STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

CASE NO. 2014AP001566
CASE NO. 2014AP001567

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROYCE HAWTHORNE,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT 974.06 STATS. FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

A. The Defendant's ineffective assistance of counsel claims are with merit.

The State argues that the defendant's arguments concern appellate counsel, not post-conviction counsel. The State claims that those arguments should have been raised in a ***Knight*** petition, not the ***Rothering*** petition that the defendant filed in the circuit court. As a preliminary matter, ineffectiveness of post-conviction counsel may constitute a sufficient reason as to why an issue that could have been raised on direct appeal was not. ***Rothering***, 205 Wis. 2d 675 (Ct. App 1996). Also, the trial court accepted the brief from the defendant under ***Rothering*** with no argument and set a briefing schedule, to which parties have responded.

B. Post-conviction counsel was ineffective for not raising the issue of ineffective assistance of trial counsel.

In arguing that post-conviction counsel was ineffective for failing to adequately challenge the ineffectiveness of trial counsel, a defendant must establish that trial

counsel's performance was deficient and that he was prejudiced by that deficiency. ***State v. Ziebart***, 268 Wis. 2d 468. The defendant sets forth its arguments on how he has demonstrated trial counsel's ineffectiveness.

1. Trial Counsel's Opening and Closing Statements.

The Respondent states in its brief that the defendant has shown no deficient performance or prejudice that trial counsel stated in his remarks to the jury in his opening statement and during closing argument. The Respondent also stated that the evidence against him was overwhelming. The State fails to understand the defendant's complaint regarding trial counsel's closing argument. It does not have anything to do with a photograph. It has something to do what trial counsel is saying to the jury. The defense counsel stated:

"I can imagine how someone who's holding on to a weapon and is holding it down by their side and is at the door and is trying to somehow get into the door or maybe his brother is on the other side trying to prevent him from getting in, he's banging against the door, and the gun accidentally discharges." [Tr.p. 31:8-24].

Clearly, this statement from trial counsel was prejudicial to the defendant. *Strickland* imposes few requirements on attorneys, but one it specifically enumerates is "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. An attorney's concession of a client's guilt without any indication of the client's consent to the strategy is deficient conduct under the standard of *Strickland v. Washington.* Trial counsel, by conceding the defendant's guilt in closing argument without any cognizable strategy did not get consent to concede his client's guilt or argue for a lesser-included offense because counsel never reclarified his statement to have an instruction conference when he uttered on record on 11/15/11, Jury Trial, a.m. session, "*One of the things—we're also going to need is an instruction conference. I may be asking for a lesser-included, but I have to talk about that with Mr. Hawthorne also.*" [Tr.p. 79:15-18]. Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. ***Nickols v. Gagnon,*** 454 F. 2d 467. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt. ***United States v. Cronic,*** 466 U.S. 648. The examination of the defendant's trial transcript does not reveal that the admitted concessions by counsel arose from indisputable evidence and credible testimony. The *Strickland Court* suggested that in assessing counsel's litigation decisions, "an inquiry into counsel's conversations with the defendant might be critical."

2. Confrontation Clause

The trial court stated in its judgment that an objection to the Confrontation Clause is a rerun of what was formerly argued on the defendant's first appeal. But the State agrees with the defendant that the Confrontation Clause claim was not previously litigated, but

disagrees that there is any merit to the claim. This defendant's case is not a domestic violence against women case. The domestic violence context is, however, relevant for a separate reason. Acts of domestic violence are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. ***State v. Baldwin,*** 330 Wis. 2d 500.

Here, the Respondent goes on to say that the State produced telephone records in which the defendant allegedly instructed Grace and Corneil not to show up for court. Self-identification by a speaker alone is not sufficient authentication. ***United States v. Puerta Restrepo,*** 814 F. 2d 1236. A telephone call out of the blue from one who identified himself as "Royce" is not sufficient authentication of the call as in fact coming from Royce. The voice recognition was not supported by the defendant's mother's statement because she never testified as to her statement. In determining the admissibility of identification testimony, "reliability is the linchpin." ***Brathwaite,*** 432 U.S. at 114. In the instant case, the defendant exercised his right to remain silent. There may well be situations in which a defendant said so little that a listener could not claim the minimal familiarity our case law requires; and in such a situation, a court will be justified in finding that the voice identification was not admissible. ***United States v. Jones,*** 600 F. 3d 847.

