitted,

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