The Respondent goes on to quote the trial court when it said that "there is a great deal" of evidence against the defendant. [37:42]. Regarding causation, the Court also agreed that the State supposed to show cause and which the State did not. [11/14/11 Tr.p. 42:2-12]. The Court acknowledged that there's not causation, it's based on circumstantial evidence. [11/14/11 Tr.p. 44:17-19]. See **Fed. R. Evid 804(b)(6).** In the defendant's case, the State's motion for the forfeiture by wrongdoing suggested that the defendant attempted to dissuade the witness and the victim from attending his *April 18, 2011 Preliminary Hearing and not trial.* Also, the witness still showed for court on April 18 and was not unavailable. So obviously the forfeiture by wrongdoing does not apply to the witness Grace Hawthorne. Also, the victim Corneil Hawthorne stated that he had no desire to prosecute the culprits. He also gave two different statements about what he said happened. *See Incident Report 008192/MCLIN, JOSEPH pg 2 of 6.* In ***Giles v. California,*** 554 U.S. 353 states:

"The manner in which the rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant has caused a person *to be absent, but had not done so to prevent the person from testifying* as in the typical murder case involving accusatorial statements by the victim, *the testimony was excluded unless it was confronted or fell within the dying-declaration exception.*"

There is an absence of showing that these phone calls were a substantial factor in neither Grace nor Corneil appearing at trial. In fact, in the third conversation, if we believe the identifications of the conversations the speaker/suspect told P, *"matter of fact, don't tell my brother about that Texture thing."* ***see Appendix A1.*** It was never communicated to Corneil Hawthorne. These errors had substantial and an injurious effect or influence in determining the jury's verdict. The notion that judge's may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial

by jury. It is akin, one might say, to "dispensing with jury trial because a defendant is obviously guilty." ***Crawford,*** 541 U.S. at 62.

3. Cross-examination

Throughout the Respondent's brief, she always adds that the evidence of the defendant's guilt was overwhelming, but fails to remember that there was no credible evidence because the witness nor the victim testified at trial. If trial counsel would have asked those important questions to the detective, the result of the verdict and case would have been different.

4. Reasonable Doubt Instruction

The State disagrees that the instruction to "search for the truth" alleviated the State of its burden of proof. Trial courts should be against using any charge that has a tendency to "understate" or "trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt." ***(quoting Commonwaelth v. Ferreira,*** 373 Mass. 116***).*** Any instruction that suggests that the concept of reasonable doubt is a simple search for truth may run the risk of detracting from both the seriousness of the decision and the State's burden of proof. Because the degree of certainty required to convict is unique to the criminal law, we discourage the resort to any language that tends to minimize the indispensable nature of the reasonable doubt standard. Courts shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence. ***United States v. Garrett,*** 574 F. 2d 778, 783 (3rd Cir). Courts shall not use language in instructions which can be understood as diluting or in anyway impairing the constitutional requirement of proof beyond a reasonable doubt. Courts are not required to define "reasonable doubt" as a matter of course. Moreover, when a trial judge does define the term, no "particular form of words" is required. ***Hernandez,*** 176 F. 3d 719. Also, the Court did not give a curative instruction after the inadequate instruction.

5. Amended Information

The Respondent disagreed when the defendant argued that trial counsel should have objected to the amended information. The Respondent continues to state that this error was simply a typographical error. Where the proof in a criminal trial varies from what is alleged in an indictment, the inquiry is not merely whether the proof at trial wondered from the charges made in the indictment. To be error, the variance must, in addition, be such as to affect the substantial rights of an accused. A variance must be material and prejudicial to overturn a conviction.. On November 15, 2011 Jury Trial, the State said that the amended information should for count 1 reflect that the defendant instructed Corey Hawthorne to dissuade Grace. [11/15/11 Tr.p. 13-14]. On the amended information Corey is not on there. ***see App A2.*** The State must satisfy two tests to sustain an amendment: the wholly unrelated test and the constitutional notice test.

6. Joinder

The Respondent states in its brief that the recklessly endangering charge was intertwined with the intimidation charge. The State is wrong. In this case, the joinder violated the defendant's residual fair-trial obligation of the due process clause, because it produced such overwhelming prejudice that the jury could not distinguish guilt from innocence and the evidence would not have been admissible at both trials, therefore the cases were not properly joined.

7. Selective Prosecution

The Respondent states that the defendant's equal protection rights were not violated, and this claim has no merit. The State is mistaken. In the defendant's case, the Court must apply the "similar situated" standard to determine discriminatory effect. ***Johnson,*** 74 Wis. 2d at 173. In this defendant's case, the Investigator's Report WITSEC Unit, proves a prima facie case of selective prosecution. It shows 2 photo lineups of Pebbles Griffin and Amber Jurgensen. ***See App. A3.*** Obviously, they supposed to got charged but they were never contacted by the authorities. The prosecutor did not have sufficient evidence to convict the defendant on case 11CF1566. The State charged only the defendant because the defendant wouldn't take his plea deal, and by charging the defendant with the intimidation counts, he can hopefully convict the defendant also with the crime of reckless endangerment. The prosecutor threatened the defendant through counsel, that if the defendant didn't take the plea deal, that he would charge the defendant and the defendant's alleged girlfriends with the intimidation charge. ***See 8/26/11 Status Conference*** [Tr.p. 4-5]. A claim of unconstitutional discriminatory prosecution is made when a defendant allege and proves "that the defendant is a member of a class being solely because of race, religion, color or other arbitrary classifications, or "*that he alone is the only person who has been prosecuted under this statute.*" ***State v. Boutch,*** 60 Wis. 2d 397. Intentional or purposeful selection of the defendant is an essential element of a claim of selective prosecution. To prove vindictive prosecution, the defendant must generally show some kind of vindictive motive. Thus, to a certain extent, both defenses require proof of the prosecutor's mental state. ***United States v. Heidecke,*** 900 F.2d 1155.

8. State's Opening Statement and Closing Argument

The State's comments in opening and closing arguments were very improper and did not derive from the evidence. A lawyer shall not: Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated therein. ***See ABA DR 7-106(c) (4).*** Applying the law to the instant case, the prosecutor committed an error during the 11/15/11 Jury Trial when he never stated on record that "this is what the evidence is going to show," instead he spoke his opinion about the case and its merits. [Tr.p. 14-18].An attorney may properly state, "I believe that the evidence has shown the defendant's guilt." ***United States v. Morris,*** 568 F. 2d 396. Also, in the opening summation, 11/15/11 a.m. session, the prosecutor stated:

"tell him that I have this over his head so he doesn't show up. When they did that, intimidation of a victim in this case because the case is open where the mom and brother are supposed to come to court." [Tr.p. 17:6-16].

But on record and in evidence on the phone calls, the speaker/suspect stated, *"Matter of fact, don't tell my brother about that Texture thing."* ***See App. A1.*** It was never communicated to him. These comments are in evidence, in the phone calls and transcribed. On 11/15/11, Jury Trial, a.m. session, in the prosecutor's closing summation, he says, *"He gets into the car. She believes he takes Corneil to the hospital. When he comes home, he says, I took him to the hospital. I'm sorry."* [Tr.p. 20:8-11]. On the **Sworn Affidavit of Shannon Jones,** it states paragraph 8: "During the course of the investigation, *Corey admitted to conveying the victim, Corneil Hawthorne to the hospital within this vehicle."* ***See App. A4.*** The prosecutor also manipulated and misstated the evidence when he stated, *"No mom, I love you. I'm sorry. That's in the CD."* [Tr.p. 36:11-12]. This comment was not on the CD, because on the CD it was allegedly the defendant talking to Ms.P and Ms.A and not Grace. ***See phone call CD.*** The prosecutor also asserted his own opinion when he said, *"I say, if he's asking where that gun was and his brother said he shot him, he had the gun."* [Tr.p. 36:21-23]. The prosecutor's statement about his witnesses amounted to telling the jury that the witness' statements were credible as a matter of law. Trial counsel was deficient because his failure to object allowed the prosecutor to state that the witness' credibility had a judicial stamp of approval. Also, trial counsel was not able to counter the prosecutor's remarks through rebuttal. The effect of the prosecutor's comments was to invade the province of the jury to determine credibility. Trial counsel had a duty to make the adversarial testing process work in this particular case. ***Marty,*** 137 Wis. 2d at 357. He failed to perform this function.

9. Redacted Tapes

The State claims that the defendant has not explained why trial counsel should have objected to the Court's request and what the exculpatory remarks were. The State claims that the defendant's argument is undeveloped. Trial counsel was deficient for not requesting the Court to play the whole telephone recordings in its entirety. On 4/11/11 call #1, Ms. A stated, "They don't know that you didn't do this shit," and the alleged suspect replied, "Lil dog set me up," referring to Mr.M. ***see Phone Call CD.*** If the jury would have heard these calls in its entirety, the result of the trial would have been different.

D. Defendant Has Demonstrated Post-Conviction Counsel Was Ineffective

The State claims that on appeal, the defendant abandoned the arguments of authentication and cause. This is a new appeal from a 974.06 motion and now the defendant is appealing that judgment by the Court. The defendant has shown prejudice from post-conviction counsel's abandonment of trial counsel's challenges to the hearsay evidence. If post-conviction counsel challenged the Court's finding on all these grounds, it would have been successful.

CONCLUSION

For the foregoing reasons, Royce Hawthorne respectfully requests this court find that post-conviction counsel and trial counsel was ineffective. Royce Hawthorne requests this court to enter an order vacating the judgment of conviction in this case and send the matter back for a new trial.

Dated this 28 day of November 2014.

Respectfully Submitted,

Royce Hawthorne

Royce Hawthorne 455666

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 2,991 words.

Dated this 28 day of November 2014

Respectfully Submitted,

Royce Hawthorne 455666

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Circuit Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on (11/28/14). I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Signed,

Royce Hawthorne 455666

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 28 day of November 2014

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